

EVIDENTIARY HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

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

HAMPTON INN & SUITES
2710 LENWOOD ROAD
BARSTOW, CALIFORNIA

THURSDAY, AUGUST 5, 2010

9:00 a.m.

Reported by:
Troy Ray, CER

Contract No. 170-09-002

COMMITTEE MEMBERS PRESENT

Anthony Eggert, Presiding Member

Jeffrey D. Byron, Associate Member

HEARING OFFICER, ADVISORS PRESENT

Paul Kramer, Hearing Officer

Lorraine White, Advisor to Commissioner Eggert

STAFF AND CONSULTANTS PRESENT

Caryn Holmes, Staff Counsel (via teleconference)

Steve Adams, Co-Staff Counsel (via teleconference)

Christopher Meyer, Project Manager (via teleconference)

Jared Babula (via teleconference)

Erin Bright (via teleconference)

Chris Huntley (via teleconference)

Shahab Khoshmashrab (via teleconference)

Scott White (via teleconference)

OFFICE OF THE PUBLIC ADVISER

Jennifer Jennings, Public Adviser

APPLICANT

Ella Foley Gannon
Bingham McCutchen, LLP

Allan J. Thompson
Attorney at Law

Felicia Bellows
Tessera Solar

Sean Gallagher
Tessera Solar

INTERVENORS

Laura Cunningham
Kevin Emmerich
Basin and Range Watch

Steven Lamb
Burlington Northern Santa Fe Railway (BNSF)

Loulena A. Miles, Attorney
Adams Broadwell Joseph & Cardozo
California Unions for Reliable Energy (CURE)

Bart Brizzee
County of San Bernardino

Joshua Basofin
Defenders of Wildlife

Wayne W. Weierbach
Newberry Community Service District

Travis Ritchie
Gloria Smith
Sierra Club

Bob Burke
Gary Thomas
Society for the Conservation of Bighorn Sheep

ALSO PRESENT

Jeff Aardahl

Jim Andre (via teleconference)

Ashleigh Blackford (via teleconference)
United States Fish and Wildlife Service

Dr. Vernon Bleich (via teleconference)

Scott Cashen

Amy Fesnock (via teleconference)

Scott Flint (via teleconference)

Becky Jones (via teleconference)
California Department of Fish and Game

Teresa Miller

Dr. Patrick Mock

Tonya Moore (via teleconference)

Jerry Newcomb

Chris Otahal
Bureau of Land Management

Edward Phillips

1 PRESIDING MEMBER EGGERT: Is this better?

2 MS. HOLMES: A little bit.

3 PRESIDING MEMBER EGGERT: Oh, okay. Well, I
4 think -- hopefully as the day progresses, we'll work out the
5 kinks on the sound system. So we do have a full day and we
6 do want to hear all of the evidence, but we also want to be
7 efficient, so again just ask folks, if the issue's been
8 previously addressed, to not to spend too much time sort of
9 revisiting issues that have already been heard. Also if
10 there's opportunity to sort of really focus the questions
11 and give sort of a clear indication of that type of
12 information we're trying to extract from the discussion, I
13 think that will also help things go more efficiently and
14 smoothly. And I think in terms of any other housekeeping
15 items, are we good to go?

16 HEARING OFFICER KRAMER: I think so.

17 PRESIDING MEMBER EGGERT: Okay. All right. So,
18 Commissioner, do you have any -- no? Let's get started.
19 I'll turn it over to Hearing Officer Kramer.

20 HEARING OFFICER KRAMER: Thank you and good
21 morning. Mr. Meyer's question about scheduling of the
22 bio-noise discussion, what is the best availability of your
23 witness, Mr. Meyer?

24 MS. HOLMES: This is Caryn Holmes. Our noise
25 witnesses are here, so one option would be to go through the

1 proposed change to the noise condition of certification that
2 the Applicant provided in their rebuttal testimony and then
3 proceed to the noise-related BIO issues and then to the
4 broader issue of biological resources.

5 I think that the purpose of noise-related
6 biological resources testimony would simply be to talk about
7 what the estimates are of noise on the project site and the
8 parties could then address what that means in terms of an
9 impact assessment later when it's appropriate.

10 HEARING OFFICER KRAMER: Okay. So you're saying
11 your noise experts know about the levels of noise but not
12 the effects on the biological resources.

13 MS. HOLMES: That's correct. And, Hearing Officer
14 Kramer, we're having a little bit of difficulty hearing you.

15 HEARING OFFICER KRAMER: And I -- somebody is
16 shuffling paper I hear. So if you're on the phone and
17 you're shuffling papers or if you're on a cell phone, if you
18 could mute yourself and I believe that is Star 6 or if
19 you're somebody who -- if you know you're not going to speak
20 all day, you can let us know and we can just mute you here,
21 but I don't want to mute people and then have them not be
22 able to speak if they need to. So -- but please try to keep
23 the noise down on the phones because we can hear it here in
24 the room and then it's interfering with the staff's ability
25 to hear all the witnesses up in Sacramento.

1 Exhibit 300, the Supplemental Staff Assessment?

2 MS. BRIGHT: I did.

3 MS. HOLMES: And was the statement of your
4 qualifications included in that document?

5 MS. BRIGHT: Yes.

6 MS. HOLMES: And have you had the opportunity to
7 review the Applicant's proposed changes to the Noise
8 Condition of Certification which is contained in Exhibit 82?

9 MS. BRIGHT: I have.

10 MS. HOLMES: Let's just through the changes one by
11 one. The first change is a proposal to add a definition of
12 noisy construction work and the Applicant proposes to define
13 noisy as greater than 75 DBA. What is the staff's response
14 to that proposal?

15 MS. BRIGHT: We disagree with that definition.
16 75 DBA would be excessively high as a definition for
17 construction noise.

18 MS. HOLMES: Do you have an alternative proposal?

19 MS. BRIGHT: We propose to submit different
20 language as noisy -- that noisy would be defined as noise
21 that can potentially draw with it legitimate complaints and
22 then add additional language defining legitimate complaint
23 as a legitimate noise complaint refers to a complaint about
24 noise that is confirmed by the CPM to be disturbing and that
25 is caused by the Calico Project as opposed to another

1 source. A legitimate complaint constitutes a violation by
2 the project of any noise condition certification as
3 confirmed by the CPM which is documented by an individual or
4 entity affected by such noise.

5 MS. HOLMES: And is that language consistent with
6 the definition that staff has used in other cases?

7 MS. BRIGHT: Yes, it is.

8 MS. HOLMES: Thank you. With respect to the
9 second proposed change, the addition of without a variance,
10 does staff have a response to that proposed change?

11 MS. BRIGHT: No.

12 MS. HOLMES: I think what you mean is that the
13 staff does not recommend that proposed change. Does staff
14 have alternative language?

15 MS. BRIGHT: Alternative language to the variance.
16 Rather than using a variance issued by the County proposed
17 to -- propose to require the Applicant to acquire the
18 approval of the two landowners that would be affected by
19 construction noise -- rather than the variance.

20 MS. HOLMES: I think those are all of the
21 corrections. The witness is available for cross-examination
22 on this topic and then I think when we're finished with
23 this, we can get into the noise-related biological issues.

24 HEARING OFFICER KRAMER: Questions from the
25 Applicant?

1 CROSS-EXAMINATION

2 BY MS. GANNON:

3 Q Yes. When you're referencing the two landowners,
4 who are you referencing?5 MS. BRIGHT: In the noise and vibration Figure 1
6 form my testimony -- two sensory receptors, SR1 and SR2, who
7 would be affected by construction noise and those would be
8 the two landowners that would need to be consulted.9 MS. GANNON: Have you utilized a similar condition
10 where private landowners were making a determination about
11 construction schedules?12 MS. BRIGHT: I'm sorry. We're having trouble
13 hearing you. Could you speak a little bit more loudly and a
14 little bit more slowly.15 MS. GANNON: Have you utilized a similar mechanism
16 in other conditions of certification wherein a private
17 landowner is given the authority to make a determination
18 about construction schedules?19 MS. BRIGHT: We have not, but I wouldn't say that
20 that would be -- that the condition be that they're given
21 the ability to approve anything, just that we would require
22 that you've consulted with me ahead of time and that they'd
23 be given some kind of nod to what they think about it.24 MS. GANNON: How is that different from an
25 approval? If the intent is to just notify them, is that

1 what you're --

2 MS. BRIGHT: Well, the intent is to protect the
3 landowner.

4 MS. GANNON: But you understand the complication
5 of getting approvals from private individuals to accommodate
6 or to reflect a construction schedule. I mean there are
7 many things you can imagine where the private landowners
8 would not be available or they -- you know, or you couldn't
9 contact them. It is just -- I haven't seen a condition like
10 that before and I'm --

11 MS. BRIGHT: I think it's certainly possible to
12 write the condition in such a way that if you can't -- that
13 you can -- you could provide evidence that you've been
14 unsuccessful in attempting the landowner. We don't have
15 specific language here today. What we're trying to do is
16 to, as I said, provide the same kind of protection we
17 typically provide for landowners. That is we try to protect
18 their peace and quiet some portion of the time during
19 construction and we're trying to give you some flexibility
20 in order to be able to do some construction if in fact it's
21 not going to be an annoyance or a nuisance for them. We
22 don't have the -- as I said, we don't have the express
23 language, so I don't think we have a problem with the
24 concept of how we're getting their permission or providing
25 some evidence to us that you tried to get permission and

1 were not able to get a response from them. That would be
2 acceptable as well.

3 MS. GANNON: I guess -- maybe we can go back to
4 understand the impact that we're dealing with here, the
5 nearest residence is located how far from the project site?

6 MS. BRIGHT: The nearest residence is located
7 approximately 1,200 feet from the project site.

8 MS. GANNON: And did you do calculations regarding
9 the noise level from construction at that area?

10 MS. BRIGHT: I did. Let's see. The anticipated
11 construction noise at the two separate residences that
12 were -- that would be affected would be over 10 decibels at
13 both. One would be closer to 20 which would be a
14 considerable noise impact.

15 MS. GANNON: I'm sorry. I'm looking at the figure
16 that you reference which was Figure 1 in your testimony. So
17 I assume that the nearest is the -- what's shown as the
18 yellow dot in the western side of Lake -- closest to the Not
19 A Parts; is that correct?

20 MS. BRIGHT: That's correct.

21 MS. GANNON: That's 1,200 feet from a disturbance
22 area?

23 MS. BRIGHT: It's at 1,200 feet from the closest
24 project boundary.

25 MS. GANNON: I guess looking at this figure, I'm

1 confused how that's calculated as 1,200 feet. I'm just
2 trying -- this scale -- this is 9,000 -- we would suggest if
3 you can provide us and the parties with the proposed revised
4 language, then we could provide comments on it.

5 MS. BRIGHT: When would you like that? Is that
6 something you wanted to have us provide by tomorrow so we
7 could close this out?

8 MS. GANNON: That would be preferable.

9 MS. BRIGHT: Okay. That's acceptable.

10 MS. GANNON: Thank you.

11 HEARING OFFICER KRAMER: Okay. And before we
12 leave this, we've noted in the discussion in the staff
13 analysis that the Sunday restriction seems to be based upon
14 the San Bernardino County noise ordinance.

15 MS. HOLMES: I'm sorry, Mr. Kramer, we're having
16 trouble hearing you.

17 HEARING OFFICER KRAMER: Okay. The staff
18 assessment suggests that your Sunday restriction is derived
19 from the county noise ordinance, so can you comment about
20 whether you're able to change that or in doing so, does that
21 then become a -- or make the project inconsistent with LORS?

22 MS. HOLMES: I think that's a legal question, so
23 I'll take a stab at it. To the extent that there's -- I
24 think I understand your question to be if the Commission
25 were to adopt the condition of certification that allowed

1 landowners to agree to a violation of the noise ordinance,
2 would that require the Commission to issue an override? Is
3 that your question?

4 HEARING OFFICER KRAMER: Well, I'm wondering if
5 the LORS does -- yes. If the LORS doesn't control this and
6 a change must also be discussed in terms of -- you know, in
7 effect overriding the LORS.

8 MS. HOLMES: I'm sorry. I didn't understand your
9 question -- the second question. Could you state that
10 again.

11 HEARING OFFICER KRAMER: I'll have to restate it
12 and probably differently. But -- so without overriding the
13 LORS, is it possible to remove the Sunday restriction or
14 have some kind of exception such as you just proposed to it?

15 MS. HOLMES: Not that I'm aware of.

16 HEARING OFFICER KRAMER: Does the Applicant want
17 to comment?

18 MS. GANNON: Yes. If you look at Chapter 83.01 of
19 the San Bernardino County Development Code, that is where
20 you get the provisions related to the noise ordinance that
21 we were discussing yesterday and that we believe you can do
22 a variance.

23 MS. HOLMES: The variances cause us -- cause me a
24 great deal of concern because we'd need to specify the
25 criteria that would apply, I don't believe that the county

1 has the authority to grant a variance for a project that the
2 Energy Commission has licensed. I think there'd be
3 questions about whether -- there'd be legal questions about
4 whether such authority could be delegated to the CPM or
5 whether it would need to be an Energy Commission decision.
6 I think that to the extent that we can reach agreement that
7 there could be noisy construction on Sundays that violates
8 the noise ordinance.

9 In the event that the landowners agree, I think it
10 would be easier simply for the Commission to do an override
11 rather than to address the complicated -- potentially
12 complicated legal issues that would arise if we tried to
13 determine who could grant a variance and under what
14 conditions.

15 HEARING OFFICER KRAMER: Okay. I don't think
16 anyone was assuming that we'd be delegating to the county.
17 They were simply saying the Commission would apply the same
18 standards that the county would if it were the approver in
19 this case.

20 MS. GANNON: Well, I would also say if you can
21 look at the way that Noise 6 is currently drafted in the
22 Supplemental Staff Assessment, which is on page 6.9-24 --
23 C -- I'm sorry -- .9-24 and it says heavy equipment
24 operation included pile driving, noisy construction work
25 relating to any project feature shall be restricted to the

1 times of day delineated below unless a variance has been
2 issued by San Bernardino County for limited nighttime
3 construction.

4 MS. HOLMES: Right. And we plan to remove that
5 last portion of the sentence because we think there are
6 legal concerns associated with having the county grant a
7 variance for a project that the Commission has jurisdiction
8 over.

9 So I -- you know, I'm getting the sense that the
10 Applicant is amenable to considering language that allows
11 them to demonstrate that either the landowners agree or have
12 been consulted and have not responded. I think that if
13 there is a question about whether or not that creates a
14 situation in which there's nonconformity with the local
15 ordinance, I think it's easier simply to do an override of
16 that, assuming an override is deemed appropriate, than to
17 try to delve into the legal issues of whether the county can
18 grant an ordinance or -- grant a variance to the ordinance
19 or whether the CEC can and whether it would be the CPM or
20 whether it would be the CPM or whether it would have to come
21 back to the full Commission and what kinds of criteria would
22 apply to that decision. That strikes me as more fuss than
23 it's worth.

24 MS. GANNON: We would suggest that it's
25 appropriate to have the CPM make the decision, but we're

1 willing to look at your language.

2 HEARING OFFICER KRAMER: Okay. So we'll be coming
3 back to this tomorrow now. I'll make it first thing for
4 planning purposes for the staff.

5 MS. HOLMES: I think that's acceptable.

6 HEARING OFFICER KRAMER: Okay. And can you get
7 the language out before 5:00 this evening?

8 MS. HOLMES: I'm seeing nodding of heads.

9 HEARING OFFICER KRAMER: Great. Thank you.

10 MS. HOLMES: Yes.

11 HEARING OFFICER KRAMER: Okay. Did any other
12 party wish to weigh in on this topic? Did you have
13 something else, Ms. Holmes?

14 MS. HOLMES: Well, if we're done with the noise
15 condition, I think we're ready to move on to the question of
16 noise impacts associated with biological resources and
17 Ms. Bright is able to testify about the conclusion she
18 reached regarding on-site noise and would be available for
19 cross-examination on that point.

20 HEARING OFFICER KRAMER: We have one follow-up
21 first from the Committee.

22 ASSOCIATE MEMBER BYRON: Ms. Holmes, this is
23 Commissioner Byron. Just a quick question, if you would,
24 please, and maybe the staff would be best to answer this.
25 Is there something unique or let's say noisy about this

1 project in terms of construction? I'd like to try and
2 understand why this project is somewhat differentiated from
3 other construction projects that have been permitted by our
4 Commission.

5 MS. HOLMES: Can you explain which differentiation
6 you're referring to? I think it might help us answer the
7 question.

8 ASSOCIATE MEMBER BYRON: Well, I have not had
9 opportunity to delve into the nature of the construction. I
10 assume that there's heavy equipment, machinery, trucks,
11 bulldozers. Is there something unique about this that makes
12 it noisier than other construction projects that we have
13 permitted?

14 MS. HOLMES: Commissioner, is there an assumption
15 underlying your question that we're treating this project
16 differently than other projects?

17 ASSOCIATE MEMBER BYRON: I'm asking you that
18 question.

19 MR. KHOSHMAHRAB: No. This is Shahab
20 Khoshmashrab. The construction equipment that will be used
21 is -- my understanding is that it's typical of the industry.

22 ASSOCIATE MEMBER BYRON: And these are -- sorry.
23 Go ahead.

24 MR. KHOSHMAHRAB: The analysis that Erin has done
25 shows that the construction would increase the noise by over

1 20 decibels at one of the receptors and that is, just to
2 give you an idea, 10 decibels increase is definitely not
3 noise and usually construction noise during the daytime and
4 -- during the daytime is exempt from -- from basically
5 significant criteria. But if construction that is going to
6 potentially increase the ambient at the receptor by that
7 much is allowed to go on on Sundays and nighttime and all --
8 you know, without any time limitation, that could be a
9 significant impact.

10 ASSOCIATE MEMBER BYRON: Okay. Mr. Khoshmashrab,
11 thank you. I got the answer to my question. Thank you. We
12 can move on.

13 MS. HOLMES: May I ask one follow-up question?

14 ASSOCIATE MEMBER BYRON: You're asking me a
15 question?

16 MS. HOLMES: No. I'd like to ask my witnesses a
17 question.

18 HEARING OFFICER KRAMER: Go ahead.

19 REDIRECT EXAMINATION

20 BY MS. HOLMES:

21 Q Ms. Bright and Mr. Khoshmashrab, is it -- does the
22 Energy Commission typically impose noise restrictions for
23 weekends and evenings in order to protect residents?

24 MR. KHOSHMAHRAB: We have -- as far as I know, we
25 have always --

1 MS. HOLMES: Thank you.

2 MR. KHOSHMAHRAB: -- with the many projects that
3 we have worked on.

4 MS. HOLMES: I just wanted to make it clear that
5 we're not treating this project any differently. What
6 appears to be different to us is that this Applicant has
7 asked for construction outside the times that we would
8 normally permit it for.

9 HEARING OFFICER KRAMER: Okay. So we'll look
10 forward to a completely -- well, a complete version of
11 Noise 6 showing all the changes including the removal of the
12 reference to the San Bernardino County variance by the end
13 of -- well, by 5:00 today. So go ahead with the biological
14 discussion then.

15 MS. HOLMES: Okay. Thank you. I think Mr. Adams
16 is going to address those questions to Ms. Bright.

17 MR. ADAMS: Steve Adams. We have just a couple of
18 questions for this witness as far as the biology.

19 Ms. Bright, have you had an opportunity to review
20 the biological section of this Supplemental Staff
21 Assessment?

22 HEARING OFFICER KRAMER: Mr. Adams. I'm sorry.

23 MR. ADAMS: Yeah.

24 HEARING OFFICER KRAMER: Sorry to interrupt. We
25 realize that we had a couple visitors here that we had

1 promised to be able to speak to the Committee before we
2 started and we apologize to them because we almost forgot,
3 but before you get going any further, take a break, and
4 we're going to hear from Jerry Newcomb who is the -- I
5 thought it was the Assistant, but your card says Deputy
6 Administrative Officer for the County. So go ahead, please.

7 And you need to be relatively close to that microphone.

8 MR. NEWCOMB: Thank you, Mr. Kramer,
9 Commissioners. And I appreciate you taking me a bit out of
10 order and stopping the other testimony that was going on. I
11 am Jerry Newcomb, the Deputy Administrative Officer with the
12 County of San Bernardino and I believe you were welcomed
13 here yesterday by Andy Silva who's a field representative
14 for Supervisor Brad Mitzelfelt in whose district we sit
15 right now, but let me add my welcome to the Commission and
16 everyone who's joined them here to the beautiful County of
17 San Bernardino which is -- about 80 percent is the Mojave
18 Desert and we are seeing a huge amount of interest in solar
19 energy projects across the Mojave Desert right now. So it's
20 an interesting prospect for the county. I would say that
21 the county has looked carefully at what's coming at us with
22 these projects and is interested in seeing them succeed.

23 The county very much supports renewable energy.
24 It looks forward to the positive impacts that it will have
25 on the local economy and job creation. That's an important

1 issue for us. We do think, however, that there are some
2 concerns, the areas that we expect that the Commission also
3 will have concerns about, and so we look forward to seeing
4 those vetted fully in these hearings and through the
5 environmental process.

6 Let me just take a minute to summarize some of the
7 comments that were contained in a position statement that
8 was adopted by our Board of Supervisors back in April and
9 then amended recently.

10 There's really four areas that we see as primary
11 concern to the County of San Bernardino. Endangered species
12 mitigation is probably at the top of the list and we very
13 much support the concept of an in-lieu feed program that
14 would provide funding for conservation, for habitat
15 restoration, implementing species recovery strategies,
16 predation control, but we don't agree that those funds
17 should be used to purchase vast tracks of desert land for
18 mitigating species impacts.

19 We have a significant concern about that kind of
20 approach and our concern is that it would render vast
21 portions of the desert unusable for other private
22 development or even public uses. Just as an example, it's
23 uncertain right now how many of these large renewable energy
24 projects will ultimately be permitted and approved and
25 operating in the desert, but if we look at the breadth of

1 projects that we've become aware of over the last six to
2 eight months, it's possible that if all those projects got
3 approved, they could take up close to a million acres of
4 land in the desert and if they're mitigated at a three to
5 one ratio, there would be another 3 million acres of
6 mitigation land which would essentially eliminate all the
7 private land that's held in the Mojave Desert at least in
8 our county.

9 So that's kind of an extreme example, but it does
10 raise a concern that we have about future other development,
11 development here around the Barstow area, development here
12 around the Barstow area, development around the Victor
13 Valley area, other private development that may be impacted
14 by these large projects that consume significant amounts of
15 the resource.

16 So we're very supportive of a financing program
17 that sets money aside from these projects to offset the
18 impacts on endangered species, but just a wholesale
19 acquisition of replacement land is not something we support.

20 Second, we are -- we're concerned about impacts on
21 local infrastructure and there really isn't an immediate
22 opportunity for the county to address those issues in
23 projects that come before the Energy Commission. If the
24 projects were coming through the county planning process, we
25 could condition them appropriately. So it's not as quite as

1 simple, but we've prepared a study that addresses what we
2 think is probably the primary impact which is on emergency
3 services, fire service to be -- in particular and I'm sure
4 that information will becoming before the Commission as this
5 process goes along.

6 So we do have concern about infrastructure
7 impacts, primarily in the public safety area, and thirdly we
8 have a concern about the ongoing operation and maintenance
9 of those services to support projects like this. And so
10 those issues are addressed in a study that we prepared and
11 provided the CEC staff and we have been meeting individually
12 with the major project proponents to discuss the information
13 in that report and -- if you will, to try and negotiate a
14 solution that -- where the county would have an appropriate
15 offset to those impacts for either one-time costs or ongoing
16 costs and be able to see these projects go forward and be
17 able to provide a level of service that they need and
18 deserve without having a greater impact on existing county
19 services.

20 And then finally the fourth area that our board
21 position statement addressed was historic and recognized
22 land uses and we are somewhat concerned that land that's
23 currently available for public recreation, for livestock
24 grazing, for just general public access in the desert could
25 be adversely impacted by these large projects and we're

1 concerned that that land -- that those kinds of uses somehow
2 need to be protected or replaced or provide additional area
3 to occur.

4 There is a significant amount of income that's
5 generated to the county to tourism, from livestock grazing,
6 businesses, and just general access, OHV in particular, and
7 so it's something that we do hope is addressed in the
8 environmental process and that ultimately there is strong
9 consideration given to those uses being continued and not
10 just eliminated by these large projects coming -- moving in
11 and taking up large tracts of land.

12 But again I want to close by noting that overall
13 the county is very supportive of these renewable energy
14 projects, very excited to see the interesting technologies
15 that are coming forward and the opportunity for there to be
16 these things in our county. We want to make sure that they
17 offset the impacts that they'll have on local services and
18 on local governments and -- but we look forward to the
19 process with the Energy Commission. So thank you very much.

20 PRESIDING MEMBER EGGERT: Thank you very much,
21 Mr. Newcomb, and I want to just reiterate a couple of the
22 things that we discussed with Mr. Silva yesterday.

23 First of all, we see the partnership between the
24 state and the local jurisdictions as being incredibly
25 important in the area of renewables development, both for

1 these projects as well as other distributed renewable
2 technologies. We have a lot of active partnerships in other
3 areas of energy for things like building construction,
4 retrofit of existing buildings. We're launching a number of
5 new programs there that I know some of which are going to be
6 actively administered through this area.

7 We have -- one thing I didn't mention yesterday
8 was the AB 118 program which is where we're focusing on
9 trying to improve the transportation system, both the
10 vehicle technologies as well as low carbon fuels and I know
11 there's a number of projects in this area. So we see that
12 partnership as being incredibly important and recognize that
13 you're an active partner in that effort and want to make
14 sure we support you in that.

15 I would note that a couple of the things you
16 mentioned with respect to the in-lieu fee program. We will
17 be talking more about that today. That is a tool -- a tool
18 that is evolving to try to deal with some of these projects
19 and the large scale of these projects in terms of making
20 sure that there is proper mitigation and we do want to take
21 into consideration the concerns that you've mentioned.

22 Similarly with emergency response and fire
23 service, I know that is an issue for these projects that --
24 many of which are occurring out in remote areas. And again
25 just want to give my appreciation for your recognition of

1 all that and your participation in this proceeding. So
2 thank you.

3 ASSOCIATE MEMBER BYRON: Mr. Newcomb, thank you
4 for being here. And I certainly appreciate your support of
5 renewables from the state energy policy perspective. It's
6 extremely important and such gratifying to hear that there
7 is support and acceptance for what's going on. But on a
8 relative basis, can you give this committee a sense, do
9 renewable projects provide any income to the county on a
10 relative basis versus the historic or projected uses? Do
11 they do any good for the county?

12 MR. NEWCOMB: They will do some good. We are --
13 the large renewable projects that are being proposed right
14 now, at least the two major ones, are on federal land. One
15 of the difficult issues we have in this county is that
16 80 percent of this desert is owned by the BLM or the federal
17 government and we don't get any tax dollars for that land.
18 The feds have an interesting program called PILT, Payment in
19 Lieu of Taxes, which is woefully underfunded and rarely
20 gives us more than about 17 cents on the dollar when it does
21 get funded.

22 So we have a strong concern about development
23 occurring on federally-owned land. However, we do have the
24 opportunity to access a possessory interest tax on these
25 projects.

1 Now, significant portions of the facilities that
2 will be built by these projects are exempt from possessory
3 interest tax, but some of those facilities will be subject
4 to possessory interest. Basically the lease with the BLM is
5 something that can be taxed by the county through possessory
6 interest.

7 And I'm told by our county assessor's office that
8 a long-term lease with a private operator for use of BLM
9 land will look a lot like property tax revenue to the county
10 in terms of how possessory interest will be calculated over
11 a 20- or 30-year period. So we do have an opportunity for
12 these projects to generate some amount of income. In fact
13 we're working with each of the project proponents right now
14 to help calculate that number and understand better what we
15 think that's likely to be.

16 So there is -- the county isn't left completely
17 out in the cold, if you will, from these projects, but it's
18 not quite the same as property tax revenue and so we have to
19 spend a little bit more time working to achieve that
20 possessory interest tax revenue.

21 ASSOCIATE MEMBER BYRON: And you're well aware of
22 course that these projects have a very aggressive schedule
23 for the permitting process because there is a great deal of
24 potential funds available to this state from the American
25 Recovery/Reinvestment Act. I will ask my question, but my

1 comment really is I want to make sure that you're aware of
2 that.

3 MR. NEWCOMB: The Applicants remind us every time
4 we meet with them. Yes, we're quite aware of that.

5 ASSOCIATE MEMBER BYRON: They remind us as well.
6 But I guess I would just like to finish, if there's anything
7 else you'd like to add, certainly we appreciate your
8 comments. We've got -- and they're part of the evidentiary
9 record, but is there anything else you'd like to add?

10 MR. NEWCOMB: No, nothing else at this time.
11 Thank you very much.

12 HEARING OFFICER KRAMER: Oh. And we also have a
13 speaker with us from the Newberry Springs Chamber who is
14 also one of our interveners.

15 MR. WEIERBACH: Good morning, Commissioners. My
16 name is Wayne Weierbach. As you noted, I just left my seat
17 as an intervener in the proceedings, but now that I'm
18 sitting in this chair, I'm here representing the Newberry
19 Springs Chamber of Commerce. I am on the Board of Directors
20 as the vice president.

21 The Newberry Springs Chamber of Commerce has taken
22 the position to adopt a resolution, something they've never
23 done before in their entire history. They have never
24 adopted a resolution in support or opposition of any project
25 affecting the community, and by action of the board on the

1 21st day of July 2010, the Newberry Springs Chamber of
2 Commerce is issuing their support for the Calico Solar
3 Project.

4 They feel that the project would be of enormous
5 benefit to the community in the way of a catalyst for
6 development, both from a commercial aspect and also from the
7 effects that that would have as far as overall beneficial
8 changes to the community over the long term. And I would
9 like to present the resolution adopted by the board --
10 present it today to the Commission.

11 HEARING OFFICER KRAMER: Please bring it up. Does
12 that conclude your remarks?

13 MR. WEIERBACH: That concludes my remarks.

14 HEARING OFFICER KRAMER: Thank you.

15 PRESIDING MEMBER EGGERT: I just want -- yeah.
16 Thank you very much, Mr. Weierbach, and I guess we'll look
17 forward to hearing from you in your other capacity also
18 again. So -- but, no, we do -- we very much appreciate the
19 input from the chambers. You know, again I think the hope
20 of the Commission and of the state is that the -- as we sort
21 of proceed with meeting our environmental and energy goals
22 that we do so in such a way that recognizes the partnership
23 with the business community and the fact that we -- well,
24 I'll say personally I believe that we can achieve our -- all
25 of our goals that have been set forth, the ambitious goals

1 on renewables, on greenhouse gases, and on energy efficiency
2 in a way that sustains a very vibrant state economy that
3 actually grows businesses, creates new jobs, and so making
4 sure that we're always having a good conversation with the
5 business community and pursuing those policies in such a way
6 that makes that most likely is critical. So appreciate your
7 comments.

8 MR. WEIERBACH: Thank you.

9 PRESIDING MEMBER EGGERT: Okay. Mr. Adams, then,
10 let's begin again your questions for Ms. Bright.

11 DIRECT EXAMINATION

12 BY MR. ADAMS:

13 Q Thank you. Just to clarify, to keep us more or
14 less on course, I'm just intending to ask Ms. Bright a
15 couple of questions related to noise levels and then when
16 our biological witnesses are up, we'll ask them -- we'll
17 circle back to that to ask them about how Ms. Bright's
18 testimony affects their analysis.

19 Ms. Bright, have you had an opportunity to review
20 the biology testimony and the supplemental staff assessment?

21 MS. BRIGHT: I have.

22 MR. ADAMS: And did you note that on page C2106 of
23 that assessment in the discussion of noise impacts the
24 report -- the testimony is that the sun catchers will
25 generate noise levels of 84 DBA at 50 feet?

1 MS. BRIGHT: Yes, I did.

2 MR. ADAMS: Is that an accurate figure based on
3 the most recent information you've received on --

4 MS. BRIGHT: We received -- we sent Murray some
5 information in May for the Imperial Valley Solar Project
6 about the Maricopa solar facility down in Arizona that
7 presents data that's a little -- quite a bit lower than
8 that. The data presented for the Maricopa facility is closer
9 to about 75 DBA on site cumulative for the 60 unit facility.
10 So we don't have more recent data on -- like one unit --
11 for the -- like one sun catcher, what that would be for
12 noise, but the 74 for 60 units -- 75 for 60 units sounds
13 fairly reasonable, although I would expect it to be scaled
14 up a little bit given the larger number of sun catchers for
15 Calico. But we would probably say that something closer to
16 74 -- 75 would be more reasonable than the 84 number, just a
17 little bit higher than the 75, like 76 or 77.

18 MR. ADAMS: So you're talking about something on
19 the order of one or two additional DBA for.....

20 MS. BRIGHT: Yeah. There just being -- we would
21 have to see additional modeling from the Applicant to have
22 an exact number, but that would be what I would anticipate.

23 MR. ADAMS: And the effect of the sound traveling
24 out from the project site, would it -- would this revised
25 number mean that the sound level dropped -- was attenuated

1 more in the shorter distance? In other words, we -- in the
2 original testimony, we say that at 850 feet, it is 60 DBA.

3 MS. BRIGHT: Yeah. The 850 feet is a mathematical
4 estimate made -- based off of the 84 value, so if we
5 estimated that it was closer to 75, then I would anticipate
6 that the 60 DBA level would occur closer to the project
7 boundary than the 850 feet that was stated.

8 MR. ADAMS: Okay. Thank you. That's all.

9 HEARING OFFICER KRAMER: Okay. Does any party
10 have questions about this part of the testimony about the
11 background -- or about the measurement of the noise levels?

12 MS. GANNON: Applicant has no questions.

13 MR. RITCHIE: This is Travis Ritchie with Sierra
14 Club. Just a few quick questions.

15 HEARING OFFICER KRAMER: Go ahead.

16 MR. RITCHIE: So my first question involves
17 construction noise which I believe was discussed on
18 page C2-65 of the staff assessment and if I could refer you
19 to the second full paragraph there. The last sentence
20 states that assuming that construction noise for the project
21 would be relatively constant, the 40 decibel level estimated
22 at the site boundaries for construction noise would be
23 similar to levels of ambient noise.

24 I had a question about this conclusion. The
25 ambient noise at the project site is based off of primarily

1 the noise from the rail yard and the freeway; is that
2 correct?

3 MS. BRIGHT: That would be correct, the freeway
4 and the rail yard are the biggest contributors to ambient
5 noise currently.

6 MR. RITCHIE: But then in that same paragraph,
7 there's a reference to a noise level of 75 decibels during
8 construction within 50 feet from the acoustic center. Isn't
9 it expected that there will be construction centers even at
10 the far northern boundary of the project?

11 MS. BRIGHT: It -- I think that relies on what the
12 definition of acoustic center kind of is. For general
13 projects, you kind of --

14 MR. RITCHIE: Well, perhaps let me rephrase. Will
15 there be noise and construction at places on the project
16 near the northern boundary that will emanate out of the
17 project?

18 MS. BRIGHT: Yeah. The project construction was
19 estimated to be conducted in a modular fashion throughout
20 the project. They'd be kind of conducting construction in
21 chunks all over the place, so you would have construction
22 noise at the various project boundaries that could be
23 relatively high.

24 MR. RITCHIE: So is it fair to say that along the
25 northern boundary of the project where you are the farthest

1 from the sources of noise from the freeway and the railroad
2 that the 40 decibel ambient noise is potentially even less
3 than that?

4 MS. BRIGHT: I can't say that. You'd have to have
5 an ambient measure going -- taken at that point based --
6 ambient values are taken in a 25-hour noise survey at
7 particular points and it kind of varies depending on what
8 point it's taken up.

9 MR. RITCHIE: But you're not aware of any other
10 source of noise other than the freeway and the railroad
11 which are far to the south.

12 MS. BRIGHT: Additional potential noise could also
13 come from any like overhead flights that are in the area,
14 wildlife, winds, there's, you know, several things that can
15 factor in. Just for the site, the --

16 MR. RITCHIE: Okay.

17 MS. BRIGHT: -- two major ones that were
18 identified were the railroad and the freeway.

19 MR. RITCHIE: And then moving on then, is it fair
20 to say that during periods of construction, even this
21 modular construction, there would be levels of noise at
22 75 decibels -- that are potentially 75 decibels within
23 50 feet of that construction site?

24 MS. BRIGHT: That would be accurate. The noise
25 was estimated to be between 77 and 90 as stated in the third

1 paragraph. I mean it's possible that it would reach that
2 high for construction noise.

3 MR. RITCHIE: Thank you. I have no more
4 questions.

5 HEARING OFFICER KRAMER: Thank you. Any other
6 party? Okay. Ms. Holmes, is it your intention then to
7 excuse Ms. Bright and I suppose Mr. Khoshmashrab if he's
8 still around?

9 MR. ADAMS: This is Steve Adams.

10 HEARING OFFICER KRAMER: I'm sorry, Steve.

11 MR. ADAMS: If there are no other questions on
12 cross, we would ask that they be excused.

13 HEARING OFFICER KRAMER: Okay. Subject to the
14 possibility of recall later, but we won't make them sit
15 through the rest of the day. Thank you.

16 Okay. Then that will take us back through our
17 expected order which was first we were going to speak about
18 the desert tortoise, then other animals, and then plants.
19 So let's begin with the Applicant's witnesses on desert
20 tortoise.

21 MS. GANNON: The Applicant calls Teresa Miller and
22 Dr. Part Mock. I believe Ms. Miller was sworn yesterday,
23 but -- or they were both sworn yesterday.

24 HEARING OFFICER KRAMER: Go ahead.

25 Whereupon,

1 TERESA MILLER

2 DR. PATRICK MOCK

3 were called as witnesses herein, and after first having been
4 duly sworn, were examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MS. GANNON:

7 Q Dr. Mock, are you the same Patrick Mock who
8 provided written testimony earlier in these proceedings
9 which are marked as your opening testimony, Exhibit 73, and
10 rebuttal testimony, Exhibit 87?

11 DR. MOCK: Yes, I am.

12 MS. GANNON: Is the resume that was attached to
13 your written testimony still accurate and correct?

14 DR. MOCK: Yes, it is.

15 MS. GANNON: Do you have any corrections or
16 revisions to make to your testimony with regard to the
17 desert tortoise?

18 DR. MOCK: No, I do not.

19 MS. GANNON: And, Ms. Miller, are you the same
20 Teresa Miller who provided written testimony that is marked
21 as Exhibit 88?

22 MS. MILLER: Yes, I am.

23 MS. GANNON: And is the resume that was attached
24 to that written testimony still accurate and correct?

25 MS. MILLER: Yes, it is.

1 MS. GANNON: And do you have any corrections or
2 revisions to make to your written testimony?

3 MS. MILLER: No, I do not.

4 MS. GANNON: All right. Thank you. Starting with
5 you, Ms. Miller. Ms. Miller, can you explain the role that
6 you have played in the Calico Solar Project and your
7 responsibilities.

8 MS. MILLER: Yes. I have been the lead biologist
9 doing tortoise surveys, preparing the tortoise biological
10 assessment and the supplemental biological assessment and
11 also preparing the desert tortoise translocation plan.

12 MS. GANNON: Thank you. Starting out with the
13 surveys that were conducted on the site, can you describe
14 the survey efforts that you were involved.

15 MS. MILLER: Yes. We conducted surveys -- ten
16 meter protocol surveys on the 8,230 acre original project
17 boundary plus a 1,000 foot buffer of the project with
18 10-meter transects according to the 2010 U.S. Fish and
19 Wildlife protocol. We used -- we had approximately 20 to 24
20 biologists on site at any given time doing the surveys and
21 the project was divided into approximately 50-acre cells to
22 accommodate allowing the -- dividing the project -- the site
23 up so that we could get all of the survey area done.

24 MS. GANNON: Was every portion of the site part of
25 a 50-acre cell?

1 MS. MILLER: Yes. Every portion of the site
2 including the 1,000 buffer was part of the cell and it
3 was -- they were all contiguous cells. There were no gaps
4 between the cells or anything like that. They were all
5 connected. And then we conducted the 10-meter surveys with
6 approximately four to five biologists per cell.

7 MS. GANNON: And in what pace would the biologists
8 be traveling during the survey efforts?

9 MS. MILLER: About one to one and a half miles per
10 hour. We were walking pretty slow collecting data on every
11 tortoise that was detected, all sign, burrows, and if
12 tortoise were detected, we did visual health assessments,
13 measured the tortoise, and collected specs, data, and as
14 much as we could had a visual collection without touching
15 the tortoise.

16 MS. GANNON: And can you briefly summarize the
17 results of the survey efforts?

18 MS. MILLER: Yes. On the original project
19 footprint, we detected 104 tortoise and then with the
20 decrease project boundary, there are -- there were 57 that
21 occurred inside the project boundary. 47 are now outside of
22 the -- inside -- outside the project boundary and located
23 within the linkage that has been created by decrease in the
24 project boundary.

25 MS. GANNON: So the 47 were in the area from --

1 the northern portion of the area where the project boundary
2 was moved down?

3 MS. MILLER: That's correct.

4 MS. GANNON: And there were 57, you said, that
5 were found within the now established project boundary?

6 MS. MILLER: That's correct.

7 MS. GANNON: And based upon this number, have you
8 made any assessment about the likely population which would
9 be assumed to be on the site?

10 MS. MILLER: Yeah. Based on Fish and Wildlife
11 formulas to determine population estimates, we determined
12 that there's approximately 93 tortoise that would be present
13 on the project site.

14 MS. GANNON: And that calculation, that's based
15 just on the survey numbers or is it -- take into
16 consideration the quality of the habitat. What's the way
17 that that number is derived?

18 MS. MILLER: It's determined by the number of
19 tortoise that are detected, and then it takes into account
20 the number that could be missed based on percevitation (ph)
21 and on user -- or not user -- observer potential to miss
22 tortoise and possible juveniles in the area.

23 MS. GANNON: So it's essentially an established
24 formula --

25 MS. MILLER: Yes.

1 MS. GANNON: -- that you put in the number and
2 then it gives you an output which is the assumed population
3 level. Is that accurate?

4 MS. MILLER: That's accurate.

5 MS. GANNON: Thank you. And with regard to the --
6 I believe you said you were also one of the authors of the
7 biological assessment; is that correct?

8 MS. MILLER: That is correct.

9 MS. GANNON: As part of the biological assessment,
10 did you -- in your survey efforts, did you do an assessment
11 of the quality of the habitat found on the project site?

12 MS. MILLER: We did do an assessment of the
13 habitat. The habitat was found to be good quality habitat
14 in the majority of the northern portion of the project.
15 That would equate to approximately 4,000 acres of high-
16 quality, suitable habitat and then -- and that ranged from
17 the northern project boundary down towards about the middle
18 of the project.

19 MS. GANNON: And how do you define high-quality
20 habitat?

21 MS. MILLER: Habitat that contains high -- large
22 amounts of forage for the tortoise, soils that are suitable
23 for the tortoise to dig burrows. What else. And then --

24 MS. GANNON: So you're looking at the quality for
25 the burrows, the food support. Those are the basic

1 parameters that you'd be assessing?

2 MS. MILLER: Those are the basic parameters, yes.

3 MS. GANNON: Okay. I'm sorry. So you have 4,000
4 acres of high-quality --

5 MS. MILLER: Yes.

6 MS. GANNON: -- habitat and the remainder of the
7 site?

8 MS. MILLER: The remainder of the current boundary
9 is the 2,000 acres and that as you get further south of the
10 boundary, you come towards the transition area that -- where
11 it becomes less gravelly soils and rocky soils and becomes
12 more fine grained sands and more disturbed as you get closer
13 to the railroad tracks. And then the area south of the
14 railroad tracks is very -- is a lot -- mostly fine sands,
15 less forage, and isolated by the I-40 and the railroad
16 track. And we found less burrows and we were also able --
17 we found less burrows in the -- south of the railroad tracks
18 and more as you went north.

19 MS. GANNON: So in summary, you're saying there's
20 4,000 acres of high-quality habitat and then the 2,350 was
21 comprised of a lower-quality habitat as you're going south;
22 is that correct?

23 MS. MILLER: That's correct.

24 MS. GANNON: And were your survey results
25 consistent with this habitat assessment?

1 MS. MILLER: They were consistent. We had done
2 several other surveys on the project site and so we knew the
3 habitat pretty well before we started the 10-meter transect
4 surveys, and so we kind of had an idea of where to expect to
5 find the density -- higher density of tortoise and that was
6 confirmed during the surveys this year.

7 MS. GANNON: So as part of your biological
8 assessment after establishing the quality or evaluating the
9 quality of the habitat and assessing the population of the
10 tortoise on the site, what would be your next step in
11 evaluating the potential impacts associated with the
12 project?

13 If you're looking at the effects of the project,
14 what would you be evaluating?

15 MS. MILLER: The number of tortoise that would be
16 impacted by the project.

17 MS. GANNON: Would you also consider the potential
18 for loss of habitat?

19 MS. MILLER: Definitely.

20 MS. GANNON: And based upon your evaluation of the
21 potential number of tortoise impacted as well as the
22 potential for the habitat to be lost -- and just to be
23 clear, when you were making this assessment, how much
24 habitat did you assume would be lost as a result of the
25 project?

1 MS. MILLER: Something like 6,200 acres -- 6,215
2 acres of habitat.

3 MS. GANNON: So you're assuming the whole site --

4 MS. MILLER: Yes.

5 MS. GANNON: -- is lost as a result of the
6 project.

7 MS. MILLER: Yes.

8 MS. GANNON: And did you make any conclusions
9 about the ultimate effect of the project on the tortoise?

10 MS. MILLER: In the BA, the conclusion is that it
11 will adversely affect the tortoise and that it will not
12 adversely modify critical habitat of the desert tortoise.

13 MS. GANNON: Where's the nearest critical habitat
14 to the project site?

15 MS. MILLER: It is the Ord-Rodman Desert Wildlife
16 Management Area south of I-40 pretty much adjacent to the
17 project except for the I-40 separating it.

18 MS. GANNON: And in terms of the -- we've
19 discussed the direct impacts on the desert tortoise. Are
20 there indirect effects that you also consider?

21 MS. MILLER: Yes. We consider indirect effects
22 that would be lost of home range for the tortoise that are
23 within an approximately thousand-foot buffer of the project,
24 loss of habitat for the tortoise, and then ultimately the
25 indirect impacts would be impacts to tortoise that are

1 translocated and impacts to tortoise that are within the
2 resident and control populations that will monitored during
3 the translocation process.

4 MS. GANNON: And before we get into discussion of
5 the translocation plan, did you consider the potential
6 impact on the connectivity that the site may provide between
7 existing populations of desert tortoise?

8 MS. MILLER: Yes, we did consider that and the --
9 the area of -- the Pisgah ACEC that is adjacent to the
10 project on the east side of the transmissions corridor is
11 going to be -- is -- will continue to be available for
12 connectivity and there's the northern portion of the -- that
13 was excluded from the project area is also an east-west
14 connectivity that has been maintained by that reduction per
15 the request of the Desert Tortoise Recovery Office actually.

16 MS. GANNON: So your view would be that the
17 east-west would be maintained to the northern portion, but
18 it would be reduced by the project?

19 MS. MILLER: Definitely. It would be reduced by
20 the project -- the 6,200 acres of the project, the east-west
21 corridor would be reduced.

22 MS. GANNON: But the corridor that's remaining, is
23 that -- that's in the area that you had found to be
24 high-quality habitat?

25 MS. MILLER: That's correct. The habitat in the

1 northern portion of the -- north of the project is the
2 higher-quality habitat where it is also good live-in habitat
3 for tortoise which is a key quality of movement of movement
4 corridors as well. So that is a better area for the -- that
5 would be considered a better movement corridor.

6 MS. GANNON: And then the north-south movement
7 corridor, you're saying that is predominantly through the
8 ACEC?

9 MS. MILLER: Yes.

10 MS. GANNON: Is that correct? Thank you. Now
11 turning to the translocation plan, were you involved in
12 developing the translocation plan?

13 MS. MILLER: Yes, I was involved. We worked
14 closely with the agencies to develop a plan in the best way
15 we could use -- finding most appropriate suitable habitat
16 and the most appropriate methods for translocation of the
17 tortoise.

18 MS. GANNON: We have copies of the translocation
19 plan available which we can distribute now which we docketed
20 yesterday and we can offer that into evidence if people
21 would like hard copies.

22 MS. MILES: Ms. Gannon, can you please explain why
23 you're offering this into evidence at this late stage in the
24 proceeding?

25 MS. GANNON: As we will be discussing with one of

1 the authors of the plan, this plan has been a collaborative
2 effort that has been developed with the agencies, including
3 the Fish and Wildlife Service, Fish and Game, the BLM, the
4 Desert Tortoise Recovery Office. Because it is a
5 collaborative product, we were not at liberty to release it
6 until the agencies got to a point where they thought it
7 should be released.

8 MS. MILES: We --

9 MS. GANNON: And we got their permission
10 yesterday.

11 MS. MILES: We have not had an opportunity
12 obviously to review this plan. As you can see, it's a
13 substantial document and so we would like to reserve the
14 opportunity to respond to this plan.

15 MS. GANNON: And we are offering again one of the
16 authors of this plan who will describe it, so hopefully we
17 can have some meaningful discussion since we're all here
18 together this morning.

19 MS. SMITH: Mr. Kramer, the Sierra Club will be
20 reviewing this document and submitting written comments on
21 it once we have had a chance to review it.

22 HEARING OFFICER KRAMER: Okay. So that's not a
23 question. That's just a statement, right?

24 MS. SMITH: Yeah. These certainly aren't ideal
25 conditions because we would have liked to have had a hearing

1 on the translocation plan since it is the preeminent
2 centerpiece of the desert tortoise mitigation strategy. So
3 we feel that we're at a disadvantage here in the evidentiary
4 hearings, not having had the opportunity to review and then
5 ask questions on this document. I mean face it, the main
6 reason why Sierra Club and the other environmental groups
7 got involved is because of impacts to wildlife and
8 especially the listed desert tortoise.

9 HEARING OFFICER KRAMER: That's fine.

10 MS. MILES: Yeah. And as CURE stated in the
11 prehearing conference statement, we felt that this was a
12 really important document that we needed to review prior to
13 hearing, and in fact the staff assessment can say that this
14 was the critical path forward for the mitigation of desert
15 tortoise and desert tortoise is one of the largest impacts
16 that will be caused by this project.

17 MS. GANNON: And one point I would raise is
18 there's about 20 pages of text in the translocation plan and
19 then there's a number of figures which is really what's the
20 bulk of it, recognizing that obviously the figures need to
21 be reviewed, but it's not as scary as it looks.

22 HEARING OFFICER KRAMER: Well, but they're worth a
23 thousand words, right?

24 MS. GANNON: Exactly.

25 MR. BASOFIN: Mr. Kramer, this is Joshua Basofin

1 with Defenders of Wildlife. I'd also just like to add to
2 what my colleagues have said in that I believe at the
3 prehearing conference nearly a week ago, we were told that
4 the translocation plan was available by the Bureau of Land
5 Management and that it was ready to be uploaded and would be
6 available. Had that happened at that time, we would have
7 had perhaps not ample time to review, but at least some time
8 to review. And so I think springing this on us here during
9 testimony -- direct testimony of the witnesses for
10 dislocation is, as my colleagues said, not ideal.

11 MS. GANNON: I mean we would offer an explanation
12 that the BLM made that representation -- one of the staff
13 from the field office made that representation on the phone
14 at the prehearing conference. The Applicant did not comment
15 on it because we recognized that the decision to release
16 this actually had to come from the project manager and the
17 project manager authorized release of this yesterday, which
18 we did docket it yesterday and we discussed in the beginning
19 of these hearings that we would be docketing it. So I
20 don't -- we recognize that there has not been a lot of time
21 to review this, but we were pleased that we were able to get
22 it to the parties yesterday and we're pleased to have one of
23 the authors of the plan here who is available for
24 questioning.

25 HEARING OFFICER KRAMER: Well -- and we want to go

1 forward today as much as we can, but we are inclined to
2 allow some additional time for -- to revisit this issue on
3 the 18th. So, but let's --

4 MS. GANNON: To the extent it's necessary, we can
5 make our witness available.

6 HEARING OFFICER KRAMER: Okay. So let's --
7 parties, plan on perhaps not the whole day and earlier when
8 Commissioner Eggert said we had scheduled 16 hours, I think
9 we meant to say that you folks had estimated that it might
10 take as much as 16 hours today, but we're hoping that you're
11 wrong in the same positive way that you overstated things
12 for yesterday.

13 But -- so let's keep going on this topic, but
14 recognize that if there are some questions that arise --
15 clearly arise only after a review of this new document which
16 will be Exhibit 93, we will revisit -- or take those
17 questions and answers on August 18th. So please continue.

18 MS. GANNON: Thank you. Ms. Miller, if you can
19 again since the parties just got the text of this, if you
20 can walk us through the way that you approached development
21 of this document.

22 MS. MILLER: Yes, I can do that. So we worked
23 with the agencies to select habitat that would be most
24 appropriate and the most suitable habitat for tortoise to be
25 translocated into and we used several different criteria

1 that -- to come to these determinations. The main thing --
2 the main criteria for the habitat was that it would be
3 protected lands or lands managed by BLM or other agencies
4 and so we used existing literature, GIS modeling, and GIS
5 modeling included land use, USGS tortoise suitability
6 modeling, roads, proximity to the roads, other disturbance,
7 also the renewable -- the BLM layer of forecast renewable
8 energy projects and we used this and then we also used from
9 the USGS modeling, we used the habitat that's greater -- was
10 modeled to be greater than .5 value -- suitability value out
11 of -- like zero to 10 basically, we used a .5.

12 MS. GANNON: And where does that number come from?
13 The designation of the .5.

14 MS. MILLER: From the USGS models determining
15 like -- 10 is the best quality and zero's the lowest-quality
16 habitat.

17 MS. GANNON: And that's taking into consideration
18 those effects -- those considerations that you just
19 referenced about --

20 MS. MILLER: Those and many more and it also
21 includes soils and values that the USGS has quantified and
22 it's actually -- that's actually described in a little more
23 detail in the plan as well. So then --

24 MS. GANNON: So -- and what was the result of
25 those efforts that you identify? What was the amount of

1 habitat that you identified as being potentially suitable?

2 MS. MILLER: We identified that there's -- the
3 closest -- we wanted to keep the tortoise translocated as
4 close as possible to minimize issues with homing and causing
5 excessive stress to the tortoise. So we looked for habitat
6 that was close to the project and managed by the agencies,
7 and the ACEC -- the Pisgah ACEC which is immediately
8 adjacent to the project, that's 942 acres that we
9 identified.

10 MS. GANNON: That would adjacent to the east of
11 the project site?

12 MS. MILLER: Yes, to the east of the project.
13 That was identified as a short distance translocation area
14 and the Ord-Rodman Desert Wildlife Management Area to the
15 south of the project was identified as a long-distance
16 translocation area and that's approximately -- well, it is
17 9,833 acres that are available to us at this time for
18 translocation.

19 MS. GANNON: And after identifying these areas,
20 did you do further -- conduct further efforts to quantify
21 the quality of the habitat and look at the populations of
22 tortoise located therein?

23 MS. MILLER: Yes, we -- I also wanted to mention
24 that we have been approved to use the linkage area that's
25 been created and then between the project and the Cady

1 Mountains that's approximately 1,591 acres that's available
2 and that's high-quality habitat and that will also be used
3 as short-distance translocation area.

4 And we surveyed -- during the spring 2000 surveys,
5 we surveyed that area of the linkage which is -- was
6 included within the 1,000-foot buffer of the project. That
7 was surveyed and the -- parts of the Ord-Rodman Wildlife
8 Management Area were surveyed and the entire area of the
9 Pisgah ACEC was surveyed.

10 MS. GANNON: And were the survey efforts done
11 similar to those that you've described this morning that
12 were conducted on the project site?

13 MS. MILLER: Yes, they were exactly consistent
14 with the surveys done on the project site and they were done
15 by the same teams that did the surveys on the project site.

16 MS. GANNON: And so those were a hundred percent
17 coverages for the areas you've described?

18 MS. MILLER: Yes. That's correct.

19 MS. GANNON: Can you describe the results of those
20 survey efforts.

21 MS. MILLER: Yes. We found -- let me get the --

22 MS. GANNON: And if you're referencing from the --
23 oh, no. You're referencing notes. Sorry.

24 MS. MILLER: Yeah. On the -- in the ACEC, that's
25 going to be the short-distance translocation area, we

1 detected 12 desert tortoise and --

2 MS. GANNON: And what's the acreage of the ACEC
3 again?

4 MS. MILLER: 942 acres. In the control and desert
5 management -- well, in the desert wildlife management area,
6 we surveyed a portion of the 9,800 acres, so we will be
7 completing those surveys this fall prior to any
8 translocation and -- I don't have the number for the DWMA
9 immediately. But we also surveyed control areas to the
10 northwest of the project which will be used to monitor. For
11 every one tortoise that is translocated, we will place radio
12 tagging on a tortoise in a control area which is located
13 greater than 10 kilometers from the translocated tortoise
14 and we'll also monitor a resident tortoise which is located
15 within the translocation area. So we did surveys of the
16 control areas to determine the habitat quality and the
17 densities of those areas as well as the DWMA, the
18 translocation areas, and in the control and DWMA
19 translocation areas, we detected a total of 279 tortoise and
20 that was -- that accounts for approximately 17,000 acres of
21 habitat that was surveyed.

22 MS. SMITH: Sorry. Mr. Kramer, just sort of in
23 the name of judicial economy, I'm kind of wondering sort of
24 the point of this testimony. There's a very good chance
25 we're going to have to revisit and bring these witnesses

1 back to speak about these exact same issues when we've had a
2 chance to review the document and then ask questions. So I
3 have a sense that she may be going -- Ms. Miller may be
4 going through this whole thing again on the 18th.

5 HEARING OFFICER KRAMER: Well, what she says today
6 is going to be available to you in a transcript in three or
7 four days, so going through the basics on the 18th would be
8 discouraged.

9 MS. SMITH: Well, we're not able to follow along.
10 We have no sense of, you know, sort of what she's talking
11 about frankly. So -- and then I'm afraid that when I need
12 to really dig into these issues and ask questions then we
13 will be discouraged from having a full hearing at that point
14 because all of this was already, you know, sort of gone
15 through between -- with the Applicant today and again I'm
16 just very concerned that this is just kind of a waste of
17 everybody's time.

18 MS. GANNON: And we feel that we are ready to make
19 our opening testimony and it can be available and we can
20 discuss the nature of cross if -- as that needs to be
21 supplemented.

22 MS. SMITH: So we're here to day to talk about
23 desert tortoise impacts and just sort of get that all out
24 without the benefit of a desert tortoise translocation plan.
25 So there's -- so what we decided that we going to talk

1 about yesterday has been transformed into the desert
2 tortoise plan.

3 HEARING OFFICER KRAMER: Well, that's part two of
4 the discussion is -- Part A is the impacts. Part B is the
5 mitigation for those impacts. So if -- are you also saying
6 that it would be helpful that it would be helpful for you if
7 she would refer you to specific illustrative figures in the
8 plan so you could understand -- get a better context of what
9 she's saying?

10 MS. SMITH: I'm not actually because I think we'll
11 all be looking at the plan in the airplane on the ride home.
12 You know, I just -- I don't know how that's -- that would
13 only serve to slow this day down further. I mean my
14 colleagues may disagree with me, but, you know, we have
15 questions on translocation directed at staff today, but it's
16 more translocation in the abstract and if we responses, you
17 know, based on the actual plan that we haven't reviewed,
18 that's just going to confuse the issue as well, but we'll
19 cross that bridge when we get to it.

20 HEARING OFFICER KRAMER: Yeah. Let's keep
21 marching towards the bridge.

22 ASSOCIATE MEMBER BYRON: And, Mr. Kramer, I'd like
23 you to explain judicial economy to me as well at some point
24 but not now.

25 HEARING OFFICER KRAMER: There are times where it

1 will seem to you to be an oxymoron.

2 MR. BASOFIN: Mr. Kramer, I'd just like -- I
3 think -- I'd like to reiterate that Ms. Smith -- regarding
4 the disconnection between the direct testimony and the
5 cross-examination which as I understand it is how we're
6 proceeding that we'll have direct testimony right now and in
7 approximately a week and a half to two weeks, we would have
8 cross-examination. I think, you know, in terms of the
9 effectiveness of cross-examination and the efficiency of
10 understanding the issues for all the parties and the
11 Commissioners, I think that's a great concern and I can't
12 think of -- frankly I can't think of a precedent where
13 that's happened before.

14 HEARING OFFICER KRAMER: Well, we have some time
15 constraints. We do not have the luxury of taking another
16 couple days later this month, and we would -- we've set
17 aside the time here today and tomorrow and yesterday to get
18 as much of our business done as we can.

19 The relocation plan does not affect the
20 determination of impacts certainly. I mean that's step one
21 and one of the answers could have been there are no impacts
22 and then there would be no discussion of a relocation plan.

23 So to say that until you read the relocation plan you
24 cannot talk about the impacts and begin perhaps to talk
25 about mitigation to me is -- just doesn't make sense.

1 MS. MILES: I'd just like to clarify. I believe
2 in the staff assessment that it was acknowledged that the
3 relocation plan would cause impacts because you have --
4 under CEQA, you have to analyze the impacts that are the
5 result of mitigation as well.

6 HEARING OFFICER KRAMER: Okay. Then maybe that is
7 step -- am I using letters or numbers? That's Step C I
8 think. But at this point, I'm hearing them trying to get
9 through Step A. They passed out the relocation plan when
10 they had it. I think it was circulated via email yesterday.

11 So I don't think it's appropriate to give them demerits at
12 least as to -- with regard to the discussion of the impacts
13 of the project on the project site to the species and we
14 need to go forward with that discussion and begin as much of
15 the discussion of the mitigation and then the -- if you
16 will, the potential impacts of the mitigation as we can
17 today.

18 MR. RITCHIE: Mr. Kramer, this is Travis Ritchie
19 with the Sierra Club. I would just like to add too this
20 issue came up during the prehearing conference and when we
21 asked whether we were ready to go for evidentiary hearing,
22 the Sierra Club stated that we did not think we were ready
23 to these evidentiary hearings and this is exactly why. This
24 information is still coming out. We don't -- this is what
25 we're supposed to be having these evidentiary hearings on

1 and we haven't had any time to review this.

2 HEARING OFFICER KRAMER: Okay. We have said we
3 are going to set aside time on the 18th, so we are allowing
4 some time for that. What we are not going to do is just
5 halt the whole process so that everybody can read this
6 report before they have any discussion of the issues to
7 which the report does not relate.

8 MR. LAMB: Mr. Kramer, Steve Lamb for BNSF. Just
9 for clarity, do we have an exhibit number of this document?

10 HEARING OFFICER KRAMER: That was 93.

11 MR. LAMB: 93.

12 HEARING OFFICER KRAMER: Continue.

13 MS. GANNON: Thank you. You were just describing
14 the survey efforts and the results that were done from the
15 areas. After completing these assessments -- or the
16 surveys, did you also do a similar assessment of the
17 possible translocation areas?

18 MS. MILLER: Yes, we did. We did using the same
19 methods as we did on the project site. We surveyed the
20 translocation and control and resident -- or -- yes,
21 resident areas for the habitat quality and figure 9 of the
22 plan shows the habitat qualities of the various areas that
23 we surveyed and that are included in the project. On the
24 Pisgah ACEC short-distance translocation area, it shows that
25 it's pretty -- it's contiguous with the project site and the

1 habitat is parallel and completely similar to the project
2 site. So as you go south, the majority of the site is high
3 to moderate-quality habitat and then part of the site is
4 lower quality as it has more soft -- excuse me -- soft and
5 fine sands.

6 MS. GANNON: Similar to the southern part of the
7 site?

8 MS. MILLER: Yes. And less forage and less
9 burrowing potential. And also we observed less tortoise and
10 less burrows on that site as well. And then the habitat in
11 the northern portion, the linkage area, that will be also
12 the short-distance translocation area, but that habitat is
13 high-quality habitat as I discussed earlier. The habitat
14 within the long-distance translocation areas in the desert
15 wildlife management areas are high-quality habitat very
16 similar to the northern portion of the project and of the
17 short-distance translocation areas.

18 And then we also surveyed the control areas and
19 found that there's a portion of high-quality in the farthest
20 northern portion and then as you go south, there's areas
21 that are medium quality and the control area actually had a
22 little bit more lower-quality habitat and it was observed
23 that there was more grazing and finer sands in that area,
24 which is sort of consistent with the areas because it's a
25 fringe toed lizard area of critical environmental concern

1 that would be consistent with habitat for fringe toed
2 lizard. So those areas kind of fit.

3 MS. GANNON: So after evaluating the quality of
4 the habitat and conducting surveys on the site, how do you
5 select which areas you would propose for being constituted
6 as relocation areas?

7 MS. MILLER: So we look at the density as well and
8 the quality of the habitat and the minimum requirement to
9 choose a translocation area that is of equal or better
10 quality as the area from which the tortoise is being moved.
11 The we -- the ACEC in the northern -- the areas of the
12 higher -- medium and high quality within the ACEC will be
13 consistent with the project site and then the long-distance
14 translocation areas is all high quality, so that will be --
15 we chose those areas.

16 MS. GANNON: And when you're talking about the
17 density of the population, is this related to the carrying
18 capacity?

19 MS. MILLER: Yes, it is.

20 MS. GANNON: And can you just briefly describe
21 what the significance and how you look at the carrying
22 capacity of the areas?

23 MS. MILLER: Yes. The goal is to not increase the
24 carrying capacity or the density of the translocation areas
25 by more than 30 percent of the existing density or carrying

1 capacity and also as part of this process -- as a
2 collaborative process, the -- when we determine to use the
3 linkage area as a short distance, it was determined that
4 that linkage area has a higher density than the surrounding
5 areas and that it can support more tortoise. And so we want
6 to --

7 MS. GANNON: That's under existing conditions?

8 MS. MILLER: Existing conditions. We want to
9 minimize -- we're going to only move enough tortoise to
10 increase by 10 percent in that area, but the remaining areas
11 are at 30 percent increase in the density of their existing
12 conditions.

13 MS. GANNON: And have you discussed those numbers
14 with the national resource agencies?

15 MS. MILLER: Yes, we have.

16 MS. GANNON: And did they provide any input on
17 that level for the increase in carrying capacity?

18 MS. MILLER: They did and that's how we came to
19 those values and the existing -- like the current density of
20 tortoise as surveyed and known in the desert wildlife
21 management areas throughout the Mojave region is
22 approximately 4.7 tortoise per square kilometer and so we
23 wanted to keep it at no more than 5 tortoise per square
24 kilometer. So we based all of that -- the densities for the
25 translocation areas on those limitations.

1 MS. GANNON: And you earlier mentioned that you
2 view the short-distance translocation as preferable?

3 MS. MILLER: Yes, we do, for many reasons. The
4 agencies definitely prefer that we stick within the
5 short-distance areas and if we can keep -- the preference is
6 to move them less than 500 meters from the point of capture
7 and by doing that, we can -- we don't have to blood test the
8 tortoise because if we go greater than that, we risk
9 infecting resident tortoise within the other area without
10 blood testing. So we want to blood test any tortoise that
11 are moved greater than 500 meters from the project site and
12 also blood test tortoise within the resident population for
13 the microplasma antibodies.

14 MS. GANNON: And based on the calculations of how
15 many tortoise you anticipate having to translocate, what
16 percentage of those tortoises will be translocated a short
17 distance?

18 MS. MILLER: We -- for the first phase of the
19 project, we anticipate moving 10 tortoise and we are able to
20 move approximately 11 tortoise into the short-distance ACEC
21 and then we have the option to move -- well, that's in the
22 phase one, 10 into the ACEC. And so that would be
23 considered a short-distance translocation within 500 meters,
24 and if not, then we'll still move them into the ACEC, but
25 they will be blood tested and quarantined until we have the

1 positive -- or the test results that show that they are
2 negative for the microplasma antibodies.

3 MS. GANNON: And have you proposed any
4 additional -- I understand you've just described the blood
5 testing that would be done. Have you -- are you proposing
6 to conduct any monitoring as part of your translocation
7 efforts?

8 MS. MILLER: Yes. For every -- all tortoises that
9 are translocated will be fitted with radiotelemetry and
10 followed -- for the first two weeks, they're followed
11 daily -- or checked daily and then it'll continue for a
12 five-year period of monitoring of those tortoise, and then
13 for every tortoise that's moved, a resident tortoise and a
14 control tortoise will be fitted with a radio tags and
15 followed as equally with the translocated tortoise.

16 MS. GANNON: And I think you referenced earlier
17 that it could be, based on your calculations, up to 93
18 tortoises that need to be translocated?

19 MS. MILLER: That is the estimate.

20 MS. GANNON: Are you aware of similar large-scale
21 translocation efforts that have been conducted?

22 MS. MILLER: Yes. The recent Ft. Irwin was the --
23 probably the largest scale translocation effort that's been
24 done.

25 MS. GANNON: And how many tortoises were

1 translocated?

2 MS. MILLER: Approximately 600. I think 560.

3 MS. GANNON: And what were the results of those --
4 the efforts -- the translocation efforts?

5 MS. MILLER: They found that 90 tortoise were --
6 they found 90 tortoises that died.

7 MS. GANNON: 90 of the 560?

8 MS. MILLER: Of the 560, approximately 16 percent.

9 HEARING OFFICER KRAMER: 1-6 or --

10 MS. MILLER: 1-6, yes. 1-6.

11 MR. BASOFIN: Mr. Kramer, at this point, I'm going
12 to object. I don't think -- I'm not sure this witness is
13 qualified to testify about the Ft. Irwin results. I haven't
14 seen any qualifications that she has worked on that study or
15 that she performed any work for the translocation there.

16 MS. GANNON: Have you reviewed reports that were
17 produced as a result of the Ft. Irwin translocation?

18 MS. MILLER: Yes, I have.

19 MS. GANNON: And do you -- does your training and
20 qualifications give you the ability to essentially sort of
21 peer review or make conclusions based upon those reports
22 after you've read them?

23 MS. MILLER: Yes, it does.

24 HEARING OFFICER KRAMER: And were you using that
25 information as part of the basis for the opinions you're

1 offering to us today?

2 MS. MILLER: Yes.

3 HEARING OFFICER KRAMER: Objection's overruled.

4 MR. BASOFIN: Thank you.

5 MS. MILES: Just one point of clarification. In
6 terms of the reports that you've reviewed, have you reviewed
7 the 2008 and 2009 reports from the Ft. Irwin translocation?

8 MS. MILLER: Yes, I have.

9 MS. MILES: Thank you.

10 MS. GANNON: Including the ones that Ms. Miles
11 docketed this morning? Did you have a chance to look at
12 those?

13 MS. MILLER: I did get a chance to look at them
14 briefly.

15 MS. GANNON: Thank you. So you were speaking to
16 the results. You said that there was 90 of the 560 which
17 were taken; is that correct?

18 MS. MILLER: Yes. That's in the estimates that
19 I've seen.

20 MS. GANNON: And based on your experience with --
21 is that a number that was surprisingly high to you or was
22 that what you would anticipate from translocation efforts?

23 MS. MILLER: That's a pretty high number for
24 tortoise mortality.

25 MS. GANNON: And based on your review of the

1 reports that have been prepared, is there any reasons that
2 you've been able to identify why this number was so high?

3 MS. MILLER: From the reports and from -- you
4 know, there's been a lot of research done on that and a lot
5 of information put out lately about that and a lot of the
6 information goes to the fact that that year was a high
7 coyote predation year and the tortoise that were --

8 MS. GANNON: And which year are we referring to?

9 MS. MILLER: 2008. That -- the tortoise that were
10 translocated, there were 90 that were -- that died and the
11 majority were by coyote predation, but also there were
12 resident and control tortoise that were monitored and those
13 were also predated by coyote and so there's a correlation to
14 across the region that there was coyote predation that was a
15 cause of tortoise mortality.

16 MS. GANNON: So there was an overall high
17 mortality rate that year?

18 MS. MILLER: There was.

19 MS. GANNON: In the area? And are there changes
20 or modifications that have been made to provisions in the
21 translocation plan based on your analysis of what has
22 occurred at Ft. Irwin?

23 MS. MILLER: Yes. Based on my analysis and based
24 on the collaboration with the agencies and working through
25 the lessons learned from that -- Ft. Irwin, we are looking

1 at -- because some of the tortoise, there was not an equal
2 sample size of tortoise that were translocated and monitored
3 to the tortoise that were residents and tortoise that were
4 control animals, we are doing an equal sample size. So for
5 every tortoise that's moved, we're doing radiotelemetry of a
6 resident and a control tortoise. We're monitoring very
7 closely. We are moving tortoise as close as possible to the
8 point of capture to minimize the homing behavior and other
9 issues that might be a factor in predation increase or in
10 stress factors for the tortoise. However, in that one -- in
11 the two -- in one of the reports that was docketed this
12 morning, the desert tortoise homing behavior research
13 activities, it does show that the mortality -- there's no
14 mortality in the short term for the tortoise and that the
15 actual translocation event was not necessarily the cause of
16 mortality and that it could be predation and the homing --
17 change in the behavior by the homing -- the desire of the
18 tortoise to get back to their home range. So --

19 MS. GANNON: Thank you. And I just had just a few
20 moments here this morning to look at this 2009 report which
21 was docketed this morning, but I noted in one section they
22 were talking about sort of higher mortality rate for
23 juveniles which were penned. Are you proposing to do a
24 similar efforts as part of your translocation?

25 MS. MILLER: As part of this translocation,

1 juveniles that are too small to be -- have radio tags placed
2 on them will be penned in predator-proof pens, but they'll
3 be released within two weeks of being -- of the pens being
4 placed.

5 MS. GANNON: And again I didn't read it carefully
6 enough. Was that similar method used here or was the
7 penning longer or are you not aware?

8 MS. MILLER: I believe the penning was longer for
9 the juveniles.

10 MS. GANNON: Okay. Thank you. Turning now to the
11 mitigation efforts which the project Applicant is proposing,
12 are you aware of the Applicant's proposed mitigation for
13 impacts to the desert tortoise in addition to the
14 translocation plan?

15 MS. MILLER: Yes. On the high-quality habitat
16 that's been identified as approximately 4,000 acres -- let
17 me see what's the real number -- 4,000 -- it's -- they're
18 proposing three to one mitigation and for the habitat of
19 lower quality south of the railroad tracks is a one-to-one
20 mitigation.

21 MS. GANNON: And in your professional judgment,
22 would preserving and managing and enhancing desert tortoise
23 habitat at these ratios be sufficient to offset impacts to
24 the population on site?

25 MS. MILLER: Yes.

1 MS. GANNON: Thank you. I would also now like to
2 call Ms. Bellows to provide some comments on our proposed
3 revisions to the desert tortoise mitigation measures or we
4 can discuss --

5 HEARING OFFICER KRAMER: No. Go ahead with that
6 and remind me which exhibit we'll find that in.

7 MR. RITCHIE: Mr. Kramer, Travis Ritchie with
8 Sierra Club. My understanding was that we would discuss
9 mitigation measures after discussing all the impacts so that
10 we could give the full evaluation.

11 HEARING OFFICER KRAMER: Then we refined that to
12 discuss the proposals that relate to desert tortoise and the
13 desert tortoise section, et cetera.

14 MS. GANNON: It was in Exhibit 92 that was offered
15 yesterday.

16 HEARING OFFICER KRAMER: Thank you.

17 MS. GANNON: And it is biological condition 17 in
18 that package.

19 PRESIDING MEMBER EGGERT: I was just going to make
20 a -- I guess again just also maybe just to reiterate and
21 clarify what I believe is consistent with what Hearing
22 Officer Kramer said that for the purposes of testimony that
23 relates to the translocation plan, there will be a further
24 opportunity at the next hearing to be able to bring that
25 forward again for additional cross-examination. So just

1 to -- in terms of -- also noting to the Applicant thinking
2 about, you know, in terms of making this the most efficient
3 as we sort of go forward as to how you want to manage the
4 testimony so that that opportunity still resides with the
5 next hearing.

6 MS. GANNON: Absolutely. And our intent is again
7 to put on our opening testimony and then we will make people
8 available for cross as necessary on the 18th and could do
9 rebuttal, but we won't rehash this on the 18th.

10 PRESIDING MEMBER EGGERT: So I agree with that,
11 but in terms of rehashing, to the extent that we may need to
12 rehash some of the testimony just for the purposes of cross
13 if it relates to the translocation plan.

14 MS. GANNON: Absolutely.

15 PRESIDING MEMBER EGGERT: Okay.

16 MS. GANNON: We don't have to walk through our
17 whole case again live.

18 PRESIDING MEMBER EGGERT: Correct.

19 MS. GANNON: Right. Right.

20 MS. SMITH: And then just -- but, Mr. Kramer, I
21 mean I've been involved in proceedings where revisions to
22 many fewer conditions of approval, conditions of
23 certification have taken hours, you know, and I can really
24 see us getting bogged down for a very long time talking
25 about the revisions to these conditions. That's fine, but,

1 you know, I really want to say that we cannot be rushed
2 later when we want to talk about -- we want to cross staff
3 and, you know, bring our own case on biological research
4 because there's a real possibility this could take a very
5 long time.

6 MS. GANNON: And we would suggest asking the
7 Committee to have a workshop on the proposed conditions of
8 revision. We are -- we think it's still valuable for us to
9 introduce to -- so the Committee can hear what we are
10 proposing and the reasons for it, but we agree that a
11 workshop might be a more efficient to be able to work
12 through some of the details and we are completely open to
13 that.

14 HEARING OFFICER KRAMER: Okay. That's -- I had
15 heard that this might be raised. The parties as I
16 understand it are already having a workshop on -- is it
17 Monday?

18 MS. GANNON: On the 10th, August 10th.

19 HEARING OFFICER KRAMER: The 10th. Okay.
20 August 10th.

21 MS. GANNON: For Imperial Valley.

22 HEARING OFFICER KRAMER: For the Imperial Valley
23 case. And I've heard some were thinking about suggesting
24 that this case also be wrapped into that workshop either
25 serially or combined.

1 MS. GANNON: I think we were thinking serially.

2 HEARING OFFICER KRAMER: Okay. And that would
3 allow the parties to potentially work out some of their
4 disagreements. So let me first ask the parties to state
5 their interest or lack of interest in having a workshop and
6 this would just be among the parties. It would not be a
7 Committee event -- on that same day, August 10th, I would
8 suppose following the Ivanpah -- Imperial Valley
9 discussions -- pardon me -- Ivanpah's sort of been on my
10 brain for a while.

11 So parties, yea or nay? Staff?

12 MR. ADAMS: Yeah, we're consulting. We would
13 support a workshop. We don't want it combined, but when you
14 say serial, you're talking about same day, immediately
15 after?

16 HEARING OFFICER KRAMER: Maybe with a little
17 break, but yes.

18 MR. ADAMS: Okay. Yeah. I think that would be
19 acceptable.

20 THE REPORTER: Who was that on the phone?

21 HEARING OFFICER KRAMER: I'm sorry. That was
22 Steve Adams.

23 THE REPORTER: Thank you.

24 MS. MILES: We're just concerned about timing and
25 all of the things that are coming at us right now in terms

1 of having to prepare briefing and I just would hope that the
2 time that we are going to be putting into the workshop can
3 be taken into account when we're setting the briefing
4 schedule.

5 HEARING OFFICER KRAMER: We already set the
6 briefing schedule as I recall, didn't we? Other comments?

7 MR. RITCHIE: I'd like to reiterate that with the
8 briefing schedule. I mean I believe it was set for
9 August 18th which -- I mean as far as what we're going to
10 brief on these impacts from the -- to the desert tortoise
11 and the potential mitigation or lack thereof, I mean that's
12 an essential component of whatever we're going to be
13 briefing and we won't even have concluded evidentiary
14 hearings now on this issue at that point.

15 HEARING OFFICER KRAMER: Okay. And that was going
16 to be the case before this proposal came up because you
17 wanted time on the 18th to discuss the desert tortoise
18 relocation plan. So that hasn't changed.

19 MR. RITCHIE: Well, we wanted time to discuss the
20 desert tortoise relocation plan since it was introduced
21 today -- or I guess last night. I mean all of these issues
22 are coming at us very quickly and originally the hearing on
23 the 18th was supposed to allow us to brief all of these
24 issues. Because of these delays and because of these late
25 submittals, we're not going to have all this information to

1 be able to brief.

2 HEARING OFFICER KRAMER: Well, you can brief the
3 facts as you believe them to be and you can certainly inform
4 us of the law and it is the Committee's job to apply the law
5 to the facts, so while we certainly welcome your advice as
6 to how we should do that, you know, ultimately we have to do
7 that -- this is a very compressed process. I'm not the
8 first person up here to say that and we're trying to do the
9 best we can with it. So on the question of whether a
10 workshop among the parties to discuss basically all of the -
11 - I assume they're mostly Applicant proposed changes to the
12 conditions, would that -- do you want to argue against that
13 or for that or are you neutral?

14 MS. SMITH: I think -- you know, having given this
15 just a couple moments of thought, frankly the briefing is
16 for the Committee's benefit. We have no obligation to
17 exhaust our legal theories with the Committee. So this is -
18 - you know, we do this for you.

19 However, our evidentiary hearing is required in
20 order for us to exhaust our evidentiary -- our
21 administrative revenues as respect to the facts. So I do
22 want to preserve all opportunities to get our evidence in
23 and comment on these substantive documents. The briefing is
24 again just for the Committee's benefit.

25 HEARING OFFICER KRAMER: Okay. But I didn't hear

1 an answer as to whether you see a benefit in having this
2 workshop next week.

3 MS. SMITH: Because of other prior commitments, I
4 won't be able to attend on Monday, so I -- for my --

5 MS. GANNON: It's Tuesday, the 10th.

6 MS. SMITH: It's Tuesday, the 10th. Yes. I do
7 see a benefit.

8 HEARING OFFICER KRAMER: Okay. Anyone else?
9 Okay. So Mr. Meyer, you were ready to send out a notice of
10 that for this case, correct?

11 MR. MEYER: Yes. I will send the basic notice for
12 the Imperial and make a note that we'll have it in the same
13 location to probably follow a half hour, hour break. At
14 this point, we don't have an end time to the Imperial one,
15 so --

16 HEARING OFFICER KRAMER: Okay. Well, my question
17 was more basic. You're able to notice this thing. Yes or
18 no. Yes, right? You will be able to send out a notice on
19 behalf of staff of this staff workshop.

20 MR. MEYER: Yeah. I will be able to send -- not
21 as a staff workshop as the Committee ordered because of the
22 fact I don't have appropriate timing --

23 HEARING OFFICER KRAMER: Okay. And that's my next
24 point is the Committee is now ordering the suspension of our
25 rules, which we are allowed to do, that require a ten-day

1 notice of such a hearing and we are authorizing you to
2 notice the hearing for August 10th and it would be a staff
3 workshop. It's not a Committee event, but we are
4 authorizing you to issue a notice with less than the
5 required -- the normally required ten-days notice. So go
6 ahead --

7 MR. MEYER: I will get that out today.

8 HEARING OFFICER KRAMER: Thank you.

9 MR. BABULA: I have a question. This is Jared.
10 I'm handling the cultural resources for this Calico and
11 Imperial and so we were trying to have the workshop on the
12 cultural section which will come out on the 9th. So a
13 workshop on the 10th might be a little short for people to
14 evaluate staff-proposed -- or our conditions and our
15 workshop for our cultural section. Is there a possibility
16 of having another -- a second day for just cultural?

17 HEARING OFFICER KRAMER: Okay. Well, we were not
18 even anticipating cultural. First of all, Jared, if you
19 could spell your last name -- both names for our court
20 reporter since you're new to him.

21 MR. BABULA: J-a-r-e-d and the last name is
22 B-a-b-u-l-a.

23 HEARING OFFICER KRAMER: Okay. Thank you. Well,
24 we -- are you saying that on behalf of staff you need a
25 similar waiver of the ten-day notice period in order to

1 notice a cultural workshop at some later time?

2 MR. BABULA: Christopher, what do you think?

3 MS. GANNON: Hearing Officer Kramer, before we get
4 into how we would procedurally do that, the Applicant
5 doesn't believe that a workshop on cultural resources will
6 be required.

7 MR. BABULA: Well, that's -- well, that's a --
8 okay. If that's the case, that would be -- if you're -- I
9 mean I don't know what the other parties think, but --

10 MS. GANNON: I'm thinking for this project, for
11 Calico.

12 MR. BABULA: Oh, right, for Calico.

13 MS. GANNON: Right.

14 MR. BABULA: That's the one I'm -- I'm mainly
15 interested in Calico. Okay. If you feel -- I'm not sure
16 how you know that without seeing the work product, but --

17 MS. GANNON: I trust you.

18 MR. BABULA: Okay. Well, maybe we don't even need
19 an evidentiary hearing. Let's just --

20 HEARING OFFICER KRAMER: Okay. Well, if you do
21 need help with the noticing at some later point, contact me
22 and the Committee will consider --

23 MR. BABULA: Okay.

24 HEARING OFFICER KRAMER: -- providing you with
25 relief from the ten-day notice requirement.

1 MR. BABULA: Okay. That'll work. Thanks.

2 HEARING OFFICER KRAMER: Okay. So now that we're
3 going to workshop, the conditions, including the BIO
4 condition that you -- the Applicant was about to explain its
5 position on, I would suggest that in the interest of that
6 judicial economy thing we wait to see if there is a dispute
7 that remains after the workshop and if you've worked it out,
8 then I don't think we need to hear your specific arguments
9 in favor of a particular petition -- position.

10 MS. GANNON: I think we could do this in a summary
11 fashion. I think there is value to it particularly because
12 I understand that there are representatives of many of the
13 REAT agencies on the phone right now and part of our
14 proposed revisions go to the calculations of the mitigation
15 numbers in terms of the costs of providing the mitigation
16 not the amount of mitigation. And we think it would be
17 worthwhile for Ms. Bellows to at least be able to provide a
18 discussion of how we came to what we are proposing and then
19 possibly at the workshops, we can have, you know, the
20 discussion of line by line and where that goes.

21 MR. MEYER: Hearing Officer Kramer, this is
22 Christopher Meyer from staff. Just before we get too far
23 from the noticing issue, I need to get a pretty good idea
24 from the Applicant -- and they can actually speak to both
25 Imperial and Calico for timing. If we're going to be

1 starting at 10:00 o'clock, I don't want to get to a
2 situation where we start losing the value of the workshop by
3 trying to cram all these issues on both Imperial and Calico
4 into the same day if that's not going to actually resolve
5 the issues -- if we're not going to have time to resolve
6 them.

7 So what is the feeling if -- I guess my question
8 would be what parties' feelings are on the time that they
9 need at the workshop.

10 MS. GANNON: Mr. Meyer, we would suggest that we
11 start in the morning with Imperial Valley and that we move
12 the start time to 9:00 rather than 10:00 and go from 9:00 to
13 12:30 for Imperial Valley, take an hour break for lunch, do
14 1:30 until 6:00 for Calico. And we believe there are many
15 similar issues, so we may be able to get at least some
16 discussion that could make the Calico go a little faster,
17 but we think that that time, it's -- it will take hard work,
18 but we think we can get through it in those times.

19 HEARING OFFICER KRAMER: Does that answer your
20 question?

21 MR. MEYER: From the Applicant's point of view.
22 Does anyone else who's going to be participating in the
23 workshop from the parties believe they can actually work
24 within that schedule?

25 MS. MILES: I'm just concerned because we actually

1 have to brief -- provide our briefs in the Imperial
2 proceeding on the 11th, and so I was not anticipating an
3 entire day on the 10th.

4 MS. GANNON: But we already schedule it for 10:00
5 to 5:00.

6 MS. MILES: I didn't realize that it was going to
7 be until 5:00 p.m. I was aware that it started at
8 10:00 a.m. I saw that in the notice, but I just think that,
9 you know, depending on how long this could actually take,
10 I'm not sure that those estimates are going to work for the
11 parties and I'm really concerned about being able to spend
12 some time and quality time on this brief.

13 MS. FESNOCK: This is Amy Fesnock from California
14 BLM. We were asked to be part of the Imperial Valley solar
15 workshop and I had indicated being able to attend but not
16 being able to be there from 10:00 to 12:00. So if you're
17 now moving Imperial Valley from 9:00 to 12:00, that will
18 preclude BLM from being a part of that workshop and many of
19 the other agencies that were also invited, we have a
20 standing obligation from 10:00 to 12:00. So you're now
21 excluding us from Imperial Valley.

22 HEARING OFFICER KRAMER: Could you spell your name
23 for our court reporter? Oh, he has it. Never mind.

24 MS. FESNOCK: Yes. It's --

25 HEARING OFFICER KRAMER: No. He has it.

1 MS. FESNOCK: Okay.

2 HEARING OFFICER KRAMER: Thanks.

3 MS. GANNON: Would the agencies be available to
4 start at 8:00 and go 8:00 to 10:00?

5 MS. FESNOCK: I can only speak for myself because
6 the other people that you guys asked to be a part of are not
7 currently in this room. I would be able to accommodate
8 that, but I don't -- like I said, I don't know if the other
9 three or four people that you asked to attend.

10 MR. MEYER: This is Christopher Meyer. This will
11 be -- we have a call-in number set up for this and so if
12 people aren't able to -- if that makes easier for people to
13 attend earlier. Hopefully they can. Do you have any of the
14 panel for the other agencies on the phone yet?

15 MR. ADAMS: I -- Steve Adams. I think they --
16 most if not all of them are on. So people from Fish and
17 Game and Fish and Wildlife Service, BLM, if you could chime
18 in on your availability on the 8th, that would be helpful.

19 MS. GANNON: On the 10th.

20 MS. MOORE: This is Tonya Moore with the
21 Department of Fish and Game. I cannot speak for the
22 Imperial Valley Project because I am not -- we are not on
23 that particular project -- that are on the phone today.

24 MR. MEYER: Hearing Officer Kramer, this is
25 Christopher Meyer. I will contact the appropriate Fish and

1 Game, Fish and Wildlife staff and BLM staff for the Imperial
2 Valley Project since that's the one being moved up and see
3 if they are available to start at 8:00 in the morning.

4 HEARING OFFICER KRAMER: Okay. Then that just
5 makes Ms. Miles' day even longer, so I don't know that that
6 addresses her concern, but it's noted. I guess it could
7 finish earlier. Okay. Is this something we need to revisit
8 in a few hours after we've heard from the participants,
9 which means then we're sort of -- is it clear though that
10 we're merely now talking about the timing and not the
11 reality that there will be a workshop? Is that fair to say?

12 Does anybody object to that assessment, that we have agreed
13 to have a workshop now? Okay. So --

14 PRESIDING MEMBER EGGERT: I just want to --
15 yeah -- interject and then I think -- I mean as I understand
16 what the intent for -- and the purpose of this workshop,
17 it's -- I think it will be a great benefit to the committee
18 and I appreciate all the parties' attempts to try to create
19 some economies of scale so to speak by tackling these both
20 on the same day, recognizing that it does create some
21 schedule conflicts, but hopefully if we can do some creative
22 scheduling either a really early start, perhaps an earlier
23 lunch break of some sort to be able to accommodate those who
24 we need to have there in the room for the purposes of the
25 discussion, then sounds like we can probably make this work,

1 but -- so --

2 HEARING OFFICER KRAMER: Now, they're, on the one
3 hand, putting off the presentation of the various positions
4 on the proposed amendments, may increase our workload on the
5 18th if they don't come to an agreement because then we're
6 going to have to hear all that. On the other hand -- well,
7 maybe I just made the argument that we should hear some of
8 that today just to be prepared.

9 MS. GANNON: I think it also could increase the
10 amount of time at the workshop if we haven't at least kind
11 of set out the basic parameters of what we're proposing.

12 HEARING OFFICER KRAMER: Okay. That's -- all
13 right. Please go ahead then with your explanation.

14 Whereupon,

15 FELICIA BELLOWS

16 was called as a witness herein, and after first having been
17 duly sworn, was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MS. GANNON:

20 Q Thank you. Ms. Bellows, as I think you're aware,
21 we're discussing BIO-17 and the proposed changes to that
22 condition. Without going into all the details, can you just
23 provide a summary of the approach that you are proposing for
24 this condition.

25 MS. BELLOWS: I can. You know, I think the most

1 important think to note on BIO-17 which is -- deals with the
2 desert tortoise is the fact that we're not taking issue
3 whatsoever with the amount of mitigation in terms of land.
4 We are fully in agreement with mitigating on a three-to-one
5 basis north of the railroad which is approximately
6 4,000 acres and then on a one-to-one basis south of the
7 railroad.

8 But you can imagine the night when the SSA came
9 out and we're all -- all the team is looking at this, you
10 can imagine the quantity of OMGs going across the wire when
11 suddenly our mitigation went from approximately 30 million,
12 just around, to 50 million plus. And that's our concern. I
13 mean at the end of the day, you have to remember that this
14 is a -- it's a commercial project that has to close on all
15 bases. It has to work within the concept and I keep going
16 back to our PPA. That's the document that brings in our
17 money that supports the project, drives acreage, drives
18 everything and supports the financing on the project.

19 So, you know, all the applications and the
20 conversations that we have had with the DOE so far have gone
21 off of a \$30 million figure and not a 50 plus million dollar
22 figure. And so that's a huge problem for us.

23 MS. GANNON: And to be clear, the change again was
24 not related to a change in the acreages?

25 MS. BELLOWS: No --

1 MS. GANNON: What was the base of the change?

2 MS. BELLOWS: It's not at all related to the
3 change in acres. The acreage is the same. In fact the
4 overall analysis didn't change. So it is a calculation
5 issue and arrival at numbers. So what that does is it
6 impacts me. Now I have to go back to the DOE. I have to
7 have a conversation with that. My coverage ratios have
8 changed. The likelihood and the ability to be able to prove
9 that out, you know, has now changed, and in addition I have
10 an issue with, you know, this is a large project, so we have
11 an investor who's looking at coming in with us to invest in
12 the project and I now have to explain that and the
13 difference.

14 So that is our overall concern with this
15 compliance condition. So what we did in terms of approach
16 to this, we also thought that the condition itself needed
17 some work in terms of it was very complicated. So we took a
18 stab, rather than redlining the document or the compliance
19 condition, we went through and organized it into a -- what
20 we called a logical order -- a little bit more logical. So
21 we worked through it. We separated it into three sections.

22 We dealt with acquisition -- the actual acquisition of the
23 land. We dealt with the improvement of the land, and then
24 made a long-term management of the plan -- of the land.

25 And in each one of those sections, we went through

1 and dealt with the process, the criteria, and the cost of
2 those and tried to organize it in a fashion that again made
3 a little bit more sense.

4 MS. GANNON: And speaking now to the numbers, your
5 numbers that you are proposing are, you know, radically
6 different from those that were included in the supplemental
7 staff assessment. Can you describe what the basis for these
8 numbers were?

9 MS. BELLOWS: They are different. What -- the
10 first thing that we looked at is we looked at the land
11 values. You know, we have purchased some lands in the Not A
12 Part to cover our well in that area. So we're familiar with
13 the land values there and our land values that we were able
14 to close on are closer to 500 an acre as opposed to a
15 thousand an acre, which is included in the analysis done in
16 the SSA.

17 So, you know, that's a doubling in value right
18 there. In addition, we also went out to our -- some real
19 estate developers and looked at what those values are in
20 their view and some numbers that we got from them were as
21 low as \$200 an acre. So we've taken -- we didn't go with
22 the \$200 analysis, but we did go with our own personal
23 experience and put in 500 an acre.

24 And that reminds me of one other point that I
25 forgot to mention before. The other thing that concerned us

1 on this is the fact that, you know, shortly after this came
2 out, an article came out in California energy markets and it
3 states here Fish and Game releases interim strategy to
4 mitigate impacts of solar plants on desert land and it says
5 developers planning large solar plants would pay per acre
6 fees of up to 8,000 to lessen impacts caused by projects on
7 plants and wildlife.

8 My concern with that is that land developers read
9 this and my guess is that the minute they read this, they
10 started dialing up people in the neighborhood of these
11 projects and saying, gee, how would you like me to manage
12 this process for you and I bet I could get a fee -- maybe
13 not 8,000 an acre, but a little bit smaller than that. So I
14 think that by setting an amount here, we're driving the
15 market up to an artificial bogie if you will. And I'm very
16 concerned about that.

17 MS. GANNON: And you've made the changes to a
18 number of the other estimations of the fees, the appraisal,
19 and the closing cost. What were the bases for the numbers
20 that you included in the chart?

21 MS. BELLOWS: We did. The other fees -- there are
22 a number of fees that they have included associated with the
23 acquisition of the lands and the processing of the lands and
24 we went back and looked at those. We also went to our
25 consultants. We went to a land developer on those fees. We

1 also went to URS in terms of the reviews that would have to
2 be done and got some estimates of what they would actually
3 cost and we've lowered those to the amounts that we believe
4 are more applicable in this case.

5 MS. GANNON: Thank you. And you also I
6 understand -- we have made a proposal regarding the payment
7 of the mitigation funds. Can you describe what you're
8 proposing?

9 MS. BELLOWS: Well, before I do that, the other
10 point I'd like to point out too is that we've also -- one of
11 the concerns we have here -- and this goes back to the
12 financing of the project is the notion that right now we
13 have no cap. We think that it's very important that we have
14 a cap established here because if I'm trying to finance the
15 project and the lender says, well, how much is it really and
16 the investor says but I see a number but if you don't have a
17 cap, it's open ended. So then they ask us to come up with a
18 range and you can see the complication there. So that's the
19 other item that we've requested here is to have a cap
20 established.

21 And going to the payment, one of the things that
22 we included in -- that I've included in my rebuttal
23 testimony was a proposal on how we would deal with payment
24 of and security -- posting of security associated with this
25 mitigation and, you know, as we talked about a little bit

1 yesterday, the DOE is a bit behind in its processing of the
2 loan guarantees. So the actual closing of the financing is
3 not going to occur prior to start of construction. You
4 know, and that's important because of the ARRA funding that
5 we have to be in construction in 2010.

6 So what we have proposed initially, we've gone
7 back and looked at -- the staff actually sent us the Blythe
8 proposal on posting of security and we went back and looked
9 at that and refined our numbers. So we've gone back and
10 refined our proposal to the proposal -- sort of put it in
11 sync with the Blythe proposal since that was staff's --
12 staff sent that to us and we have a proposal around of
13 actually posting security based on the initial posting,
14 based on the acreage that we will actually disturb prior to
15 financial closing, and then posting the remainder of the
16 security on phase one on financial close and then posting
17 the security on phase two prior to construction and grounds
18 disturbance on phase two.

19 MS. GANNON: So in summary, instead of providing
20 all security up front, you would be tying the security
21 payments to the impacts that would occur in each one of
22 these phases; is that correct?

23 MS. BELLOWS: That's correct. The -- it's a --
24 we've tried -- it's an attempt to actually tie the
25 mitigation to the ground disturbance.

1 MS. GANNON: Thank you. And now there's a number
2 of other changes and subtle revisions that are included in
3 this proposal. Is there anything else that you would like
4 to address directly with the Committee?

5 MS. BELLOWS: The only other point we would make
6 note of is that there were some costs here that were
7 unknown. There's an agency cost to accept the land which is
8 priced out in the staff assessment and SSA as 17.6 percent
9 of the overall value. We thought that was excessive, but on
10 the other hand, we have no way of estimating that. So our
11 comment is that can we go back and look at that as opposed
12 to I can't estimate that.

13 MS. GANNON: Thank you. That ends my direct of
14 these witnesses and I would offer them for cross-
15 examination.

16 HEARING OFFICER KRAMER: Thank you. Let's begin
17 with the staff. Mr. Adams.

18 CROSS-EXAMINATION

19 BY MR. ADAMS:

20 Q Steve Adams. I guess first for Ms. Bellows, in
21 talking about the costs, you are aware that the dollar
22 figures that add up to \$50 are primarily an estimate of the
23 costs not a dollar requirement for the mitigation?

24 MS. BELLOWS: I am correct that the 50 million is
25 an estimate. My concern though it goes to the fact that

1 that's what the market sees. That's what the market hears
2 and that's what the lenders see.

3 MR. ADAMS: So is -- your main objection to it is
4 its impact on the real estate market in the desert?

5 MS. BELLOWS: I'm sorry. Can you repeat your
6 question?

7 MR. ADAMS: Yes. I'm just following up to your
8 answer asking if your main concern with the new cost
9 estimates are with the impact on the real estate market in
10 the desert.

11 MS. BELLOWS: I would have to say that it's
12 twofold. One would be the fact that it is a printed
13 document that I do have to show an investor on the project
14 and the lender. So that's what they're going to see. You
15 know, in conversations with the BLM, for instance, you know,
16 and also the staff assessment clearly states that I can go
17 out and buy the land. So that's the second issue is that,
18 yes, I can go out and buy the land, but by having this value
19 in the document, I do believe that you're setting a price in
20 the market that it will be hard for me to buy at prices
21 today and that they'll automatically be driven up to those
22 high prices, not only impacting our project but also
23 development in general in the county -- or in the area.

24 MR. ADAMS: And are you experienced in the real
25 estate market to talk about the influences that a regulatory

1 document estimating prices is going to have on market
2 generally?

3 MS. BELLOWS: I'm a project developer. I've been
4 doing development for a number of years and prior to
5 development, I worked on the finance side in the electric
6 market and I'm very familiar with the impact of documents
7 and I can assure you that I've gotten more than a number of
8 calls from developers on the fact that if I don't buy the
9 land up quickly, as soon as these documents hit the street,
10 the prices are going to go up.

11 MR. ADAMS: I guess I would now like to turn to
12 the translocation plan and have some questions for Ms.
13 Miller. And at the outset, let me say that our proposed
14 condition BIO-16 requires that the translocation not only
15 includes a number of substantive requirements for the
16 translocation plan, but also requires approval of the plan
17 by staff prior to the beginning of translocation, requires
18 approval by the Department of Fish and Game as well as the
19 federal agencies, and so we also need quite a bit more time
20 to study this. I've taken just a cursory look at it and on
21 that basis, have these questions, the first of which is does
22 the plan clearly articulate remedial actions that will occur
23 if there a higher than expected translocation mortality.

24 MS. MILLER: I believe it does discuss remedial
25 actions. In Section 2.8, Monitoring and Reporting, we

1 discuss the monitoring process and following up with any
2 health problems that would be reported to Fish and Wildlife,
3 any mortalities, and the conducting vegetation transects to
4 capture the changes in habitat characteristics to determine
5 adaptive management for the translocated animals.

6 MR. ADAMS: Is there a contingency in the plan if
7 tortoises at the receptor sites are found to be diseased?

8 MS. MILLER: In the immediate part of the
9 translocation? Is that what you're asking? Like when we're
10 translocating into the recipient sites?

11 MR. ADAMS: Yes. Or, you know, on the verge of
12 beginning the translocation.

13 MS. MILLER: Yes, there is an approach to if we
14 find tortoise that have antibodies to the microplasma, they
15 will be isolated or quarantined and there will be a
16 250-kilometer buffer around those diseased -- 250-meter.
17 Sorry -- 250-meter buffer around diseased tortoise that
18 where no translocation of the tortoise from the project
19 could be -- could occur.

20 MR. ADAMS: So I'm -- just to make sure I
21 understand. That provides for an exclusion area at the site
22 where you're taking the tortoises with a margin around it
23 to --

24 MS. MILLER: Yes, that's --

25 MR. ADAMS: -- prevent exposure of the moved

1 tortoises?

2 MS. MILLER: That's correct.

3 MR. ADAMS: Does the plan include an estimate or
4 have you separately estimated the number of juvenile
5 tortoises that are likely to be on the site?

6 MS. MILLER: We have estimated the number of
7 juvenile tortoises that are expected on site. It is
8 approximately 39 tortoise -- juvenile tortoise that would be
9 on site but may need to be translocated.

10 MR. ADAMS: So how does that relate to the 93
11 figure you mentioned?

12 MS. MILLER: I'm sorry.

13 MR. ADAMS: I'm sorry. Go ahead.

14 MS. MILLER: That is in addition to the estimated
15 adult tortoise that would be on site -- that may be on site.

16 MR. ADAMS: Okay. So it's -- you're saying the
17 translocation plan provides for the translocation of 93
18 adults plus 39 juveniles?

19 MS. MILLER: That's correct. That is what has
20 been identified in the translocation plan.

21 MR. ADAMS: And there's a presumption that
22 juveniles can be found and success -- all of them can be
23 found and successfully translocated?

24 MS. MILLER: There's the -- where we will be
25 conducting the five-meter clearance surveys and so the

1 expectation is that we'll find -- and the requirement is to
2 find all tortoise before we close out the area. So a
3 minimum of two five-meter clearance surveys and additional
4 until the area is cleared of all tortoise.

5 MR. ADAMS: I also would appreciate your
6 explaining maybe in just a bit more detail than you did
7 earlier the derivation of the number of 93 tortoises on
8 site. So 57 were found in an actual survey and can you
9 explain the computation used to get the 93?

10 MS. MILLER: Yes. We have in the translocation
11 plan at the very back, there's an appendix of the
12 supplemental BAs in the back and Appendix C of that is the
13 population estimate formulas, the forms that we used to come
14 to those numbers. And so the number is determined by
15 putting in the acreage of the site. We take into account
16 the rainfall and other habitat changes or other things that
17 would affect the number of tortoise that would be above
18 ground or detectible and then we determine -- we look at the
19 number of transects that were conducted and the total length
20 of the transects, and based on this formula that is pretty
21 intense -- like we put in the numbers, it's formulated, and
22 Fish and Wildlife -- it's provided by the Fish and Wildlife
23 Desert Tortoise Field Manual.

24 And so we put those numbers in and then that's how
25 we come to the 93 for the -- from the 57 that were detected.

1 MR. ADAMS: Thank you. Is a computation of the
2 range in there at all since it is an extrapolation from the
3 actual detections? In other words, do you have a -- is it
4 just a single number or is there some calculation of high
5 and low within the range of possibility?

6 MS. MILLER: Yes. Also on that table, the
7 confidence interval is identified and there's -- it's
8 from -- the lower 95 percent confidence is 47 and the upper
9 95 percent confidence is 185.

10 MR. ADAMS: Okay. That's all the questions I have
11 for now. Thank you.

12 HEARING OFFICER KRAMER: San Bernardino County.

13 MR. BRIZZEE: Thank you. My questions are for
14 Ms. Bellows.

15 HEARING OFFICER KRAMER: Okay.

16 MR. BRIZZEE: First of all, the proposed BIO-17,
17 does that -- and I haven't -- I admit I haven't read through
18 it. Does it give the Applicant the option of either
19 acquiring the property or paying money into a fund or some
20 combination?

21 MS. BELLOWS: Yes. The answer is that you can
22 purchase the land and turn it over within a certain period
23 of time or you can turn in funds for the agencies to
24 purchase the land within a certain period of time.

25 MR. BRIZZEE: And is that consistent with staff's

1 proposed BIO-17?

2 MS. BELLOWS: Yes.

3 MR. BRIZZEE: The same approach?

4 MS. BELLOWS: It's the same approach.

5 MR. BRIZZEE: Did you do any investigation as to
6 the availability of roughly 14,000 acres of private land
7 being available at mitigation land?

8 MS. BELLOWS: I have looked at the amount of
9 private land which would be considered to be desert tortoise
10 habitat in the area that they've laid out. I believe it's
11 called the West Mojave --

12 MR. BRIZZEE: And that's private land?

13 MS. BELLOWS: I looked specifically at the private
14 land, yes.

15 MR. BRIZZEE: But I mean you probably looked at
16 private land that was included within the West Mojave plan.

17 MS. BELLOWS: That's correct.

18 MR. BRIZZEE: Did you do any further investigation
19 of whether that land is available for acquisition or for
20 purchase?

21 MS. BELLOWS: We are in the process of starting
22 that right now.

23 MR. BRIZZEE: All right. So at this point in
24 time, you don't have any opinion on whether there is that
25 amount of land available on the market ready for purchase.

1 MS. BELLOWS: In terms of it being on the market
2 at this moment, I do not know. I do know that again through
3 our real estate developers, there are lands out there for
4 again as low as 200 an acre.

5 MR. BRIZZEE: And from the testimony yesterday, we
6 established that there's roughly a million acres' worth of
7 projects that are on the drawing board and if we go
8 three-to-one mitigation, that would be, what, 4 million
9 total acres taken for either the projects or for mitigation,
10 right?

11 MS. BELLOWS: Yes.

12 MR. BRIZZEE: Do you have any opinion whether
13 there's 3 million acres of mitigation land/private property
14 available?

15 MS. BELLOWS: Of desert tortoise habitat?

16 MR. BRIZZEE: Of desert tortoise habitat.

17 MS. BELLOWS: It -- the number if I recall was
18 some hundred thousand figure. I can't recall if it was
19 400,000 acres -- 400,000 -- like 400,000 acres.

20 MR. BRIZZEE: All right. Thank you. I have
21 nothing further.

22 HEARING OFFICER KRAMER: Sierra Club.

23 MR. RITCHIE: This is Travis Ritchie with Sierra
24 Club. We have several questions on the translocation plan;
25 however, we're going to request to defer those questions

1 until the August 18th hearing until such time as we and our
2 expert have had time to go over the translocation plan that
3 we just received.

4 HEARING OFFICER KRAMER: Okay. And then I gather
5 you did not have any questions about her surveys or her
6 estimates of the number of tortoises.

7 MR. RITCHIE: Staff covered those issues very
8 well.

9 HEARING OFFICER KRAMER: Okay. Thank you. CURE.

10 MS. MILES: My first question is for Ms. Bellows.
11 I was wondering if you could give an overall estimate,
12 ballpark figure, of how much this project is going to cost.

13 MS. BELLOWS: What we typically say in terms of
14 technology, ballpark figure is 3 million a megawatt. That's
15 without taking into account any type of extra things that we
16 need to do, just a typical project.

17 MS. MILES: Okay. My next question is for
18 Ms. Miller. You said that there is good-quality habitat in
19 the north and that that is in part due to high amounts of
20 forage, soil suitability, and digging and -- a soil suitable
21 for digging burrows and I was wondering how did you measure
22 the amount of forage.

23 MS. BELLOWS: The forage was -- we had botanists
24 on site doing vegetation mapping and the -- we measured it
25 by observation of the level of annual vegetation on the

1 ground and the forage that tortoise prefer that we found.

2 MS. MILES: And was that put into -- was that
3 documented?

4 MS. BELLOWS: I believe it was documented in the
5 botany reports and it's a qualitative assessment, so it was
6 provided in the general BA and other reports that have been
7 provided.

8 MS. MILES: And in terms of evaluating soils, did
9 you dig any soil pits?

10 MS. BELLOWS: No.

11 MS. MILES: And can you just briefly provide your
12 opinion on the relationship between habitat quality and
13 desert tortoise abundance?

14 MS. BELLOWS: Well, the habitat quality of the
15 area is -- the abundance of tortoise would be relative to
16 the availability of the forage and of the areas where they
17 could dig burrows in the soil. So it's -- they clearly
18 directly --

19 MS. MILES: Would you mind, since we're doing
20 informal process, if I could let Scott Cashen just ask a
21 follow-up question.

22 HEARING OFFICER KRAMER: Sure. And, Mr. Cashen,
23 it's your first time, so please -- did you get your card to
24 the court reporter already? Okay. He's good. So go ahead,
25 Mr. Cashen.

1 MR. CASHEN: Would you consider the desert
2 tortoise a territorial animal?

3 MS. BELLOWS: Yes. I believe they defend their
4 territories.

5 MR. CASHEN: Are you aware of any instances in the
6 animal kingdom where territorial individuals defend
7 resources so you actually have a lower abundance of animals
8 in the highest-quality areas?

9 MS. BELLOWS: Yes. That's -- that occurs.

10 MR. CASHEN: Thank you.

11 MS. MILES: Let me just see one thing. I think
12 that's all my questions for now. Thank you.

13 HEARING OFFICER KRAMER: Thank you. Basin and
14 Range Watch?

15 MS. CUNNINGHAM: My question -- one question for
16 Ms. Miller is you said coyote predation was a problem at
17 Ft. Irwin translocation. Is there -- are there coyotes in
18 and around the Calico Project site?

19 MS. MILLER: Yes, there are coyotes around the
20 project site.

21 MS. CUNNINGHAM: Thank you.

22 HEARING OFFICER KRAMER: Society for Big Horn
23 Sheep.

24 MR. EMMERICH: I have just a couple.

25 HEARING OFFICER KRAMER: Okay. Mr. Emmerich, go

1 ahead.

2 MR. EMMERICH: Yeah. Just short questions. For
3 Ms. Miller. Regarding -- that one just brought up, are you
4 familiar with another translocation site in Nevada called
5 the large scale translocation site?

6 MS. MILLER: I'm a little bit familiar but not as
7 much as with Ft. Irwin.

8 MR. EMMERICH: It's located right near Ivanpah
9 Valley. It's in -- but it's on the Nevada side. It's not
10 far from the Nevada side. So you're not familiar with some
11 of the biologists -- the local biologists who say that there
12 is an over 75 percent failure rate on that site. You just
13 haven't talked to those folks about that?

14 MS. MILLER: I haven't talked to those folks about
15 that translocation.

16 MR. EMMERICH: Okay. And then if you think that
17 you've -- if it's possible that you've underestimated the
18 amount of desert tortoise that need to be translocated and
19 moved to an area like say the Ord-Rodman DWMA and you find
20 that you've exceeded your expected number of tortoises that
21 need to be translocated and if that exceeds a carrying
22 capacity of some kind, do you have a plan B for that? Is
23 there another place to put these tortoise?

24 MS. MILLER: We are doing -- so we determined the
25 long-distance translocation areas and the -- for the

1 immediate areas and there's 9,800 acres available, but if we
2 do find that we need additional, it is in the plan to survey
3 and find other areas and determine additional areas to
4 translocate the animals.

5 MR. EMMERICH: Okay. Thanks. That's all I have.

6 HEARING OFFICER KRAMER: Thank you. The Society
7 for Big Horn Sheep.

8 MR. BURKE: We have no questions for the
9 Applicant.

10 HEARING OFFICER KRAMER: Thank you. Defenders of
11 Wildlife.

12 MR. BASOFIN: I have -- Joshua Basofin with
13 Defenders of Wildlife. I have just a couple questions for
14 Ms. Miller. Ms. Miller, you've described the area in the
15 4,000 foot reduction zone as high-quality desert tortoise
16 habitat; is that right?

17 MS. MILLER: That's correct.

18 MR. BASOFIN: Would you say -- how would you
19 compare that habitat in terms of quality with the habitat
20 just directly to the south?

21 MS. MILLER: The habitat within the project site?

22 MR. BASOFIN: Correct.

23 MS. MILLER: They are very similar habitat
24 quality. The habitat within the linkage area is of the same
25 and then as you go south, it's more a transition zone and --

1 but I think they're very similar quality. I would say
2 they're equal.

3 MR. BASOFIN: And in terms of the potential for
4 the 4,000-foot reduction area to be connectivity corridor,
5 how did you conduct the assessment in terms of how tortoises
6 can move through there?

7 MS. MILLER: The determination of the connectivity
8 corridor was actually based on the surveys that we
9 conducted, the habitat quality that was observed, and also
10 by request of the Desert Tortoise Recovery Office. We
11 determined that area and we've moved the project site down
12 to accommodate that and to allow that corridor to be
13 available and conserved for the tortoise.

14 MR. BASOFIN: Is there a slope requirement that's
15 necessary for tortoises to be able to move through washes in
16 that area?

17 MS. MILLER: There's a general assumption of
18 trying to avoid slope of greater than 20 percent for
19 tortoises, but there's also tortoise have been seen in
20 various other areas on slopes of much greater than that in
21 the Sonoran Desert and even in -- during our surveys, we've
22 seen tortoise at the tops of the ridge line that we didn't
23 want to climb up because it was too high for us, but we've
24 seen them all the way up there, so -- but generally it's a
25 20 percent I think is the accepted number.

1 MR. BASOFIN: Okay. Which of the -- what
2 percentage of the features in the 4,000-foot reduction area
3 constitute less than a 20 percent slope?

4 MS. MILLER: I would say at least 80 percent.

5 MR. BASOFIN: And did you conduct a terrain
6 analysis to determine that figure?

7 MS. MILLER: That is done in several areas. We
8 did GIS. We did -- used slope analysis and we did conduct
9 -- it's slope analysis I guess using the -- I can't think of
10 the actual terms of what we used, but DEMs. Yeah, digital
11 terrain models and then we also used the USGS habitat
12 suitability modeling which takes into account the slope and
13 all those details already. So we combined those two and
14 then on top of that placed the slopes that we determined by
15 the digital terrain models. So, yes, we did.

16 MR. BASOFIN: So you did -- you had on the ground
17 surveys determining the terrain of the entire area in terms
18 of slope.

19 MS. MILLER: We did the GIS modeling and then
20 during the surveys, we also confirmed the slopes of the area
21 and some of the areas that were too high to climb to get up
22 to for us, so some of those areas were confirmed just by --
23 you know, by us not going up there or like marking that on
24 the data sheets. That terrain was very high slope.

25 MR. BASOFIN: Is it possible that there are banks

1 in that area that are incised that would prevent a tortoise
2 from moving across them?

3 MS. MILLER: There are a lot of incised banks and
4 drain edges or washes in that area, but there's also a lot
5 of caliche caves in that area where we found several
6 tortoise burrows and occupied tortoise burrows within that
7 area. So they definitely -- whether they can cross or not,
8 I think they can cross and I think that they use those
9 areas.

10 MR. BASOFIN: Well, you think that they use those
11 areas. Do you have evidence that they use those areas?

12 MS. MILLER: I have evidence that they use those
13 areas by observing the burrows and the occupied burrows
14 within that area and observing tortoise within those incised
15 washes.

16 MR. BASOFIN: That's all I have. Thanks.

17 MS. MILES: I have a couple more questions. What
18 percentage of the tortoises that you were able to
19 visually -- well, what percentage of the tortoises were you
20 able to visually analyze whether they were sick and that
21 type of thing.

22 MS. MILLER: I would say that we were able to
23 assess 90 percent. There were some that were facing inside
24 the burrow. We weren't able to pull them out of the burrow
25 to test -- to look at them, so some if they were facing

1 inward, we didn't get those, but we were able to assess at
2 least 90 percent.

3 MS. MILES: And then you stated that the BA
4 concludes that the project will not adversely affect
5 critical habitat and I was wondering are you aware of
6 whether the transmission line goes through critical habitat?

7 MS. MILLER: The transmission line is adjacent to
8 the ACEC and also adjacent to the Ord-Rodman critical
9 habitat and I believe it does -- I don't think it does, no.
10 It's on the boundary of the critical habitat.

11 MS. MILES: How does the density of desert
12 tortoise at the project site compare to what is in the
13 nearby critical habitat?

14 MS. MILLER: The nearby critical habitat has a
15 higher density than the project site.

16 MS. MILES: And what are you basing your
17 information on?

18 MS. MILLER: On the ten meter transect surveys
19 that we conducted on the project site and the critical
20 habitats.

21 MS. MILES: Okay. Thank you. No further
22 questions.

23 HEARING OFFICER KRAMER: Thank you. Mr. Lamb for
24 Burlington Northern.

25 MR. LAMB: Thank you. Thank you. Steve Lamb for

1 BNSF. Ms. Miller, if I understand this correctly in
2 Exhibit 93, Figure No. 8, that delineates the temporary and
3 permanent fencing the Calico Solar intends to place upon the
4 project, right?

5 MS. MILLER: That's correct.

6 MR. LAMB: And that is a condition of
7 certification, correct?

8 MS. MILLER: Correct.

9 MR. LAMB: Now, that perimeter exclusionary
10 fencing, does it canalize potentially migrating or moving
11 tortoises in any way?

12 MS. MILLER: What was the --

13 MR. LAMB: Channelize, canalize?

14 HEARING OFFICER KRAMER: For the record, you're
15 speaking about Exhibit 93, correct?

16 MR. LAMB: Exhibit 93, Figure No. 8, sir, yes.

17 MS. MILLER: The entire project will be fenced, so
18 it would not channelize migrating tortoises.

19 MR. LAMB: Well, the project is fenced, but the
20 right-of-way is not fenced. It's a railroad right-of-way,
21 right?

22 MS. MILLER: That's correct.

23 MR. LAMB: Okay. And in one of the responses to
24 your earlier questions, you stated that tortoises are
25 territorial, correct?

1 MS. MILLER: Correct.

2 MR. LAMB: And being territorial, once they've
3 been relocated, do they have a tendency to attempt to return
4 to the position from where they were relocated from?

5 MS. MILLER: Yes, they do.

6 MR. LAMB: And based on that and the fact that
7 they're going to be relocated to the Pisgah area and --
8 which is directly to the east, correct?

9 MS. MILLER: Correct.

10 MR. LAMB: Wouldn't it be correct that the way the
11 fencing is set up that's going to channelize them or
12 canalize them through the right-of-way of the railroad?

13 MS. MILLER: There is the potential for that.

14 MR. LAMB: Have you --

15 MS. MILLER: But -- yeah. But we observe very few
16 tortoise along the railroad both south and north of the
17 railroad tracks.

18 MR. LAMB: Have you studied or analyzed that?

19 MS. MILLER: Studied or analyzed as far as further
20 than the transect surveys and the --

21 MR. LAMB: There's going to be over a hundred
22 desert tortoises that are going to be relocated, right?

23 MS. MILLER: Approximately 93.

24 MR. LAMB: Okay. And if they have this tendency
25 being territorial, to try to return to where they were

1 relocated from, how many do you expect will try to go along
2 that particular area, the right-of-way?

3 MS. MILLER: That -- it's actually an unknown.
4 We're not sure of that.

5 MR. LAMB: Okay. Now, this question is for either
6 Ms. Miller or Ms. Bellows. Have either of you reviewed the
7 testimony Exhibit 1201 of Edward Phillips particular
8 relating to desert tortoises and exclusionary fencing?

9 MS. BELLOWS: I have.

10 MR. LAMB: Okay. And you understand that in that
11 testimony one of the things that Mr. Phillips is commenting
12 on is the possibility of a derailment, which always exists
13 for the railroad, right?

14 MS. BELLOWS: Yes.

15 MR. LAMB: And one of the concerns of BNSF is that
16 through emergency response, they be able to if necessary go
17 out into the surrounding area outside the right-of-way and
18 then in fact remove some of this permanent fencing and
19 replace it with temporary fencing while they deal with the
20 emergency response to the derailment, correct?

21 MS. BELLOWS: I do understand that.

22 MR. LAMB: And do you think that that's a
23 reasonable condition of certification that BNSF be allowed
24 to do that?

25 MS. BELLOWS: Absolutely.

1 MR. LAMB: Thank you. The second comment in
2 relation to this particular area that Mr. Phillips noted was
3 that based on BNSF's longstanding control at least over the
4 right-of-way, whenever anybody comes onto the right-of-way
5 whether it's BNSF personnel or contractors, there is a
6 requirement by BNSF that they go through environmental
7 sensitivity training. You're familiar with that, correct?

8 MS. BELLOWS: Yes, I am.

9 MR. LAMB: Okay. And you understand that BNSF has
10 offered to provide that through a PowerPoint presentation to
11 Calico Solar, correct?

12 MS. BELLOWS: I certainly do.

13 MR. LAMB: And, ma'am, would you agree that that's
14 a reasonable condition of certification that anyone that was
15 in this particular area and that goes across the
16 right-of-way or uses the right-of-way of BNSF basically go
17 through this environmental sensitivity training?

18 MS. BELLOWS: I do agree that that's reasonable.

19 MR. LAMB: Thank you. I have no further
20 questions.

21 HEARING OFFICER KRAMER: Okay. Now the normal
22 staff conditions already require sensitivity training. So I
23 wanted to ask, has BNSF reviewed those and decided that its
24 program is required in addition to what I've always thought
25 was a pretty thorough training program that would be

1 required under the Commission's condition. In other words,
2 do you need anything more than what's already there?

3 MR. LAMB: Mr. Kramer, I will decline to comment
4 on the adequacy of that training, but the answer is yes, we
5 believe that BNSF training is very important and needs to be
6 done and it is different.

7 HEARING OFFICER KRAMER: Okay.

8 MR. LAMB: It takes about an hour or an hour and a
9 half most.

10 HEARING OFFICER KRAMER: Okay. Well, the
11 Applicant apparently has no problem with that. Can I ask
12 that the two parties prepare condition language to stipulate
13 to and submit to us no later than the hearing on the 18th.

14 MR. LAMB: We would be happy to work that out.

15 MS. BELLOWS: That's fine.

16 HEARING OFFICER KRAMER: Okay. I think that -- we
17 had talked yesterday, Mr. Lamb, about Mr. Phillips
18 testifying this morning?

19 MR. LAMB: Yes, we did, sir, and if --

20 HEARING OFFICER KRAMER: And in light of your
21 discussion, is that even necessary?

22 MR. LAMB: The only thing that I would like to do
23 for the record is to bring him up and make available him for
24 testimony for cross-examination if someone wants to. He is
25 in the room. I think that he should just be very briefly

1 sworn and affirm his testimony, this Exhibit 1201, and then
2 people the opportunity to examine him if they want.

3 HEARING OFFICER KRAMER: Okay. Well, let me ask,
4 does anybody wish to cross-examine, Mr. Phillips?

5 MS. GANNON: We have no wish to cross-examine him.
6 I do have one redirect question and so I don't know if
7 we're going to excuse these witnesses before we put other
8 witnesses on. I can do it later. It doesn't matter.

9 HEARING OFFICER KRAMER: No, go ahead with your
10 redirect then.

11 MS. GANNON: Thank you.

12 REDIRECT EXAMINATION

13 BY MS. GANNON:

14 Q Ms. Bellows, Mr. Adams was asking you about your
15 concerns about the number that was assigned to the
16 mitigation costs. Is it your understanding that as drafted
17 that number is also the basis for the security amount that
18 has to be provided prior to ground disturbing activities?

19 MS. BELLOWS: Yes. As drafted, that's the
20 determiner of the security.

21 MS. GANNON: So is it also a concern of yours that
22 that number not be artificially high so that your security
23 is not artificially high?

24 MS. BELLOWS: Absolutely.

25 MS. GANNON: Thank you. That's the end of my

1 redirect.

2 HEARING OFFICER KRAMER: Okay. Any recross?

3 Seeing none, thank you. That'll conclude our desert
4 tortoise discussion -- well, no, it doesn't. It just gets
5 rid of -- releases these witnesses rather.

6 MR. LAMB: And, Mr. Kramer, this is Steve Lamb for
7 BNSF. If none of the parties object and no one wants to
8 cross-examine Mr. Phillips, with the understanding that we
9 can offer that testimony at the close of these proceedings,
10 we don't need to physically pull him up.

11 HEARING OFFICER KRAMER: Okay. And I think we
12 can -- it sounds as if you'll be able to just stipulate to
13 the entry of his written testimony which as I recall
14 contained a declaration, correct?

15 MR. LAMB: That is correct, sir.

16 HEARING OFFICER KRAMER: Okay. So -- now,
17 Mr. Phillips is also speaking in his testimony about the
18 hydrogen issue, but --

19 MR. LAMB: He will be here for that tomorrow, sir.

20 HEARING OFFICER KRAMER: Okay.

21 MR. ADAMS: Mr. Kramer, Steve Adams here. I hate
22 to do this when we're trying to move along, but I do have a
23 question from staff that we'd like to ask.

24 HEARING OFFICER KRAMER: Okay. They've sat down.

25 So who has to come back up? Have Mr. Phillips or --

1 MR. ADAMS: Well, the witness that was being
2 offered I think was Mr. Phillips, wasn't it?

3 HEARING OFFICER KRAMER: Yes. And you had a
4 question of him?

5 MR. ADAMS: Yes.

6 HEARING OFFICER KRAMER: Okay. Mr. Phillips, can
7 you come forward. And did you appear on the phone yesterday
8 or anything to be sworn as a witness?

9 MR. PHILLIPS: I was not.

10 HEARING OFFICER KRAMER: Okay. Could you raise
11 your right hand.

12 Whereupon,

13 EDWARD PHILLIPS

14 was called as a witness herein, and after first having been
15 duly sworn, was examined and testified as follows:

16 HEARING OFFICER KRAMER: Thank you.

17 MR. LAMB: Briefly, Mr. Phillips, are you the same
18 Edward Phillips that submitted sworn testimony in this
19 particular proceeding which is now marked as Exhibit 1201?

20 MR. PHILLIPS: I am.

21 MR. LAMB: And was that testimony true and correct
22 to the best of your ability and knowledge?

23 MR. PHILLIPS: It is.

24 MR. LAMB: Offer the witness for
25 cross-examination.

1 HEARING OFFICER KRAMER: Mr. Adams, go ahead.

2 BY MR. ADAMS:

3 Q Mr. Harris [sic], the question is whether BNSF
4 would allow or if you have rules/procedures that prohibit
5 tortoise fencing across access roads that run along or
6 through the right-of-way. In other words, as I understand
7 there will be tortoise fencing -- project installed tortoise
8 fencing between the project and the access roads within your
9 right-of-way and the question is how will tortoise fencing
10 prevent the tortoises from entering that access road and
11 getting into the right-of-way or conversely leaving the
12 right-of-way I guess and getting into the project?

13 MR. PHILLIPS: I'm not sure I understand the
14 question. I can say that we do -- we are concerned about
15 the potential for tortoise and other fencing excluding our
16 access to the right-of-way and my understanding of the
17 proposed fencing is that the project perimeter will be
18 fenced, yet the BNSF right-of-way will not be fenced in
19 terms of access by railroad employees. Am I incorrect in
20 that assumption?

21 Your question is whether the fencing of the
22 project will fence in the right-of-way; is that correct?

23 MR. ADAMS: No. Just a minute, please.

24 MR. LAMB: It's Exhibit 93, Figure No. 8, and
25 Mr. Adams, I don't mean to recast your question, but I

1 believe the question related to not so much the fencing
2 along the project boundary but whether that was going to
3 impact access across the right-of-way.

4 MR. ADAMS: The question involves tortoises from
5 outside the project using the railroad right-of-way combined
6 with the access road that is going to be positioned within
7 the right-of-way to access the project site and whether BNSF
8 will allow either gates, cattle guards, something along that
9 line that would be a barrier to tortoises on that road
10 through the right-of-way without --

11 MR. PHILLIPS: Well, insofar as any gates or
12 guards, if the result would be an increase in occurrence of
13 tortoise on the right-of-way, I think we have a concern
14 there insofar as that may relate to higher potential for an
15 incidental take during normal railroad maintenance
16 operations which occur daily out there. Does that answer
17 your question?

18 MR. ADAMS: I guess we encumbered in part by my
19 trying to understand -- could we have one of our witnesses
20 ask --

21 HEARING OFFICER KRAMER: You're now breaking up.
22 I hate to be the --

23 MR. ADAMS: Oh, I'm sorry. I think may have
24 pushed the button. Steve Adams. Could we ask Chris
25 Huntley, one of our upcoming witnesses, to ask a question?

1 HEARING OFFICER KRAMER: Sure.

2 MR. HUNTLEY: This is Chris Huntley. C-h-r-i-s
3 H-u-n-t-l-e-y. The question we were asking is does the BNSF
4 have any restrictions or policies regarding the placement of
5 either gates, cattle grates, or other physical structures
6 that would not impede vehicle movement but that would impede
7 tortoise access to sections of the railroad right-of-way.
8 Our intent was to place a structure that would prohibit or
9 minimize potential for tortoises to get onto the access road
10 which, as you stated earlier, could add -- affect the
11 species during routine maintenance.

12 MR. PHILLIPS: I am not aware of any policies or
13 procedures that the BNSF railway has that would prohibit
14 such structures from being installed if that were -- if the
15 intent or the function of those structures were to prohibit
16 tortoise from accessing the right-of-way.

17 MR. HUNTLEY: Thank you.

18 MR. ADAMS: That's it from us.

19 HEARING OFFICER KRAMER: Okay. For the record,
20 Exhibit 93 has several sets of figures and in the groups,
21 they all tend to restart their numbering at 1. So to be
22 more precise about the exhibit we've been looking at in
23 Mr. Lamb's cross-examination starting in and through now, it
24 is Figure No. 8 and its title is Temporary and Permanent
25 Fencing, Calico Solar. So that is the Figure 8 among the

1 several Figure 8s that we've been referring to.

2 I gather that's all we have for Mr. Phillips, so
3 than you, sir, and you'll be back to discuss hydrogen at a
4 later time.

5 Okay. Next would be the staff's witnesses.

6 MR. ADAMS: Just a question of order. Do you want
7 to hear from our two biological witnesses or do you want the
8 entire government panel seated before lunch?

9 HEARING OFFICER KRAMER: How long do you think --

10 MR. ADAMS: Excuse me?

11 HEARING OFFICER KRAMER: About how long are you
12 estimating for their direct testimony?

13 MR. ADAMS: Limiting it to general introductory
14 matters and desert tortoise, 20 minutes.

15 HEARING OFFICER KRAMER: Okay. And how long were
16 you folks requesting for a lunch break there or can we do a
17 working lunch?

18 MR. ADAMS: Staff needs at least half an hour to
19 tend to something.

20 HEARING OFFICER KRAMER: Okay. Well, our food has
21 arrived as well, so let's take a half an hour break and be
22 back at 12:30 to continue. Can we go off the record.

23 (Off the record.)
24
25

1 A F T E R N O O N S E S S I O N

2 HEARING OFFICER KRAMER: And Mr. Adams, if you
3 want to tell us who you would like to find out is on the
4 telephone and check for their presence and then go ahead and
5 introduce your panel and we will swear them in in a moment.

6 MR. ADAMS: Okay. Tonya, are you there?

7 MS. MOORE: Yes, I am.

8 MR. ADAMS: Good morning or afternoon? Becky?

9 MS. JONES: Yes, I'm here.

10 MR. ADAMS: Scott Flint?

11 MR. FLINT: Yes, I'm here, Steve.

12 MR. ADAMS: Okay. Batting a hundred so far. Amy
13 is right here with us from the BLM and Chris Otahal? Chris?

14 MR. OTAHAL: Yes, I'm present here.

15 MR. ADAMS: And Ashleigh?

16 MS. BLACKFORD: Yes, I'm present.

17 MR. ADAMS: Okay. So our panel includes from the
18 staff two witnesses, Scott White and Chris Huntley. Tonya
19 Moore and Becky Jones both from Fish and Game are by phone.

20 Scott Flint is here to testify about certain things related
21 to Fish and Game. He was with Fish and Game until last week
22 and has joined the Energy Commission staff. Amy Fesnock
23 from BLM; Chris Otahal, BLM; Ashleigh Blackford from Fish
24 and Wildlife Service.

25 So if we could swear those -- oh, well, excuse me.

1 First -- forgetting the federal agency people cannot
2 formally testify. In fact they're prohibited by federal
3 guidelines from testifying in proceedings such as this. So
4 the BLM and Fish and Wildlife Service employees are here to
5 offer comments, to answer questions informally, but not --
6 cannot be sworn and cross-examined.

7 MR. BASOFIN: I have a -- this is Joshua Basofin,
8 Defenders of Wildlife. I have a question about that. Will
9 the comments of the federal agencies be included in the
10 transcripts for this proceeding?

11 HEARING OFFICER KRAMER: Oh, certainly.

12 MR. BASOFIN: Okay.

13 HEARING OFFICER KRAMER: And we'll -- we have
14 somewhat relaxed rules of evidence here at the Commission,
15 so we'll -- you know, we'll give their comments and both
16 directly and in response to your questions, not
17 cross-examination, just questions, the weight -- the
18 appropriate weight that they're due. So I see that as more
19 just a technicality and -- than any particular issue in our
20 case.

21 So those of you who would -- are willing or are
22 allowed by federal regulation to be sworn, if you would
23 raise your right hand and answer this question.

24 (Thereupon the witnesses were sworn, by the
25 Hearing Officer to tell the truth, the whole

1 truth and nothing but the truth.)

2 HEARING OFFICER KRAMER: Thank you. Mr. Adams, go
3 ahead. Did you get all the names, Mr. Reporter? Do you
4 need any spellings? Okay. So the first time you speak, if
5 each of you could spell your name for our court reporter,
6 that would be appreciated.

7 MR. ADAMS: Okay. Initially these questions will
8 be addressed to the staff witnesses, Scott White and Chris
9 Huntley.

10 Whereupon,

11 SCOTT WHITE

12 CHRIS HUNTLEY

13 were called as witnesses herein, and after first having been
14 duly sworn, were examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. ADAMS:

17 Q Could you both give your names and spell them,
18 please.

19 MR. WHITE: Scott White, S-c-o-t-t W-h-i-t-e,
20 Energy Commission staff.

21 MR. HUNTLEY: Chris Huntley, C-h-r-i-s
22 H-u-n-t-l-e-y, Energy Commission staff.

23 MR. ADAMS: Did the two of you prepare the
24 biological resources section of the supplemental staff
25 assessment marked as Exhibit 300 as well as the staff

1 rebuttal testimony and errata marked as Exhibit 303?Okay.

2 MR. HUNTLEY: We did.

3 MR. WHITE: Yes.

4 MR. ADAMS: Was a statement of your qualifications
5 included with your testimony?

6 MR. HUNTLEY: Yes.

7 MR. WHITE: Yes.

8 MR. ADAMS: Are the facts true and correct to the
9 best of your knowledge?

10 MR. WHITE: Yes, they are.

11 MR. HUNTLEY: Yes, they are.

12 MR. ADAMS: Do you have any corrections or
13 additions to your written testimony?

14 MR. HUNTLEY: Yes. Staff would like to make
15 several revisions to the SSA based on feedback and
16 supplemental information it's received. Staff will be --

17 HEARING OFFICER KRAMER: Who's this?

18 MR. HUNTLEY: -- the number of tortoises
19 associated with the proposed project. We'll be discussing
20 that I believe a little bit more later. We'd also like to
21 review information on noise levels associated with the
22 proposed project based on new information received from
23 technical staff and would like to revise some conditions to
24 reflect suggestions on the SSA.

25 HEARING OFFICER KRAMER: Those of you -- you sound

1 enough alike that our court reporter would like you to at
2 least say your first name when you speak so he can identify
3 you. So who was that who spoke last?

4 MR. HUNTLEY: This was Chris Huntley who just
5 spoke.

6 HEARING OFFICER KRAMER: Okay. Thank you. Are
7 these changes -- are they memorialized in some kind of
8 writing somewhere or are we just going to hear them orally?

9 MR. ADAMS: This is Steve Adams, if I could jump
10 in. Typically the conditions of certification are being
11 revised as we move forward, so that would not be the subject
12 of a supplemental submission. The main topic will have to
13 do with the analysis of the number of tortoises on the
14 project site and we're going to cover that in direct, but we
15 were proposing to submit a reworking of a relatively small
16 section to reflect additional information in the next few
17 days -- next week.

18 HEARING OFFICER KRAMER: Okay. Go ahead with the
19 testimony.

20 MR. ADAMS: Okay. Could one of you briefly
21 summarize your written testimony?

22 MR. HUNTLEY: Certainly. This is Chris Huntley.
23 I'll do a quick summary. Construction and operation of the
24 Calico Solar Project would result in a permanent land-use
25 conversion of approximately 6,215 acres of high-quality

1 native vegetation. The project would also result in direct,
2 indirect, and operational impact to native vegetation,
3 common wildlife, nesting birds, special status plant and
4 animal species, and jurisdictional state waters.

5 Because of the size of the project and the
6 perimeter fencing, the project would also interfere with the
7 movement of wildlife and disrupt wildlife linkages. Several
8 sensitive plant species, include white margin beard tongue.

9 The BLM sensitive and CNPF list one species are known to
10 have limited distribution in the central Mojave Desert and
11 have been documented on the project site and construction
12 activities would result in direct, indirect, and operational
13 impacts to some of these species.

14 Because of the rarity of white margin beard
15 tongue, impacts were considered significant and absent
16 mitigation and staff recommended that Applicant avoid all
17 known locations of the species on the project site.

18 Staff recommended condition of certification
19 BIO-12 be implemented which also requires a series of
20 monitoring and remedial actions should populations of white
21 margin beard tongue be observed to decline over time.

22 Staff has acknowledged there remains a potential
23 for late season blooming of rare plants to occur on the
24 project site that have not been detected at the timing of
25 the surveys. To address this potential, condition of

1 certification BIO-12 requires the Applicant to conduct late
2 season botanical surveys of these species. The condition
3 has set performance standards for avoidance and provided a
4 suite of minimization actions in the event that any of these
5 species are detected.

6 The staff also indicates that the project would
7 result in significant impacts to several sensitive wildlife
8 species. These include but are not limited to desert
9 tortoise, Mojave fringe toed lizard, golden eagle, burrowing
10 owl, migratory birds, Nelson's big horn sheep, and American
11 badgers.

12 For desert tortoise, the construction would
13 require the removal of all of tortoises from the project
14 site. To mitigate this impact, staff and the agencies have
15 proposed a mitigation strategy that includes the acquisition
16 and enhancement of off-site tortoise habitat, the
17 development of a translocation plan which includes to the
18 ease (ph) testing and long-terrain monitoring of
19 translocated and control populations -- control measures to
20 reduce predation on juvenile tortoises, and a suite of
21 standard best management practices to minimize take during
22 construction.

23 Even with these mitigation strategies, the project
24 would result in the loss of desert tortoise through direct
25 take or post-translocation mortality. Similarly, project

1 impacts to Mojave fringe toed lizards would be severe and
2 likely result in the loss of on-site populations. Staff has
3 proposed the acquisition of mitigation lands in order to
4 mitigate project impacts of this species. However, staff
5 considers the cumulative impact to the species from habitat
6 fragmentation and movement to be cumulatively considerable
7 even with mitigation.

8 Impact to the big horn sheep would also occur
9 during construction activities and post-development project
10 fencing would restrict movement across the solar field.
11 Staff considered the movement of these and other species in
12 relation to I-40 during the preparation of the supplemental
13 staff assessment.

14 Burrowing owl are also known to occur adjacent to
15 the project area and golden eagles nest approximately
16 3.5 miles from the project site. The project would also
17 result in direct and indirect impact to state jurisdictional
18 waters both through the loss of habitat and the alteration
19 of site hydrology.

20 That concludes my brief summary of the proposed
21 project.

22 MR. ADAMS: Thank you. Can you next describe the
23 extent to which you worked with state and federal wildlife
24 agencies and the property owner, the Bureau of Land
25 Management, in analyzing project impacts to biological

1 resources and developing mitigation measures.

2 MR. HUNTLEY: Yes, sir. This is Chris Huntley
3 again. In the preparation of the draft staff assessment and
4 the supplemental staff assessment, staff reviewed the
5 material provided by the Applicant and the interveners. We
6 conducted independent research and the bio-resources that
7 have the potential to appear in the project area and the
8 region. We reviewed scientific literature, consulted with
9 recognized experts. We conducted surveys of the project
10 site and we coordinated with resource agency staff including
11 the regroup and interagency team which included Fish and
12 Game, BLM, Fish and Wildlife Service, and California Energy
13 Commission staff in order to evaluate impacts and develop
14 mitigation strategies.

15 Staff also met personally with CDFG, BLM, and Fish
16 and Wildlife staff at the project site and in other
17 locations to discuss mitigation strategies of the proposed
18 project. Staff also reviewed previous Energy Commission
19 staff assessments and other relevant plans and environmental
20 documents in preparing the analysis.

21 MR. ADAMS: Mr. Huntley, you mentioned REAT.
22 Could you explain what that stands for?

23 MR. HUNTLEY: I'm sorry. The Renewable Energy
24 Action Team which as I think I said is an interagency group
25 that is working to streamline solar development projects and

1 renewable energy projects in the Mojave Desert areas. I
2 think they can speak to that a little bit more later.

3 MR. ADAMS: Okay. And the last general question
4 before we get into a few desert tortoise issues, could you
5 describe how your analysis of the project changed when the
6 project was reconfigured to pull the northern boundary to
7 the south away from the Cady Mountains.

8 MR. HUNTLEY: Certainly. This is Chris Huntley
9 again. The project that was analyzed in the draft EIS and
10 draft staff assessment included a much larger project
11 footprint. Staff at that time concluded that there'd be
12 significant unmitigable impacts to a variety of resources
13 including desert tortoise, big horn sheep movement, and
14 other species.

15 I guess in response to staff assessment agency
16 comments, the Applicant worked to reduce that project
17 footprint fairly substantially and avoid a large swath of
18 good-quality habitat located near the toe of the Cady
19 Mountains.

20 MR. ADAMS: Thank you.

21 MR. HUNTLEY: Oh, pardon me.

22 MR. ADAMS: Yeah.

23 MR. HUNTLEY: Based on the modifications to the
24 project footprint, staff did change some of the significant
25 conclusions, particularly the desert tortoise, big horn

1 sheep, and I believe movement. We felt that with the
2 reduction of the project footprint, there would persist a
3 large linkage area where passage to dwelling species could
4 persist post-development.

5 MR. ADAMS: In addition to analyzing the project
6 impacts on east-west wildlife movement in the project
7 vicinity, did you consider impacts to north-south wildlife
8 movement?

9 MR. HUNTLEY: We did. Although it may not be well
10 articulated in the document, when we sat down to consider
11 impacts to movement, we considered the role that
12 Interstate 40, the fence line, and the BNSF Railroad had in
13 restricting or limiting north and south movement. We
14 recognized and went to the project site and we realized
15 there are culverts and there are passages in there. We
16 didn't consider the highway to be an absolute physical
17 barrier to movement, but we do believe that it acts as an
18 effective -- for many species and may act as a sink in fact
19 for a species such as tortoise should they wander onto the
20 highway.

21 MR. ADAMS: Have the two of you reviewed
22 Applicant's proposed changes to the conditions of
23 certification?

24 MR. HUNTLEY: Yes, we have. This is Chris Huntley
25 again.

1 MR. ADAMS: I'd like to run you through the -- I
2 think there were perhaps eight conditions, they proposed
3 changes in the language. I'd like to focus just on the few
4 that pertain specifically or in part to desert tortoise to
5 get your initial thoughts on whether the proposed changes
6 are acceptable -- whether there are any changes acceptable
7 to staff from the Applicant.

8 The first is BIO-8 which has to do with general
9 avoidance measures.

10 MR. HUNTLEY: This is Chris. Staff largely
11 concurs with the recommended changes for BIO-8 and that we
12 would consider altering the language to remove trash to
13 prevent overflow and that we would provide clarification of
14 where tackifir (ph) would be used, but we were not
15 comfortable with placing language to the extent feasible in
16 the document.

17 MR. ADAMS: I think there were perhaps some other
18 changes proposed in that as well. Are you saying that the
19 only changes at this point that staff would support are the
20 removal of the daily trash removal requirement and the
21 clarification in tackifir?

22 MR. HUNTLEY: I believe so, but let me take one
23 moment to pull that document up to make sure I haven't
24 overlooked anything. There was other condition that they
25 had or component that the Applicant had struck which is 16D

1 and I don't believe at this time we are comfortable removing
2 that language.

3 MR. ADAMS: I think there was also a measure in
4 Item 8 on desert tortoise moving if a tortoise is discovered
5 under a vehicle on site.

6 MR. HUNTLEY: Thank you for pointing that out.
7 That's correct. We would not recommend altering the
8 condition to reflect the Applicant's revised language.

9 MR. ADAMS: Okay. BIO-17 is the desert tortoise
10 compensation measure that requires replacement habitat. We
11 were -- received that yesterday. Do you have thoughts on
12 that?

13 MR. HUNTLEY: Yes, this is Chris Huntley. Staff
14 has not had adequate time to review that, so at this time,
15 we would not recommend changes. Phasing though mitigation
16 may be considered.

17 MR. ADAMS: And finally BIO-18, raven control
18 plan, the Applicant requested a reduction in the per acre
19 fee for that.

20 MR. HUNTLEY: At this time, staff does not
21 recommend an alteration to that mitigation measure.

22 MR. ADAMS: The final area I wanted to ask you
23 about before we open this up to other parties is the issue
24 that you mentioned when I asked if you had changes in your
25 testimony and that is the number of tortoises on the project

1 site that would be affected by development of the project.
2 Can you tell me what the staff assessment currently says
3 about that and what that was based on?

4 MR. HUNTLEY: Yes, sir. I believe the
5 supplemental staff assessment currently indicates that
6 approximately 57 tortoises were identified by the Applicant
7 in the proposed project area. The staff assessment did not
8 include an extrapolation of those numbers based on U.S. Fish
9 and Wildlife Service formula.

10 MR. ADAMS: And you're proposing to supplement
11 that -- your original written testimony with some additional
12 analysis of undetected tortoises that would be subject to --

13 MR. HUNTLEY: Yes, sir. We intend to update the
14 staff assessment to reflect expected numbers of tortoise
15 based on the formula and I believe we'll be working with
16 Fish and Game and the Service and BLM to come to an
17 agreement on what is the most appropriate number to use for
18 that analysis.

19 HEARING OFFICER KRAMER: And when might this come?

20 MR. ADAMS: This is Steve Adams. Because of the
21 need to consult with the Department of Fish and Game which
22 is responsible for administering the California Endangered
23 Species Act, we -- it will be top priority. We think it
24 will be too difficult to pull this off Monday when we are
25 planning to publish the last two sections of the

1 supplemental staff assessment, traffic and transportation
2 and cultural resources. But it would be I think very
3 shortly after that.

4 HEARING OFFICER KRAMER: So sometime next week in
5 other words?

6 MR. ADAMS: Yes. Maybe by midweek. And could be
7 a topic for the workshop as well.

8 HEARING OFFICER KRAMER: And are you expecting to
9 find more tortoises need to be moved than we heard from the
10 Applicant this morning?

11 MR. HUNTLEY: This is Chris. At this time, we
12 wouldn't expect to find that number. What we are doing is
13 using the existing number of observed tortoises. We're
14 going to use the same formula that the Applicant can utilize
15 and then we will have to look at it and decide what portion
16 of the confidence level staff is most comfortable using.

17 HEARING OFFICER KRAMER: But --

18 MR. ADAMS: Mr. Huntley, maybe you could
19 address -- there are some other documents I assume that you
20 might consult, one of which is due out tomorrow.

21 MR. HUNTLEY: Right. There's -- the biological
22 assessment, the translocation plan from the Applicant all
23 have tortoise estimate numbers. We also will be able to use
24 the existing Fish and Wildlife Service formula to do an
25 independent calculation to verify those numbers. In

1 addition, we'll be including language on juvenile tortoises
2 that would be expected to occur on the project site and
3 we'll clarify with language in the text that some percentage
4 of those tortoises would not be expected to be detected
5 during the five meter transect surveys because of their
6 cryptic nature.

7 MR. ADAMS: That completes direct questioning.

8 HEARING OFFICER KRAMER: Okay. The Applicant,
9 cross-examination.

10 MS. GANNON: Thank you. Just a couple of
11 questions regarding your response to the proposed changes
12 and I guess that was Mr. Huntley who was providing that
13 response; is that correct?

14 MR. HUNTLEY: Yes, ma'am.

15 MR. ADAMS: Excuse me for the interruption. I
16 just realized I overlooked the government panel. Would it
17 be appropriate for me to jump in here with a question to
18 them?

19 HEARING OFFICER KRAMER: Yes.

20 MR. ADAMS: Okay. Sorry about that. If I could
21 ask all the members of the government panel from the other
22 agencies to -- and please remember to state your name before
23 you speak since there's no way of identifying you otherwise.

24 Could you please briefly indicate whether you are
25 familiar with the conditions of certification that are being

1 proposed by staff at least in the areas over which your
2 agency is concerned and has jurisdiction and whether you
3 support them as written. And I'm not asking for a
4 condition-by-condition review, just sort of a summary
5 statement of where you stand. Thanks.

6 HEARING OFFICER KRAMER: Okay. Maybe I'll just
7 try to get -- I'll be the director of traffic here. Mr.
8 Flint, any response?

9 MR. ADAMS: I'm sorry, Mr. Kramer. It may be that
10 Scott Flint is -- he's on the line, but it may be that we
11 should pass over him with this since he's now an Energy
12 Commission employee. We did want to hear from him on how
13 some of the cost estimates were derived because he was
14 involved in that, but we do have Fish and Game -- current
15 Fish and Game employees on the line who could speak to Fish
16 and Game position on the issues. I'm sorry.

17 HEARING OFFICER KRAMER: Okay. Ms. Moore.

18 MS. MOORE: Yes. Tonya Moore, T-o-n-y-a
19 M-o-o-r-e. Department of Fish and Game. And I am familiar
20 with the conditions and the information within the document
21 and the Department agrees with some of the information. The
22 Department believes that the current CEC document does not
23 contain enough information in detail, analyze the potential
24 effects that this project will have on desert tortoise; thus
25 at this time, we cannot determine if the project fully

1 mitigates for that species.

2 HEARING OFFICER KRAMER: And what's missing in
3 your view?

4 MS. MOORE: The information that the CEC is
5 potentially -- everything that Chris Huntley had addressed.

6 HEARING OFFICER KRAMER: Okay. And will the
7 desert tortoise translocation plan be a factor thereto?

8 MS. MOORE: Will it be affected, yes.

9 HEARING OFFICER KRAMER: Okay.

10 MS. MOORE: I have not read that.

11 HEARING OFFICER KRAMER: Okay. Was it Mr. Jones?

12 MS. JONES: That's Becky Jones.

13 HEARING OFFICER KRAMER: Oh, I'm sorry. Yeah. I
14 just had a first initial in my notes. Pardon me.

15 MS. JONES: It's spelled B-e-c-k-y J-o-n-e-s.

16 HEARING OFFICER KRAMER: And your response?

17 MS. JONES: The same as Tonya Moore's.

18 HEARING OFFICER KRAMER: Okay. Ms. Fesnock?

19 MS. FESNOCK: I am aware of the conditions. As
20 far as where they overlap with what federal regulations
21 would require, I agree with those and cannot comment on the
22 additional requirements that would be needed in order to
23 meet state statutes.

24 HEARING OFFICER KRAMER: But it fully satisfies
25 your federal concerns?

1 MS. FESNOCK: Yes.

2 HEARING OFFICER KRAMER: Okay. Mr. Otahal, do you
3 have anything to add to that?

4 MR. OTAHAL: No. I generally confirm with that.

5 HEARING OFFICER KRAMER: Okay.

6 MR. OTAHAL: Amy's testimony.

7 HEARING OFFICER KRAMER: Thank you. Ashleigh
8 Blackford?

9 MS. BLACKFORD: Ashleigh Blackford, spelled
10 A-s-h-l-e-i-g-h B-l-a-c-k-f-o-r-d. My response is similar
11 to Amy Fesnock's. I cannot comment on the additional
12 requirements of the state. I am familiar although not
13 intimate with all the conditions of certification and I do
14 agree with them.

15 HEARING OFFICER KRAMER: Okay. Was that your only
16 question for these witnesses, Mr. Adams?

17 MR. ADAMS: Actually a couple more on the cost
18 figures that are reflected in BIO-17. Maybe I could the
19 first one to Mr. Flint. I -- Scott, can you tell us what --
20 where in particular the derivation and thinking on the
21 long-term management fee amount is or was at the time, how
22 you came up with that, and I believe that's \$1,450 an acre,
23 what purpose that serves as well.

24 MR. FLINT: Yes. This is Scott Flint, S-c-o-t-t
25 F-l-i-n-t. At the time we were working to derive these

1 numbers that are still estimates, the one piece of that
2 equation for the fee is long-term management endowment.
3 That money is collected based on a per-acre basis for the
4 long term and ongoing management of the mitigation land
5 property and/or maintenance of any required fencing or other
6 mitigation measures that would happen as a result of the
7 project. That money is invested and the interest off of it
8 is spent to do that work.

9 At the time we were making these calculations, we
10 used as a basis the -- a longstanding number that's been
11 used by Fish and Game regional staff for purposes of
12 calculating permits -- purposes of calculating an estimate
13 for security -- for securing the obligation for mitigation
14 to so that the projects can proceed. That number, you know,
15 changes from time to time and is recalculated, but
16 consistently in the desert for security estimate, we have
17 been using \$1,350 per acre.

18 We -- the renewable energy action team agencies
19 were looking at those numbers and that \$1,350 acre estimate
20 was used as a basis and we also discussed considerations for
21 specific the properties under BLM's control that would
22 require basically more patrolling and monitoring for illegal
23 access onto properties under BLM control that would mitigate
24 the impact.

25 So we added to the typical \$1,350. We added as a

1 rough estimate at this time a thousand dollars per acre to
2 cover enhanced monitoring of the properties since that kind
3 of impact is something we were concerned with that happens
4 on these lands. So basically that's how the number was
5 derived. It is an estimate.

6 What typically -- and it's an estimate for
7 security purposes. And what typically happens with all the
8 projects -- what happened with these projects is we revised
9 that long-term management cost figure by using a property
10 record analysis that we perform once mitigation lands are
11 identified -- once the actual lands are identified and that
12 is a computer program that you can specify different inputs
13 for different management actions on that property and it
14 will help you calculate the actual long-term management cost
15 of that land specific for that piece of property.

16 So right now we have an estimate -- a general
17 estimate based on years of experience managing these
18 properties and based on some general assumptions of what it
19 costs to edit (ph) those properties with similar habitat.
20 That's how that number was derived. That's how it was
21 adjusted in the estimate form and the intent would be at the
22 time mitigation property is identified, we would go back and
23 use the property record analysis to set the actual cost.

24 MR. ADAMS: Thank you. Consequently if some of
25 this mitigation for a project directly to BLM for mitigation

1 activities on BLM land, the long-term management requirement
2 for the Applicant would also be adjusted based on the
3 project specific -- or I should say mitigation specific
4 leads that are -- have been approved for mitigation on that
5 project?

6 MR. FLINT: That's correct. And -- that's correct
7 and also all the details and workings of how this happened
8 had not been worked out at the time I left. The assumption
9 would be -- is made at the REAT agencies -- the rural energy
10 action team agencies continue to manage these properties as
11 a team just as we are now working on permitting the projects
12 and so that we would make those adjustments as a team
13 irregardless of who -- or regardless of who was actually
14 managing the property.

15 We make those decisions as a team. If lands went
16 to BLM, we would make those appropriate adjustments. And in
17 this case, if the actions were management actions such as
18 fencing or -- tortoise fencing for protection of tortoises
19 or other activities such as invasive plant removal or road
20 restorations and removals for illegal roads, habitat
21 restoration, then those things need to have maintenance and
22 ongoing -- have ongoing costs associated with keeping them
23 in that state that will provide the best value for the
24 desert tortoise. So those would -- those kind of actions
25 would be factored into that PAR analysis at that time.

1 MR. ADAMS: Okay. Thank you. And final question
2 or two questions I think are directed to Ms. Fesnock. If
3 other members of the panel have knowledge and want to
4 contribute after she speaks, feel free, but my understanding
5 is that Ms. Fesnock may have some of the closest knowledge
6 of this and that is the calculation of the acquisition --
7 the estimated cost for acquiring lands to mitigate the
8 project and how that number was derived, a thousand dollars
9 an acre.

10 MS. FESNOCK: BLM being a land management agency
11 is in the business of buying and selling federal lands. And
12 as such, we looked at transactions that have occurred over
13 the last three years, 2008, 2009, and what's been active and
14 completed in 2010.

15 So we looked at what we have actually paid for
16 lands in addition to appraisals that have come in for lands
17 that we're looking at purchasing. BLM and the Park Service
18 are in a large negotiation of exchanging lands with the
19 State of California. So we actually have a large number of
20 recent appraisals associated with that exchange.

21 If I look at lands that have been acquired by BLM
22 in the last three years, that's the 2008, '09, and '10,
23 we're looking at a cost in Imperial County averaging at \$550
24 an acre, San Bernardino County at 480, Riverside at 650. If
25 I look specific to habitat purchased inside of DWMAs or

1 desert wildlife management areas, we're looking at an
2 average of \$520 an acre.

3 A lot of the lands that we purchase are in
4 designated wilderness and designated wilderness lands are
5 such that if somebody wanted to develop those lands, BLM
6 would not allow them to build a road to access those lands
7 because we're precluded from building roads in wilderness.
8 So a lot of the basis for these costs are from wilderness
9 areas and as such we believe them to be lower than what an
10 average acre would cost outside of the wilderness and
11 therefore easier to develop.

12 If I look at the appraisals that the Park Service
13 got associated with the land exchange that they're working
14 on with the State of California, the averages for those came
15 in at \$930 an acre with San Bernardino at \$900, Inyo at 960,
16 and then there were two areas that I couldn't identify from
17 the parcels whether they were Inyo or San Bernardino because
18 they're right up next to that border and those came in at
19 averaging \$985 an acre for appraised values.

20 When we were looking at those appraisals and our
21 understanding of our historic pattern of purchases being in
22 wilderness areas, we felt that going with the more recent
23 appraisals was the conservative route. At the time that we
24 were creating this cost table, it was stressed to agency
25 staff that it would be difficult and politically unpalatable

1 to go back and ask for money if we had underestimated, so
2 that we needed to ensure that the estimate that we came up
3 with would be sufficient to cover the real and actual costs
4 in order to ensure appropriate mitigation was purchased. So
5 that's where the cost per acre was derived from.

6 When I look at the Applicant's suggested changes
7 associated with the cost table, you know, they've identified
8 that an environmental site assessment should be cost at a
9 thousand dollars and I can tell you from going back and
10 looking at what PALS (ph), which is a lower level than what
11 an ESA actually attributes and therefore is less work -- our
12 PALS estimate were more than a thousand dollars an
13 acquisition.

14 We're looking at that average at the -- just a
15 second, I'm trying to find the right paper. That PALS
16 average cost was 1,670 a parcel with a maximum at \$11,000
17 and a minimum at 700. And if I took the maximum and the
18 minimum out, the average -- you know, move down to \$1,500,
19 so, you know, that \$11,000 only skewed the average about a
20 hundred bucks. And that's for PALS which is less than what
21 an ESA actually entails. So we still believe that our
22 assessment at \$3,000 for an ESA Level 1 per parcel is an
23 appropriate and reasonable estimate.

24 We have similar data associated with appraisals.
25 We have similar information associated with closing costs.

1 It appears that the Applicant is accepting the \$2,500 for
2 closing costs, what they haven't acknowledged is that in the
3 process that we're establishing, we will need to pay for two
4 closings. There will be the closing associated with the
5 original purchase of the land and then the closing
6 associated with the donation of that land to the land
7 management agency that will continue to manage that land in
8 perpetuity.

9 The reason for needing to establish two closings
10 is in order those acquisition lands to meet state
11 requirements, there needs to be a conservation easement or
12 deed restriction placed on that land. If BLM purchases the
13 land ourself, we're not allowed to encumber ourself. So we
14 need that initial transaction, that initial purchase, to
15 occur by a third party who can then encumber the government
16 when they donate it to us. I hope that makes sense.

17 When it comes to third-party administrative costs,
18 here the Applicant is indicating that that should be
19 5 percent. We've talked to a variety of nonprofit agencies
20 and all of them agree that 10 percent would cover their
21 actual costs. So if the Applicant believes that there's
22 somebody out there that can do the work for 5 percent, I
23 empower them to find them and hire them and have them do the
24 work instead of through the NFWF process.

25 When I look at the estimate for the biological

1 survey data, the Applicant estimated that at a thousand
2 dollars a parcel. I'd like to explain to you the
3 information that went into the derivation of \$5,000 a
4 parcel. We've identified a parcel size as being 40 acres.
5 We estimated the average cost for a biological consultant at
6 a hundred dollars an hour.

7 In order to do tortoise surveys of that parcel, we
8 will require approximately ten hours of survey time. In
9 order to do survey -- visual survey encounters of other
10 species like birds, lizards, mammals, you will need an
11 additional ten hours of survey time. Biological surveys
12 specific to the endangered plants or sensitive plants that
13 we're interested in these acquisition lands covering
14 multiple species, not just desert tortoise, you would need
15 an additional ten hours of survey time.

16 We allowed for one day of writing the report and
17 one day for compiling the data and creating the maps and all
18 of that at a hundred dollars an hour equals \$4,600. We then
19 allowed for \$400 to cover supplies, gas to and from the
20 site, and that kind of basic support.

21 I would find it very difficult to believe that
22 somebody would actually be able to document that a parcel of
23 land can meet multiple species' needs for less than this
24 cost.

25 MR. ADAMS: Thanks for that answer. Can you just

1 confirm that it sounds like you are deep into the numbers.
2 The decision on what numbers to set which have evolved over
3 the last several months were jointly worked out with the
4 four agencies I presume?

5 MS. FESNOCK: Yes. With the understanding that
6 CEC and Fish and Wildlife Service typically don't purchase
7 lands. So when it came to acquisition costs, we relied upon
8 BLM information, information provided by the Park Service
9 which is another agency that does a lot of acquiring of
10 lands and then information gathered from nonprofit land
11 trusts working specifically in the desert.

12 MR. ADAMS: The -- and as for the cost of land, if
13 we go back to that for just a minute, you indicated that the
14 thousand was justified in part because cheaper wilderness
15 land was reflected in the lower average. You feel fairly
16 comfortable that a thousand -- at a thousand dollars,
17 there's mitigation land to be bought in the desert in the
18 kind of quantity we're requiring the --

19 MS. FESNOCK: Yes. You know, I agree with the
20 Applicant in that there are parcels of land out there that
21 are very cheap. The question becomes whether the \$200 acre
22 parcel actually provides sufficient habitat for the species
23 we're attempting to mitigate for.

24 It also becomes a question of where is that parcel
25 physically located and whether that -- securing of that land

1 in that physical location actually resolved the issues and
2 concerns of wildlife movement, genetic connectivity, and
3 these larger, harder to describe, indirect impacts of this
4 project and how we're dealing with other conservation lands
5 in the desert and trying to ensure that the lands that are
6 purchased not just replace the acres but actually replace
7 the function that we are concerned that this project might
8 actually impact.

9 MR. ADAMS: Thank you. You heard Ms. Bellows'
10 testimony that the chart of expenses put out by the agencies
11 and included in our staff assessment is going to drive up
12 land prices and I think in particular she mentioned \$8,000
13 an acre plus. Do you share that concern?

14 MS. FESNOCK: I would first like to correct what
15 that \$8,000 figure actually represents. If you look in the
16 interim mitigation strategy which is a document prepared by
17 the Department of Fish and Game because of SB34, that \$8,000
18 figure actually covers acquisition and long-term management
19 of that property. I believe the way I would have
20 interpreted what Ms. Bellows said in her testimony is that
21 the IMS was actually saying that it was going to cost 8,000
22 acres to purchase the land and that is not what it says.
23 It's 8,000 acres cradle to grave for that piece of land.

24 I am concerned that all the talk that we have
25 regarding purchasing of land and how many acres will be

1 required associated with these projects will create a land
2 rush in the desert. However, I don't believe each of these
3 identifying a cost is actually creating the land rush. What
4 I believe is creating the land rush is the actual fact that
5 we have 75,000 acres of projects proposed in the desert that
6 haven't been proposed before. If you look historically at
7 the numbers of acres that BLM has been trying to mitigate on
8 an annual basis, we're not even close to that.

9 So the reason that there will be a land rush isn't
10 because some agency document says land is going to be valued
11 at a thousand dollars an acre. The reason there's going to
12 be a land rush is because there's going to be a huge demand
13 for the remaining supply that exists.

14 MR. ADAMS: Thank you. That concludes the direct
15 testimony.

16 HEARING OFFICER KRAMER: Cross from staff -- the
17 Applicant. Sorry.

18 MS. GANNON: Thank you. Starting with you,
19 Mr. Huntley, regarding the proposed revisions to the
20 conditions. Turning to the BIO conditions 18 which relates
21 to the raven monitoring and management plan, the Applicant
22 has suggested putting a cap on this funding and the staff
23 assessment suggested a \$105 per acre fee which would be --
24 was it 652,000 and some change. Can you explain the basis
25 for the \$105 an acre for raven management.

1 MR. HUNTLEY: This is Chris Huntley. I think that
2 answer may be better provided by the REAT group or Fish and
3 Game or Ashleigh Blackford as well. I can explain it, but I
4 think they can probably explain it in more detail.

5 MS. GANNON: So your testimony is that you were
6 just given that number by the REAT team?

7 MR. HUNTLEY: The initial number that we -- or the
8 number we're utilizing in our staff assessment is based on
9 information provided by the REAT team, yes.

10 MS. GANNON: Okay. Well, then if any of the staff
11 who -- the agency staff members who are on the phone could
12 speak to where the source of that number. I'm not sure who
13 is best to address that.

14 HEARING OFFICER KRAMER: Well, Mr. Huntley.

15 MS. BLACKFORD: This is Ashleigh Blackford. I
16 think it would be either Amy Fesnock or myself.

17 MS. GANNON: You want to take it?

18 MS. BLACKFORD: Amy?

19 MS. FESNOCK: I will begin the answer and,
20 Ashleigh, since you were involved more in the conversation
21 with NFWF, if you can add anything to clarify my
22 understanding, that would be helpful.

23 MS. BLACKFORD: Great. I would be happy to
24 support you on that.

25 MS. FESNOCK: Okay. My understanding -- okay. So

1 to provide a little bit of history, there is a group called
2 the desert managers group. They are a consortium of
3 agencies, federal, state, and local, that work on
4 maintaining and improving the desert as an entire system,
5 trying to improve how agencies coordinate with each other.

6 Recognizing that all of these agencies in the
7 desert are motivated to recover the desert tortoise, they
8 work on tortoise a lot. One of the issues that came
9 forward, oh, probably five to ten years ago is the impact on
10 ravens, particularly ravens eating baby tortoises and what
11 that means to reproductive abilities of tortoises and
12 ultimate recruitment into the population.

13 C&G working with Fish and Wildlife Service as the
14 lead agency put together what was a raven management plan
15 trying to address how we would reduce the impact of ravens
16 on tortoises to increase recruitment of tortoises and
17 ultimately lead to the recovery of the species. Based on
18 that plan, it calls for a step-wise approach going through
19 different levels of managing ravens with monitoring to
20 determine which level of management is actually needed in
21 order to get the results, that is improved tortoise numbers,
22 and reduce predation that the goal -- that's the goal of the
23 project.

24 When renewable energy came onto the scene, there
25 was questions of how much these projects might actually

1 subsidize raven populations in the desert and how much they
2 might affect the cumulative raven issues. At that point, it
3 was determined that a fee associated with each of these
4 projects would need to be acquired in order to implement the
5 raven management plan as created by the desert managers
6 group and that it's a fee that's not assessed solely on
7 renewable energy, but it's assessed on, you know, all
8 projects that happened within the range of the tortoise
9 where ravens could be subsidized by the projects.

10 Looking at the levels of implementation that were
11 identified in the environmental assessment for that project,
12 Fish and Wildlife Service calculated out what the annual
13 cost would be to implement that project. They then looked
14 at costs of how much of the land of the Mojave Desert are
15 likely to be developed in the 20 to 30 years. They then
16 looked at of that development, what portion is associated
17 with renewable energy, what portion is associated with, you
18 know, city development, expanding highways, that kind of
19 thing.

20 To figure out how many acres they thought were
21 going to be affected, they then took the cost of the
22 program, the numbers of acres that were going to be
23 affected, divided the cost by the numbers of acres, and came
24 up with a cost per acre. They then went to NFWF, which is
25 the National Fish and Wildlife Foundation, to determine

1 whether this was how the money could be invested and
2 portions -- you know, how we could do investments in such a
3 way that the actual cost per acre could be reduced because
4 we would recover in interest bearing -- interest earning
5 over the time -- lifetime of the project.

6 And through a series of negotiations with NFWF who
7 are specialists in determining investment strategies for
8 conservation monies, they came up with two fees. One is \$64
9 an acre and that's if your project is anticipating a 20-year
10 permit and the other is 105. The 105 is associated with
11 transmission corridors because transmission corridors
12 actually require more management work because they support
13 raven nests and therefore have more work associated with
14 removing those nests.

15 And then if your project has a permit time of
16 30 years, it turns out that the transmission cost and the
17 30-year permit both came out at the same price of \$105 an
18 acre.

19 MS. GANNON: So this just didn't come from the top
20 of your head, it sounds like.

21 MS. FESNOCK: This number did not come off the top
22 of our head. It was years of work in determining the
23 phasing that would be needed in order to demonstrate that
24 the management of ravens were being effective in improving
25 tortoise recovery and then months dealing with, you know,

1 realistic costs of what it would be implement that and then
2 how best to attribute that cost to projects that will impact
3 habitat in the Mojave Desert.

4 MS. GANNON: Thank you. I understand that. I
5 guess -- I think our concern about this other than just the
6 level of the number because it's additive to everything else
7 that is being requested of the project is when we were
8 taking this figure, 105, and multiplying it by the various
9 scenarios we had seen of the development that's likely to
10 happen in the area, it seemed to be -- to us to come out as
11 an astonishing number.

12 But you have provided a very thorough explanation
13 and we may just be -- agree to disagree on this one.

14 If I can turn now -- and I'll have other questions
15 for some of the other panel members. But just going back to
16 you, Mr. Huntley first, so I understand your response to our
17 proposed revisions to BIO-17, I believe you said in your
18 testimony you haven't really had a chance to review, so you
19 don't recommend going with the changes? Was that correct?

20 MR. HUNTLEY: That's correct.

21 MS. GANNON: So there's a possibility after
22 reviewing you might recommend going with the changes?

23 MR. HUNTLEY: It is possible we may adopt some of
24 your changes or recommendations, but we until we have had
25 adequate time to take a look at it --

1 MS. GANNON: Okay.

2 MR. HUNTLEY: -- we don't feel confident in
3 giving you an answer right now.

4 MS. GANNON: Okay. I understand. I just wanted
5 to make sure I'd gotten it correctly. Ms. Moore, if I can
6 ask you a couple of questions based on your testimony.

7 MS. MOORE: Yep.

8 MS. GANNON: I believe I heard you say that you
9 believe that the document as it exists now is inadequate
10 because it doesn't include this calculation of the potential
11 population of desert tortoise; is that correct?

12 MS. MOORE: No. What I stated is the Department
13 does not believe that the current CEC document contained
14 enough information and detail analysis to the potential
15 effects of this project.

16 MS. GANNON: And then you referenced --

17 MS. MOORE: One factor of that is the numbers.

18 MS. GANNON: So I guess I'm confused. You
19 reference the fact that the errata or -- I don't remember
20 what Mr. Huntley called it -- but what he was anticipating
21 producing to supplement the discussion of desert tortoise
22 which sounded to me like it was including or mainly focused
23 on the calculation of the numbers. And I thought you said
24 that with what you were anticipating to see in that, we'll
25 just call an errata for now, would satisfy your concerns.

1 Did I misunderstand that?

2 MS. MOORE: You didn't misunderstand that, but
3 maybe I misunderstood what Chris Huntley was saying. I was
4 thinking that he was stating that he would have the
5 extrapolation of numbers and the translocation and BA -- the
6 other information within those within his documentation.
7 Not just the extrapolation of numbers.

8 MS. GANNON: So what is -- what you believe you
9 need to see in part of this errata is the extrapolation, the
10 relocation plan, and the biological assessment; is that
11 correct?

12 MS. MOORE: Not the biological assessment but the
13 translocation plan and the numbers, correct.

14 MS. GANNON: Okay. And with those documents, you
15 believe that the document could be adequate?

16 MS. MOORE: I believe they have the information to
17 be adequate if they're added adequately.

18 MS. GANNON: Okay. Thank you. And just as
19 another follow-up, I believe you testified that you have not
20 had an opportunity it read the translocation plan; is that
21 correct?

22 MS. MOORE: I did say that, yes.

23 MS. GANNON: Have other members of Fish and Game
24 staff had an opportunity to review the plan?

25 MS. MOORE: This last current version that we

1 received last night or --

2 MS. GANNON: I believe my understanding was that
3 there are members your staff or some of your colleagues have
4 been working with the Applicant and with the other agencies
5 on this plan for many months; is that accurate?

6 MS. MOORE: Yes, that is accurate.

7 MS. GANNON: So the document that was distributed
8 we could assume has been reviewed by other members of Fish
9 and Game staff; is that correct?

10 MS. MOORE: The one prior to this last one, yes.

11 MS. GANNON: Okay.

12 MS. MOORE: The one that was actually docketed has
13 not been read from last night.

14 MS. GANNON: We believe that's the same version
15 that was given -- that was actually -- that there's -- a
16 member of your staff provided comments on. So we believe
17 that that has occurred, but thank you for that
18 clarification.

19 Now turning to you, Mr. Flint, I was a little
20 confused. I understood the explanation about where the
21 1,400 number came to the long-term management funding and
22 you can see I believe in our proposed revisions to BIO-17 we
23 have not asked for any changes to that number. But what I
24 was not understanding was what you were saying about the
25 cost of managing BLM lands. Can you explain that again?

1 MR. FLINT: Yeah. I think there -- the -- what I
2 was trying to address with that was that regardless of which
3 agency ends up managing the land, there will be ongoing
4 costs to manage the properties or improvements or habitat
5 restorations that are done as part of the project
6 mitigation. So that is not relevant what agency takes it
7 over. Those costs can be captured and they would be
8 captured in a PAR analysis, so really it's independent of
9 agency. That's all I was trying to -- that's the point I
10 was trying to make, one that's independent of agency that
11 relates to the land and the species and what needs to be
12 done and the agencies would continue to make those decisions
13 and assessments in a team fashion.

14 MS. GANNON: I guess I'm a little confused, so
15 maybe I need to address this question to both you,
16 Mr. Flint, and to you, Ms. Fesnock. Ms. Fesnock, at the IVS
17 -- Imperial Valley hearings last week, we had a discussion
18 about the need for long-term management funding on BLM
19 lands. Do you recollect that discussion?

20 MS. FESNOCK: Yes, I do.

21 MS. GANNON: And in the way that I recall your
22 testimony in that proceeding was that BLM is in the business
23 of land management and that they generally do not require --
24 or you generally do not require long-term funding for the
25 management of BLM lands. Is that accurate or am I

1 mis-recalling what you said?

2 MS. FESNOCK: That is correct. However, I would
3 like to provide a clarification for the Commission to
4 understand -- or hopefully improve the understanding of our
5 nested (ph) mitigation process. May I do so not?

6 MS. GANNON: That's fine with me.

7 MS. FESNOCK: You were correct in that when BLM is
8 looking solely at federal statutes we do not request or
9 require a long-term management fee associated new lands that
10 are acquired either through BLM or acquired and then donated
11 to BLM. However, BLM manages its lands -- our lands through
12 a multiple use mandate which most conservation groups and I
13 would hazard the two wildlife agencies would argue do not
14 meet CESA (ph) standards, right?

15 If you look at the numbers of employees that BLM
16 has per acre of land, it's at a very low level, which means
17 that each individual acre of land gets very little attention
18 or directed protection.

19 If you're looking at Fish and Game would have done
20 prior to nesting with BLM, Fish and Game would have required
21 lands to be acquired. My general understanding is that
22 those acquired lands are then fenced to prevent people from
23 accessing them because they need to be managed in such a way
24 as to ensure that the conservation purpose of that
25 acquisition is actually being met.

1 BLM typically doesn't fence -- in fact we don't
2 fence acquisitions that are then donated to us because we
3 want to maintain an open and available desert, right,
4 consistent land management. So if I'm looking at what Fish
5 and Game would have done, they would have acquired lands and
6 then isolated it and in doing our nesting, lands that are
7 acquired and then donated to BLM will not be isolated.

8 The way that we get around that issue is increased
9 monitoring and increased enforcement patrols to ensure that
10 the conservation values of those lands are being maintained.

11 That is off-road vehicle recreationists are actually
12 staying on roads and not traveling everywhere which is our
13 primary impact concern.

14 So it's because we are nesting our agencies'
15 requirements that there is this long-term management
16 fund/fee, whatever you want to call it, that's being
17 attributed and it's the fact that BLM generally doesn't
18 manage its lands -- all of its lands to the standards that
19 Fish and Game would need in order to say that those lands
20 are being managed for conservation purposes.

21 There will be additional effort that needs to be
22 put in. Whether that's expressly going to be done by BLM
23 employees or contracted out or Fish and Game employees that
24 then do work on BLM lands, we haven't figured out exactly
25 what that process is, but there will be additional work done

1 on these lands associated with maintaining the conservation
2 value of those lands.

3 MS. GANNON: Ms. Fesnock, are you -- I know we had
4 the discussion earlier today about the workshop. Are you
5 going to be able to be available to attend the Calico
6 workshop if it's held in the afternoon of August of 10th?

7 MS. FESNOCK: It really depends on how late it
8 goes. I find it hard to believe that we're going to cover
9 Imperial and Calico in an 8:00 to 6:00 kind of time frame
10 and I have other obligations that will not allow me to stay
11 into the wee hours of the morning.

12 MS. GANNON: I appreciate that and hopefully we
13 can allocate it so that the proportions that you would need
14 to participate in, we can handle earlier. What I was
15 thinking is I have a number of questions and I think we
16 would have -- like to have a dialogue with you about the
17 numbers we have offered and the numbers that you have
18 offered, but assuming we can have the workshop, I think it
19 may make more sense for us to have that conversation when we
20 can actually be speaking in a more informal process. So I
21 think I will --

22 MS. FESNOCK: Yes. And I guess the comment that I
23 would make to the Commission and to all of the interested
24 parties is that we do not believe that the REAT agency
25 biological mitigation table is something that can be

1 negotiated. We are basing these dollars on our experience
2 and the people that we're anticipating to do the work and
3 the prices that they've told us that that work will be
4 accomplished at.

5 We are -- actually as I speak to you, there is
6 another group who is working out the questions of how do we
7 refund money or how do we keep, you know, pots of money
8 separate so in case we have grossly overestimated the actual
9 cost, we will be able to return money to you should you
10 choose to use the NFWF option. If the NFWF option is deemed
11 too expensive to you, you always have the option of doing it
12 yourself.

13 So I don't want the Commission to think that we
14 are forcing people to pay these prices, but these are the
15 prices that we believe we have estimated accurately. If you
16 have questions as to the accuracy, I'll be happy to discuss
17 that with you, but I do not believe that in any further
18 discussions that those numbers will be changed or modified.

19 MR. FLINT: This is Scott Flint.

20 HEARING OFFICER KRAMER: Did you want to add
21 something to the answer, Scott?

22 MR. FLINT: Yes. Now that I actually understand
23 the question, I can help -- then I can help demonstrate a
24 big difference between the Imperial Project and the Calico
25 Project, if you'd like me to.

1 MS. GANNON: I think I know the difference with
2 regard to the listed species -- the state list of species.
3 Is that the explanation?

4 MR. FLINT: Yeah. Yeah. That's correct.

5 MS. GANNON: Thank you.

6 MR. FLINT: -- mitigation there, so --

7 MS. GANNON: Right.

8 MR. FLINT: Yeah.

9 MS. GANNON: Yes. No, we appreciate that
10 difference. I guess if there is -- we appreciate you
11 telling, Ms. Fesnock, that that's just totally nonnegotiable
12 and we won't make any headway at any workshop or in any
13 future discussion with you with regard to these numbers. So
14 it sounds like the workshop would be much more productive
15 than if we are talking to CEC staff regarding the security
16 numbers and how that relates if there are alternative
17 provisions that are undertaken. If there is no room for
18 discussion at all with the REAT members, then I suppose that
19 it makes sense to -- I don't know that there's any reason to
20 have that participation in the workshop.

21 MS. FESNOCK: My comment would be I think it would
22 be important to share the information associated with this
23 refunding concept that is being worked on. And there's a
24 couple of other nuances that I think we should talk about
25 outside of this hearing that might meet some of your needs.

1 MS. GANNON: Okay. We appreciate that. We have
2 no further questions.

3 HEARING OFFICER KRAMER: Okay. Thank you.
4 San Bernardino County.

5 MR. BRIZZEE: This is Bart Brizzee from
6 San Bernardino County. My question is directed to
7 Ms. Fesnock. You gave some figures and I wasn't clear if
8 they were based on appraisals -- these figures that related
9 to the value of this mitigation property. Were they based
10 on appraisals or actual sales?

11 MS. FESNOCK: We worked on two sets of
12 information. One set of information is acquisitions that
13 BLM has been a party to in 2008, '09, and 2010 closings to
14 date and then we have another document provided to us from
15 the National Park Service that are associated with
16 appraisals that they got in December of 2009 associated with
17 this large state exchange program that they're working on as
18 far as attributing values of lands as we're swapping federal
19 lands and state lands. So it's two different documents.

20 MR. BRIZZEE: Was one of them predominant over the
21 other in terms of your calculations?

22 MS. FESNOCK: Given the direction that we were to
23 come up with a number that would require us to not go back
24 to ask for additional money from an application if we had
25 underestimated what the actual cost was going to be and the

1 fact that our database on actual acquisitions were in
2 wilderness areas and the appraisals of the Park Service
3 being more recent and higher, yes, there was -- we looked at
4 all of that.

5 And if you look at the NFWF table, that thousand
6 dollars per acre is an estimate that can be changed
7 depending upon specific information that's, you know,
8 identified in this process. So whether the Applicant's
9 request to change that to \$500 an acre is the correct price
10 or if there's somewhere difference between 500 and a
11 thousand, there is nothing in the REAT table that prevents
12 us from redefining that acquisition cost.

13 But as I've tried to explain to Sara, at the end
14 of the day, what it costs is what it costs and that if --
15 because we have to look at the numbers of acres that are
16 acquired. All of our mitigation documents are in acres and
17 we're trying to -- and in order to actually achieve what the
18 document says we're going to do in mitigation, at the end of
19 the day, it's the numbers of acres that are purchased not
20 the amount of money that's put in an account and then spent
21 in acquiring them.

22 So, you know, we can -- there is room in changing
23 the land acquisition cost if the Applicant has different or,
24 you know, more explicit information, but that's going to
25 also be tied to where those parcels are actually located and

1 whether that makes sense for the mitigation purposes that
2 we're trying to achieve. I don't know if I answered your
3 question.

4 MR. BRIZZEE: Yes. Thank you. As far as the land
5 that's donated to -- land that's acquired, I think you
6 indicated would be donated to a land management agency that
7 would then manage it?

8 MS. FESNOCK: Yes.

9 MR. BRIZZEE: Is that right? And part of the
10 arrangement is that the land that is so donated is
11 restricted from development in perpetuity, I believe was
12 your term; is that right?

13 MS. FESNOCK: That is correct.

14 MR. BRIZZEE: I believe it's safe to say you're in
15 concurrence with BIO-17 as it has been drafted by the staff?

16 MS. FESNOCK: I'm sorry. I'm having a hard time
17 hearing you. You said I'm aware of what?

18 MR. BRIZZEE: Are you in concurrence with BIO-17
19 as drafted by the staff?

20 MS. FESNOCK: To the best of my knowledge, yes.

21 MR. BRIZZEE: Are you aware of the selection
22 criteria that are included as a part of that condition?

23 MS. FESNOCK: Yes.

24 MR. BRIZZEE: And in -- I think during a portion
25 of your testimony under direct, you said there was

1 sufficient quantity of land meeting the qualifications to be
2 acquired as mitigation?

3 MS. FESNOCK: There is sufficient lands out there
4 to meet this project's mitigation needs, yes.

5 MR. BRIZZEE: Did you evaluate those lands in
6 relationship to the selection criteria of BIO-17?

7 MS. FESNOCK: Let's see. I think I can say I
8 evaluated them at a 30,000 viewpoint as far as I looked at
9 lands that BLM has identified as ACECs or DWMAs. I looked
10 at the percentage of private lands within those. I assessed
11 of those acres that were private within those, did I think
12 there were going to be enough willing colors (ph) to be able
13 to meet this need and, yes, so I was working off of the
14 assumption that an area that BLM had identified as an ACEC,
15 which is an area of critical environmental concern, would
16 actually have biologically valuable lands because otherwise
17 we wouldn't have identified it as an area of environmental
18 concern.

19 But as far as identifying specific values of
20 specific parcels according to these selection criteria, no,
21 I have not done that.

22 MR. BRIZZEE: And when you say you're looking at
23 them from the 30,000 feet approach, you're not looking at
24 individual privately-owned parcels and making a
25 determination whether they meet the criteria; is that

1 correct?

2 MS. FESNOCK: No, I do not believe I'm actually
3 allowed to do that. I mean the whole process of the
4 government buying land is this concept of willing sellers
5 and we are not encouraged to determine which parcels we
6 actually would want to buy and work on that. We're more the
7 hands-off kind of approach.

8 MR. BRIZZEE: Thank you. That's all I have.

9 HEARING OFFICER KRAMER: Let's just go down the
10 row here. So we'll start back in the corner with Mr. Lamb.

11 MR. LAMB: No questions.

12 HEARING OFFICER KRAMER: Okay. Mr. -- I'm sorry.
13 I forgotten.

14 MR. WEIERBACH: Weierbach.

15 HEARING OFFICER KRAMER: Weierbach. Do you have
16 any questions?

17 MR. WEIERBACH: No questions.

18 HEARING OFFICER KRAMER: Ms. Miles.

19 MS. MILES: No questions at this time.

20 HEARING OFFICER KRAMER: Sierra Club.

21 MR. RITCHIE: Yes. This is Travis Ritchie with
22 the Sierra Club. I have a couple of questions for staff
23 either I believe Mr. Huntley or Mr. White could address this
24 regarding desert tortoise.

25 MR. HUNTLEY: Yes. Go ahead, please.

1 MR. RITCHIE: You discussed that -- let me find it
2 in my notes one -- you discussed in your testimony just now
3 and I believe it's also addressed in the supplemental staff
4 assessment that the project will result in a complete
5 barrier to north-south movement; is that correct?

6 MR. HUNTLEY: This is Chris Huntley. Yes. We
7 believe where the project footprint lies there will be a
8 complete barrier to north-south movement.

9 MR. RITCHIE: So now is it also correct then that
10 the critical tortoise habitat is directly adjacent to the
11 project across Highway -- I-40?

12 MR. HUNTLEY: The Ord-Rodman is south of the
13 project, south of I-40, and to the east -- or pardon me --
14 to the west.

15 MR. RITCHIE: Now, in your understanding and
16 experience -- well, first let me back up a little bit.
17 There are culverts underneath I-14, correct?

18 MR. HUNTLEY: Yes, there are and we do consider it
19 a possibility that tortoises can move through those
20 culverts.

21 MR. RITCHIE: So would that -- speaking of the
22 critical tortoise habitat to the south, the Ord-Rodman I
23 believe critical habitat and the population of desert
24 tortoise that will be to the -- well, what's left of the
25 population of desert tortoise that will be north of the

1 project, any potential movement between those two
2 populations will be completely severed by this project,
3 correct?

4 MR. HUNTLEY: No, that's not true. It would be
5 severed merely along the three mile or so fence line of the
6 proposed project. Tortoises would still have access across
7 and under the highway through culverts to the east and to
8 the west of the proposed project. Highway underpasses,
9 culverts, drainages.

10 MR. RITCHIE: Based on the proximity of the
11 critical desert tortoise habitat, if you were to choose the
12 closest line of travel for migration with the population
13 that would be remaining north of the project, is that
14 closest line being severed by this project?

15 MR. HUNTLEY: I would have to look at a map to
16 figure that out and again tortoise movement in that region
17 is not tortoises picking up and moving multiple miles at any
18 given time. It's likely that over generations tortoises are
19 moving to the east, to the west, to the north, to the south.

20 MR. RITCHIE: Okay. And I have one more question.
21 With respect to mitigation, do any of the proposed
22 mitigation measures protect or preserve or otherwise address
23 this at least inhibition or to north-south connectivity?

24 MR. HUNTLEY: Could you repeat that question,
25 please?

1 MR. RITCHIE: Sure. We said earlier that the
2 project would pose a barrier to north-south connectivity,
3 correct?

4 MR. HUNTLEY: Yes, we did.

5 MR. RITCHIE: Do any of the proposed mitigation
6 measures in the SSA protect or preserve or address this
7 barrier to north-south connectivity?

8 MR. HUNTLEY: We had one component in the
9 mitigation that has requested or proposes to fence certain
10 portions of the right-of-way adjacent to the I-14 should
11 tortoises that occur within these Not A Part areas or should
12 tortoises move north from the Ord-Rodman area into the Not A
13 Part areas on the south side of the project, we would like
14 the area -- the culverts fenced so that the tortoises if
15 they were to walk under the Interstate 40 on a culvert do
16 not come out onto the surface and then wander onto the
17 freeway. We would -- I think we would have -- pardon me --
18 we do have a condition that requires fencing there. If
19 fencing cannot be put up, we're asking that the two
20 tortoises that were observed in the Not A Part be relocated
21 or translocated off the site.

22 MR. RITCHIE: But that mitigation measure wouldn't
23 actually prevent the barrier to north-south connectivity.
24 It would just address existing culverts that are already
25 there, correct?

1 MR. HUNTLEY: That's true. Staff does consider
2 that the north-south movement of tortoises through this area
3 is likely very low based both on the number of tortoises
4 that were observed in the area between Interstate 40 and the
5 BNSF Railroad. We do not expect a large movement of
6 tortoises through that area.

7 MR. RITCHIE: Thank you. I have no additional
8 questions, although my colleague does.

9 MS. SMITH: I have a couple of questions about
10 mitigation as well, staff. The supplemental staff
11 assessment identified numerous impacts associated with
12 translocation; is that correct?

13 MR. HUNTLEY: I believe we identified that impacts
14 would occur from translocation and that translocation risks
15 are present, yes.

16 MS. SMITH: Could you please describe some of the
17 more significant impacts associated with translocating
18 desert tortoise?

19 MR. HUNTLEY: Without looking directly at the
20 text, I believe we identified that mortality is a potential
21 concern when translocating animals.

22 MS. SMITH: Right. But can you just explain a
23 couple of the causes of mortality as a result of
24 translocating desert tortoise?

25 MR. HUNTLEY: Animals can void their bladder, be

1 harmed during the translocation process. Animals can be
2 introduced into an area where they're quickly predated upon
3 among other things.

4 MS. SMITH: And do you anticipate desert tortoise
5 mortality as a result of translocation at this project?

6 MR. HUNTLEY: We think mortality will likely occur
7 to some degree, but it's unknown what level that will be at.

8 MS. SMITH: And has staff made recommendations to
9 mitigate mortality resulting from a translocation plan?

10 MR. HUNTLEY: Specific language resulting from
11 mortality from translocation has not been articulated in the
12 conditions of certification. This was -- pardon me. Pardon
13 me. We are reviewing and approving the translocation plan
14 which we would expect to contain language regarding
15 thresholds for significance or thresholds for the
16 implementation of remedial action should translocation
17 mortality occur.

18 MS. SMITH: Right. I understand that. But my
19 question is we know that translocation would result in some
20 level of mortality. Is there mitigation aside from the
21 translocation plan itself that will take care or ameliorate
22 in some way that mortality? It's the principle where CEQA
23 requires you to identify impacts as a result of a mitigation
24 measure and make an attempt to mitigate those impacts.

25 MR. HUNTLEY: When we assessed impacts of the

1 proposed project on desert tortoise, we did consider the
2 effects of translocation mortality as noted in our document.

3 The translocation process is one component of the
4 mitigation strategy for desert tortoise which includes the
5 land acquisition, habitat enhancement, raven control, and
6 the translocation process among best management -- in
7 addition to best management practices. Collectively all of
8 these, you know, strategies were being implemented to ensure
9 that we had fully mitigated impacts to desert tortoise. So,
10 yes, they were considered.

11 So just to be a little more specific, there's
12 BIO-1 through 9. Let me back up a second. In the
13 supplemental staff assessment, you do address this issue and
14 say that BIO-1 through 9 and in BIOS-15 through 17 will
15 address impacts associated with translocation.

16 Are there any other specific measures that go to
17 actually mitigating desert tortoise mortality as a result
18 of implementing the desert tortoise plan? That's my
19 question.

20 MR. HUNTLEY: I'm not sure there is specific
21 language that says condition X is specifically for mortality
22 from translocation, but again staff considered the
23 impacts -- or potential impacts of mortality associated with
24 translocation and that is the primary reason we have
25 requested a translocation plan that would be subject to

1 agency and condition approval.

2 MS. SMITH: Thank you so much. That's it.

3 MR. HUNTLEY: Thank you.

4 HEARING OFFICER KRAMER: Defenders of Wildlife.

5 MR. BASOFIN: Thank you. Joshua Basofin with
6 Defenders of Wildlife. I have just a few questions for
7 Mr. Huntley. Are you there, Mr. Huntley?

8 MR. HUNTLEY: Yes, sir.

9 MR. BASOFIN: Good afternoon.

10 MR. HUNTLEY: Good afternoon to you.

11 MR. BASOFIN: Did you assess the potential for the
12 4,000-foot reduction area to serve as a desert tortoise
13 movement corridor?

14 MR. HUNTLEY: Yes, we did and yes, I did.

15 MR. BASOFIN: And did you conclude that it would?

16 MR. HUNTLEY: We concluded based on multiple days
17 of hiking that northern area and coordinating with
18 regulatory staff that the area would function as live-in
19 habitat and act as a linkage for linkage dwelling species
20 such as desert tortoise.

21 MR. BASOFIN: And besides what you just mentioned
22 regarding walking the site, did you base that decision on
23 any other documents or literature or factors?

24 MR. HUNTLEY: We did review literature regarding,
25 you know, slopes that tortoises can access. We were very

1 closely considering, you know, how the bajadas are laid out
2 in that area to see whether or not we thought there would be
3 an impediment to movement. You know, this is -- this
4 necessitated, you know, several conversations with the
5 regulatory agencies and a meeting with Fish and Wildlife
6 Service to specifically talk about this and also one of the
7 reasons the Fish and Wildlife Service and the Desert
8 Tortoise Recovery Office went out to the site with BLM and I
9 believe Fish and Game to inspect some of these areas.

10 Based on our site visits and review of documents,
11 known tortoise behavior, we felt it would be adequate to
12 maintain a movement corridor or a linkage corridor in that
13 area.

14 MR. BASOFIN: Thank you. Is that corridor meant
15 to connect multiple populations of desert tortoises?

16 MR. HUNTLEY: I believe the intent of the corridor
17 is to provide live-in habitat for the resident tortoises
18 that are currently there and to support the tortoises that
19 would be translocated into that location. It's likely that
20 these tortoises will breed and juvenile tortoises will move
21 in and out and that populations to the east and populations
22 to the west would, you know, exchange genetic material over
23 time.

24 MR. BASOFIN: Okay. And I think you testified
25 that one of the purposes of that reduction area was to

1 facilitate that type of movement; is that right?

2 MR. HUNTLEY: That's right. In our previous staff
3 assessment and draft EIS, I believe we concluded that it was
4 a significant and unmitigable project if we did -- if we
5 maintained the solar field up in that area.

6 MR. BASOFIN: And is that type of movement that
7 you've considered through that 4,000-foot reduction area,
8 could that potentially connect a DWMA -- desert tortoise and
9 a DWMA with other desert tortoise populations?

10 MR. HUNTLEY: I'm not sure I can answer that. I
11 believe that tortoises could move over generations to the
12 east, to the west, and to the north and to the south, but
13 the tortoises that are there we believe are resident animals
14 and we believe they'll breed and, you know, certain
15 juveniles will disperse to the east and to the west. It is
16 possible that they could go to the south, but we're not
17 proposing that any individual animal would make a multiple
18 mile, you know, movement to the other area, no.

19 MR. BASOFIN: Are you familiar with the U.S. --
20 the recommendations in the U.S. Fish and Wildlife Service
21 1994 recovery plan with regard to the width of corridors
22 that connect desert tortoise populations including those in
23 DWMA's and ACECs?

24 MR. HUNTLEY: We reviewed the plans and I think we
25 reviewed the update. I think there's another one in 2010,

1 like at least revised plan.

2 MR. BASOFIN: What was your understanding in
3 reviewing the revised recovery plan in terms of the
4 necessary width of a corridor connecting --

5 MR. HUNTLEY: I believe -- but I could be wrong.
6 I do not have the document in front of me, but I believe it
7 exceeded the 4,000-foot barrier -- or the 4,000-foot
8 distance.

9 MR. BASOFIN: Do you know by how much it exceeded
10 the 4,000-foot distance?

11 MR. HUNTLEY: No, I don't.

12 MR. BASOFIN: Thank you. Turning now to --
13 actually staying with the 4,000-foot reduction issue, in
14 making your determination concerning the potential for the
15 4,000-foot reduction area to serve as a movement corridor,
16 did you consider slope?

17 MR. HUNTLEY: Yes, we did.

18 MR. BASOFIN: And how did you do that?

19 MR. HUNTLEY: Well, we considered slopes greater
20 than 20 or 30 percent to be a problem. When we walked out
21 into the area -- when I walked out onto the project site, we
22 specifically looked to see if the site contained low
23 gradient, low topographical relief areas that wouldn't pose
24 a barrier to movement. I did not bring an inclinometer to
25 the site in all locations, but we could very clearly see

1 slopes that we know tortoises have moved on in previous
2 surveys. In addition, we did note several areas where it
3 was a vertical incised channel that tortoises would clearly
4 not go. But I did not do a mathematical analysis or a
5 topographical analysis of the site.

6 MR. BASOFIN: So your analysis was predominantly
7 through observations on the site?

8 MR. HUNTLEY: It was a qualitative analysis by
9 hiking the terrain back and forth across the top of the
10 project site looking for low relief habitat where we've
11 observed tortoises and it was also walking through the
12 project area looking at the tortoise maps of where we have
13 observed tortoises, so we had a pretty good sense of where
14 tortoises were vis-a-vis the topographical features.

15 MR. BASOFIN: And how much time approximately did
16 you spend observing the slopes on that portion of the site?

17 MR. HUNTLEY: I would say probably 20 hours of
18 time. We've been there multiple days. I walked from the
19 east side to the west side and back again over the course of
20 two days.

21 MR. BASOFIN: And was there a terrain analysis
22 performed in that area?

23 MR. HUNTLEY: I beg your pardon?

24 MR. BASOFIN: Was there a --

25 MR. HUNTLEY: Could you repeat that, please.

1 MR. BASOFIN: Was there a terrain analysis
2 performed in that area?

3 MR. HUNTLEY: As I've stated previously, we did
4 not conduct a terrain analysis.

5 MR. BASOFIN: Thank you. That's all I have.

6 MR. HUNTLEY: Thank you.

7 HEARING OFFICER KRAMER: Okay. The others have
8 indicated no questions. So any redirect, staff?

9 MR. ADAMS: No redirect from staff.

10 HEARING OFFICER KRAMER: Okay. Thank you. So I
11 presume most of the panel will stick around because we'll be
12 getting into the -- more details about the other -- the
13 species other than desert tortoise and then the plants a
14 little bit later. Okay. Caryn, you had Mr. Cashen and --
15 or -- was it Mr. or Ms. Bleich? I think it was Mr. Bleich.

16 MS. HOLMES: Bleich.

17 HEARING OFFICER KRAMER: Is Mr. Bleich on the
18 telephone?

19 DR. BLEICH: Yes, I'm here.

20 HEARING OFFICER KRAMER: Okay. Were you sworn
21 earlier?

22 DR. BLEICH: Not for this project, no, sir.

23 HEARING OFFICER KRAMER: Okay. And then Mr.
24 Cashen I think was not as well?

25 MR. CASHEN: No.

1 HEARING OFFICER KRAMER: Okay. So if you can just
2 come up to the table, we'll get you both sworn.

3 MR. ADAMS: Hearing Officer Kramer, this is Steve
4 Adams. We have a question whether -- from Ms. Fesnock
5 whether she needs to stick around or whether the questions
6 related to the cost table and acquisition have been
7 exhausted and she might leave.

8 HEARING OFFICER KRAMER: Committee is hoping
9 exhausted.

10 MS. GANNON: We're exhausted.

11 HEARING OFFICER KRAMER: Okay. Applicant admits
12 to exhaustion. Anyone else?

13 MR. BASOFIN: Mr. Kramer, I just have a point of
14 clarification. Was it the Committee's intent to have
15 Mr. Aardahl serve on the panel in conjunction with
16 Mr. Cashen?

17 HEARING OFFICER KRAMER: One of the Defender's
18 witnesses. Well, we could certainly do that. Let me ask
19 them if the big horn sheep folks have -- would you like --
20 would you prefer to have a separate panel of your witnesses
21 or just to join the rest of the witnesses in one big panel?

22 MR. BURKE: In order to expedite things, I think
23 that's a fine idea.

24 MR. BASOFIN: If I could make a suggestion. I
25 believe Mr. Cashen and MR. Aardahl both have testimony

1 regarding desert tortoise and also testimony regarding big
2 horn sheep, so if we could perhaps do desert tortoise first.

3 HEARING OFFICER KRAMER: Okay. That's right.

4 MR. BASOFIN: I think that might be efficient.

5 HEARING OFFICER KRAMER: Actually I should have
6 asked from the sheep society, is your testimony completely
7 limited to the sheep or do you have something to say about
8 desert tortoise?

9 MR. BURKE: No, sir. They share that same
10 4,000-foot -- we have no objection.

11 HEARING OFFICER KRAMER: Okay. So the habitat is
12 shared by the two species and as long as you get to tell us
13 what you need to in either place, you're happy.

14 MR. BURKE: Yes, sir. Anything to speed this up.

15 HEARING OFFICER KRAMER: Okay. Okay. Well, so
16 any objection to -- and, Mr. Basofin, what happened to
17 Mr. Andre? Did we ever hear from him?

18 MR. BASOFIN: I haven't been in touch with
19 Mr. Andre, but I'm hopeful that he will be able to join us
20 later tonight. He is hosting -- not only participating in,
21 but hosting a botany workshop today which I think is why
22 he's out of hand, but I'm hoping that later tonight, we'll
23 have him.

24 HEARING OFFICER KRAMER: Okay. Well -- okay. I
25 did not hear any objection to bringing the remaining

1 witnesses we had into one panel, so let's do that.

2 MS. GANNON: We have no objection. I mean we have
3 not put on our witness about the sheep, but we have very
4 little testimony on that, so we're fine to even do sheep and
5 tortoise together on this panel if they're all together.

6 HEARING OFFICER KRAMER: Okay. Or -- we'll leave
7 the sheep with the others. So -- because there are a few
8 other species as well. So -- okay. This will be desert
9 tortoise, so we're going to have Mr. Cashen, Mr. Bleich.

10 MS. MILES: Actually Dr. Bleich is only testifying
11 on the big horn issue.

12 HEARING OFFICER KRAMER: Oh, okay. Well, then
13 Dr. Bleich, you can wait until the next round or do you have
14 time constraints that we should be aware of?

15 DR. BLEICH: No. I'm available and I'll wait for
16 the next round.

17 ASSOCIATE MEMBER BYRON: Okay. Thank you.
18 Ms. Fesnock, just in case you're still there, this is
19 Commissioner Byron and I do want to thank you, although it
20 seems some of the attorneys were exhausted, the Committee
21 found your testimony very helpful. Thank you if you're
22 still there.

23 MS. FESNOCK: Thank you. It was my pleasure and
24 good luck with the rest of today. Thank you for letting me
25 go.

1 HEARING OFFICER KRAMER: I'm not sure what to make
2 of that. Okay. So then we're going to have Mr. Cashen,
3 Mr. Aardahl -- well, I guess just the two of you then.
4 Okay. So were either of you sworn? Okay. If you could
5 raise your right hand.

6 Whereupon,

7 SCOTT CASHEN

8 JEFF AARDAHL

9 were called as witnesses herein, and after first having been
10 duly sworn, were examined and testified as follows:

11 HEARING OFFICER KRAMER: Okay. Thank you. You
12 need to be really rock star close to the microphone so you
13 can pull that out of there and share the microphone if you'd
14 like. Go ahead.

15 DIRECT EXAMINATION

16 BY MS. MILES:

17 Q Mr. Cashen, whose testimony are you sponsoring
18 today?

19 MR. CASHEN: My own.

20 MS. MILES: And do you have any changes to your
21 sworn testimony?

22 MR. CASHEN: No.

23 MS. MILES: And are the opinions in your testimony
24 your own?

25 MR. CASHEN: Yes, they are.

1 MS. MILES: Would the Committee like Mr. Cashen to
2 provide a summary of his qualifications?

3 MS. GANNON: We're willing to stipulate.

4 HEARING OFFICER KRAMER: Is anybody not willing to
5 stipulate? No, we do not need his qualifications.

6 MS. MILES: Okay. Thank you. I would like to
7 insert into evidence Exhibits 424 through 436 and that is
8 Cashen's testimony and exhibits. I would also like to offer
9 as Exhibit 439 the reports from the Ft. Irwin translocation
10 plan 2008 and 2009. I believe the content of these
11 documents is generally known to the Applicant and staff.

12 HEARING OFFICER KRAMER: You referred to those as
13 in the plural. Are there more than one?

14 MS. MILES: It's two reports from 2008 and 2009.

15 HEARING OFFICER KRAMER: Okay.

16 MS. MILES: And they've both been circulated by
17 email.

18 HEARING OFFICER KRAMER: Okay. So -- all right.
19 I'll get the dates off of those. I have those emails.
20 Okay. Those will be Exhibit 439. Again we're -- as far as
21 the formal admittance of the documents, we'll do all these
22 en masse at the end of the hearing.

23 MS. MILES: Okay. Great. So we've decided rather
24 than marching through Mr. Cashen's testimony, we are going
25 to just open it up for cross-examination.

1 HEARING OFFICER KRAMER: The Applicant.

2 MS. GANNON: I have no questions for this witness.

3 HEARING OFFICER KRAMER: Okay. Mr. Weierbach?

4 MR. WEIERBACH: None.

5 HEARING OFFICER KRAMER: Okay. He says none.

6 Mr. Brizzee?

7 MR. BRIZZEE: None.

8 HEARING OFFICER KRAMER: He says none. Sierra

9 Club?

10 MR. RITCHIE: Not so fortunate. This is Travis
11 Ritchie with the Sierra Club. And actually I have some maps
12 that have been provided in the testimony, but I think it
13 would be helpful to everyone if we could put them up on the
14 screens. I believe they're in a file labeled Sierra Club
15 maps that we had provided.

16 HEARING OFFICER KRAMER: My only request is that
17 you tell us where they would be found in those documents --

18 MR. RITCHIE: Yes.

19 HEARING OFFICER KRAMER: -- for the record.

20 MR. RITCHIE: Yes.

21 MS. MILES: Did you ask staff if they had
22 questions?

23 HEARING OFFICER KRAMER: I did not, but we'll get
24 to them.

25 MR. RITCHIE: Going to start with if you could

1 please bring up Slide No. 6.

2 HEARING OFFICER KRAMER: And are you --

3 MR. RITCHIE: And this is -- this map is from the
4 biological assessment, Figure No. 12 in the biological
5 assessment.

6 HEARING OFFICER KRAMER: And are you getting this
7 in Sacramento?

8 MR. ADAMS: Not yet.

9 HEARING OFFICER KRAMER: Okay. Standby. Okay.
10 I'm seeing it here now on my WebEx. Or I was.

11 MR. HUNTLEY: We just noted the -- a map up.

12 MR. RITCHIE: Very good.

13 HEARING OFFICER KRAMER: Okay. Who was that who
14 just spoke from staff?

15 MR. HUNTLEY: Chris Huntley.

16 HEARING OFFICER KRAMER: Okay. Thanks. Okay. It
17 looks like you're good to go.

18 MR. RITCHIE: Okay.

19 CROSS EXAMINATION

20 BY MR. RITCHIE:

21 Q Mr. Cashen, you referenced the quality of desert
22 tortoise habitat in your testimony. Is this a map also
23 referenced in your testimony and are you familiar with it?

24 MR. CASHEN: Yes, I am. This is a map that was
25 presented in Applicant's biological assessment and this is

1 the USGS modeled desert tortoise habitat potential depicted
2 on the project site and surrounding area.

3 MR. RITCHIE: And based off this map, can you make
4 any conclusions about the quality of desert tortoise habitat
5 at the project site?

6 MR. CASHEN: I can and for those of you who are
7 not familiar with the map, I'll just briefly explain what
8 the colors mean. The desert tortoise habitat potential was
9 modeled and rated on a scale from zero to one with zero
10 being the dark blue and one being the red and what this map
11 shows is a large swath of dark orange habitat which is
12 equivalent to a rating of .9 just below the maximum possible
13 value.

14 This map shows a large swath of that high-quality
15 modeled habitat right -- of this map and the project site
16 would be located smack in the middle of that high-quality
17 habitat and it would completely fragment that habitat.

18 The long-term -- the draft recovery plan that's
19 been prepared for the species specifically says that the
20 long-term persistence of extensive unfragmented habitats is
21 essential to the survival of the species and that the loss
22 and degradation of those habitats places desert tortoise at
23 increased risk extirpation.

24 MR. RITCHIE: And are you generally familiar with
25 the type of habitat in the Mojave Desert and can you speak

1 to how this quality habitat relates to that -- or let me
2 rephrase.

3 Is this a high amount of quality habitat relative
4 to what is otherwise existing in the Mojave Desert?

5 MR. CASHEN: Based on what's depicted on this map,
6 there's a relatively limited supply of this high-quality
7 habitat and there are no other -- at least to my eye, no
8 other large continuous chunks of this relatively high-
9 quality habitat that has a value of .9 in this region.

10 MR. RITCHIE: So now moving on a little bit, based
11 off of your review of the materials, has there been
12 observations of desert tortoise populations that show that
13 they're actually using this high-quality habitat as would be
14 expected?

15 MR. CASHEN: Yeah. I think this would be the
16 appropriate time to tie the model into what was actually
17 observed at the project site. So this map depicts what is
18 modeled desert tortoise habitat and even though that model
19 was developed by experts and it was statistically tested and
20 was based on an extensive amount of field data, it's been
21 shown to be highly accurate, but it's still just a model and
22 it does not account for anthropogenic effects or natural
23 disturbances such as fire that may have altered habitat from
24 relatively high to relatively low.

25 And this is important for a couple reasons. It

1 tells us that once a project is built, what you see as
2 orange next to the project sight will no longer be of
3 equivalent value because it does not -- the model does not
4 consider these anthropogenic effects.

5 MR. RITCHIE: I was going to say if I could move
6 on to another map from the audio-visual help, Slide No. 14,
7 please. And are you familiar with this map, Mr. Cashen?

8 MR. CASHEN: Yes. This is a map that was provided
9 in application for certification. It shows the results of
10 the 2008 protocol desert tortoise surveys that were
11 conducted at the project site and surrounding region and
12 unfortunately I'm sure most people cannot see the actual
13 markers of where the desert tortoises were detected, but
14 what you can see are these larger colors and Applicant used
15 those colors to represent the present of desert tortoise and
16 I believe -- I'm pretty sure that green represents no
17 tortoise were detected, blue detects -- correct me if I'm
18 wrong -- I believe it was tortoise sign but no actual
19 tortoises and the red was actual tortoises were detected.
20 Is that accurate? Can you tell from looking at the legend?

21 And so --

22 MR. RITCHIE: I apologize for being a little
23 blurry on this side.

24 MR. CASHEN: That's more or less what it is if
25 it's not exactly what it is. And so what this map has shown

1 is it's basically validated the model. If you look at where
2 the tortoises were detected, it coincides with what the
3 model has predicted as high quality habitat. And so we have
4 a relatively dense population of tortoises distributed
5 across the site more or less as predicted by the model and
6 then Applicant conducted surveys again in 2010 this year and
7 those data were just submitted recently and those data
8 demonstrate that the project site still has a relatively
9 dense population of tortoises.

10 MR. RITCHIE: And actually if I could stop you
11 there. I'll let you get going, but can we also now put
12 Slide No. 8 up, please. Please continue while that's
13 transition, Mr. Cashen, about the most recent survey.

14 HEARING OFFICER KRAMER: And what's the source of
15 8?

16 MR. RITCHIE: This will be Figure No. 3 in the
17 supplemental staff assessment.

18 MR. CASHEN: So this map is of the 2010 desert
19 tortoise survey results and it just demonstrates that
20 there -- through the course of two rounds of protocol
21 surveys that were separated by a couple years, we still have
22 a relatively dense population of desert tortoises on the
23 site and in 2010, Applicant collected data on the sex and
24 health and age status of tortoises that it encountered and
25 those data suggest that the site has a relatively dense

1 population of healthy tortoises that are reproducing and
2 contributing to the function of the larger desert tortoise
3 population.

4 And in my mind, this suggests a possible source
5 population. The distribution of the data in relation to
6 other data that were collected off the site is similar to
7 what you would expect out of a source population. And
8 source populations are extremely important for declining
9 species and for a species that exhibits a metapopulation
10 structure.

11 MR. RITCHIE: And for clarification, can you
12 please briefly define what a source population is and how
13 that benefits potentially a region such as this?

14 MR. CASHEN: Sure. A source population is one in
15 which the reproduction output exceeds the number necessary
16 to maintain the population. So in those instances, the
17 young that are born may decide to disperse out of the area
18 in an effort to have less competition for resources and in
19 doing so, they colonize new areas, they help support other
20 populations that may be depleted and they can recolonize
21 areas that have experienced extirpation from disease or some
22 sort of stochastic event like a weather condition or
23 something like that.

24 MR. RITCHIE: And so I believe you said -- is it
25 fair to say that a source population is an extremely

1 valuable component of the overall regional population of a
2 species?

3 MR. CASHEN: It is in general and it's especially
4 important for a species that has known metapopulation
5 dynamic structure and it's extremely important in light of
6 our knowledge that tortoise populations are declining across
7 the Western Mojave and that there are very few source
8 populations out there that would be capable of having
9 individuals disperse to recolonize other areas.

10 MR. RITCHIE: Now I'd like to address very
11 briefly, you mentioned a metapopulation. Can you briefly
12 define what a metapopulation is?

13 MR. CASHEN: A metapopulation is one that you -- I
14 think the best way of thinking about it is several distinct
15 populations that are connected through corridors where
16 animals immigrant and emigrate between the various
17 populations. You can think of it as like a spider web with
18 nodes.

19 MR. RITCHIE: So is there a potential of another
20 metapopulation in the critical habitat to the south of the
21 project, the Ord-Rodman critical habitat?

22 MR. CASHEN: Yes.

23 MR. RITCHIE: And based on your experience, is
24 there a potential for genetic flow between these two
25 metapopulations, that is the metapopulation on site and

1 another metapopulation that could be in the critical habitat
2 area to the south?

3 MR. CASHEN: Yes.

4 MR. RITCHIE: And we discussed a little bit
5 earlier in the testimony about north-south connectivity.
6 Based on your understanding of tortoise movement in this
7 area, do you think it's likely that there is at least some
8 north-south movement of tortoise from the source population?

9 MR. CASHEN: Yes. Absolutely.

10 MR. RITCHIE: Can you explain why in the relation
11 to the Cady Mountains north-south movement might be
12 occurring?

13 MR. CASHEN: Desert -- sure. Desert tortoises
14 spend the winter in burrows and when they emerge from their
15 burrows in the spring, they have high energetic demands and
16 need to have a bite to eat pretty quick and the resources
17 that are available to eat are not uniformly distributed.
18 They are distributed across an elevational gradient and so
19 you have green-ups of forage at higher elevations at a
20 different time of year than you do at lower elevations and
21 so what tortoises do is they travel this elevational
22 gradient in search of available forage and capitalize on
23 what is available at the time depending on the local
24 environmental conditions.

25 And this has been documented in the literature and

1 it's known that tortoises commonly travel along desert
2 washes which on this project site are primarily aligned in a
3 north-south direction.

4 And there's one other thing that I would -- I'll
5 throw out there that I thought was pretty interesting and
6 that is if you look at the 2010 data, there was a couple
7 maps that were provided. There was this map that shows
8 actual where live tortoises were detected and there's
9 another map that shows where the burrows were detected.

10 And if you look at those, you can see that there's
11 a cluster of tortoise burrows generally sort of south of
12 where the actual tortoises were found and I think that
13 presents sort of an interesting theory about tortoises
14 having moved up to capitalize on available forage and they
15 actually have spent the winter in the burrows further south,
16 although some of those may have also been summer burrows.

17 MR. RITCHIE: Thank you. I'd like to move on now
18 to address the issues of the proposed mitigation for the
19 Calico Project with respect to desert tortoise. In your
20 opinion, will the compensation strategy be a successful
21 mitigation strategy?

22 MR. CASHEN: No.

23 MR. RITCHIE: Can you explain why not?

24 MR. CASHEN: There's a few reasons. The first is
25 there's been no acquisition proposal from the Applicant, so

1 we have no knowledge of the condition of the compensation
2 lands and where they would be located. We cannot evaluate
3 something that we don't have any information on.

4 The ability of compensation lands to fully
5 mitigate impacts to desert tortoises is not supported by our
6 past experiences. However, even if we take a leap of faith
7 and assume a best case scenario, staff's proposed
8 compensation strategy would not be successful and I'm going
9 to quickly highlight some of the main reasons that I use to
10 derive this conclusion.

11 The first is that staff's conclusion that the
12 compensation lands would fully mitigate impacts desert
13 tortoises hinges primarily on a theory that the lands that
14 would be acquired would be enhanced and thus would increase
15 carrying capacity for desert tortoises. And carrying
16 capacity is a very difficult variable to measure.

17 And the supplemental staff assessment provides no
18 provisions to measure carrying capacity now or in the future
19 to demonstrate the success of these compensation lands. The
20 compensation strategy also hinges on the assumption that
21 lands would be -- that compensation lands would have habitat
22 quality that would be equal to or higher quality than the
23 project site. But yet the supplemental staff assessment
24 provides no measures to measure habitat quality or discusses
25 how it would be measured.

1 Based on Ms. Miller's testimony this morning, I am
2 concerned that the Applicant does not have a good
3 understanding of what constitutes good desert tortoise
4 habitat or how to measure habitat quality. There are no or
5 very few other parcels with high-quality desert tortoise
6 habitat in the area and those that the model predicts are
7 high quality are already in reserves or have pending
8 applications for renewable energy development.

9 The compensation lands cannot mitigate
10 connectivity that would be lost by the project. The
11 supplemental staff assessment has pointed out that this is
12 an essential connectivity corridor and compensation lands
13 cannot compensate for the loss of that corridor.

14 There's a term that has been introduced in
15 conservation biology called SLOSS, and I wanted to say it
16 because I wanted to spit all over Mr. Aardahl when I said
17 it, but what it stands for is single large or several small
18 and it's the concept of what's -- what provides more
19 conservation value, buying -- or protecting one big chunk of
20 land like Yosemite National Park or providing -- or
21 protecting several small parks such as, you know, county
22 parks or regional parks.

23 And the consensus among the desert tortoise
24 experts is that large -- and the recovery plan is that a
25 large block of contiguous intact high-quality habitat is

1 essential for the species. And the reason that I bring this
2 up is because we've had some discussion this morning about
3 the cost associated with acquisition and BLM and staff have
4 both concluded that in order to meet the mitigation
5 requirements, that Applicant was going to have to purchase
6 several parcels. Multiple. There was no single large
7 parcel out there to purchase to satisfy the mitigation
8 requirements.

9 And so in doing so, we've exchanged one large
10 block of habitat for several smaller ones which we -- which
11 the desert tortoise community has agreed is not as valuable
12 as one large block of habitat.

13 There are numerous threats to the viability of
14 desert tortoise populations and these include things such as
15 disease, invasive plants, fire, collection by humans, OHV
16 activity, just to name a few. And the revised recovery plan
17 that was prepared for the desert tortoise highlights the
18 significance of these threats, and in fact in the
19 introduction of the revised recovery plan, it states that
20 the primary driver for the revision was to address these
21 threats that had not been adequately addressed by the
22 original recovery plan.

23 And the revised recovery plan stresses the need to
24 evaluate these threats if we want to conserve desert
25 tortoise populations. And this.....

1 MR. RITCHIE: Carry on.

2 MR. CASHEN: Yeah. I'm almost done. The
3 supplemental staff assessment's compensation strategy
4 provides no provisions for assessing threats at the
5 compensation sites or measures to assure that the specific
6 threat or threats that is limiting desert tortoise at the
7 compensation sites would be alleviated.

8 And there's sort of the suggestion that there are
9 enhancement actions that will benefit desert tortoises and
10 those might include things like fencing off the site or
11 removing exotic plants and certainly those things could
12 benefit a desert tortoise population. But all the existing
13 literature on threats of desert tortoise populations
14 demonstrates that threats do not affect desert tortoises
15 equally across the range. In some places, the population is
16 declining because of disease and in other places, it's
17 declining because of poachers or illegal collection.

18 And in some places, it's doing poorly because of
19 disease and then the poachers come and finish it off. And
20 so you really have to have knowledge of what the threat is
21 and what is limiting that population before you can
22 adequately manage land for the conservation of the species.

23 MR. RITCHIE: And in your opinion, the
24 compensation mitigation strategies proposed by the SSA do
25 not accomplish that, correct?

1 MR. CASHEN: No.

2 MR. RITCHIE: Okay. I'd like to move on now to
3 another proposed mitigation strategy which is translocation.
4 Do you believe that translocation will be a successful
5 mitigation strategy for this project?

6 MR. CASHEN: No.

7 MR. RITCHIE: Can you please explain why not.

8 MR. CASHEN: Sure. As I discussed earlier, this
9 is a large contiguous block of high quality habitat. It's
10 got a relatively dense population of tortoises on it. It
11 provides connectivity to the surrounding reserves. It may
12 be a source population and it appears to be healthy and
13 thriving and translocation cannot mitigate that impact.

14 MR. RITCHIE: Now --

15 MR. CASHEN: This is --

16 MR. RITCHIE: Sorry. With respect to individual
17 tortoises, we've discussed those as far as a broad
18 population. Do you think that even for the individual
19 tortoises that would be moved during translocation, is
20 translocation an appropriate mitigation strategy for the
21 survival of those tortoise?

22 MR. CASHEN: Desert tortoise is an organism that
23 takes many years to reach sexual maturity, but once it does,
24 it can live for a very long time and it can -- even though
25 it has a low reproductive output, over the life span of

1 tortoise, which is pretty long, they can produce a lot of
2 offspring and in that sense, even a few tortoises that are
3 saved and able to reproduce for many years to come,
4 translocation is a good thing.

5 MR. RITCHIE: So going back to mitigation for the
6 several -- the population as a whole, considering mortality
7 and the other issues, is translocation going to be a
8 successful strategy and what are the other concerns of why
9 it won't be?

10 MR. CASHEN: The problems associated with
11 translocation I thought were very well articulated in the
12 supplemental staff assessment and those included things like
13 mortality, tortoises voiding their bladders when they're
14 handled, introducing diseased tortoises into healthy
15 populations, heightened predation, this homing response that
16 causes tortoises to be susceptible to all kinds of things,
17 and then the challenges in establishing appropriate
18 translocation sites including the carrying capacity of the
19 translocation site and whether it's capable of supporting
20 additional tortoises.

21 But the most recent information that is available
22 indicates that translocation is not a mitigation strategy.
23 It is a salvage operation.

24 MR. RITCHIE: Now moving on to some of those
25 additional problems that the supplemental staff assessment

1 addressed. Have you seen actual studies or translocation
2 projects where those problems have emerged?

3 MR. CASHEN: I have. Since I submitted my written
4 testimony, we received a response from the U.S. Fish and
5 Wildlife Service from a FOIA request and that response
6 included an extensive amount of documents pertaining to the
7 Ft. Irwin desert tortoise translocation effort.

8 MS. MILES: And that is Exhibit 439 just to
9 clarify.

10 MR. CASHEN: And the Ft. Irwin project is
11 relatively close to the project site. It has comparable
12 habitat and it was considered the gold standard the used the
13 most recent knowledge of how to translocate tortoises. And
14 the monitoring results from the Ft. Irwin project have
15 provided data that I think are relevant to what the
16 Applicant is proposing to do with tortoises on this project
17 site and here are just a couple of the highlights that we
18 received from the documents that the U.S. Fish and Wildlife
19 Service provided us.

20 Between March 2008 and December 2009, 44.3 percent
21 of translocated tortoises were found dead. And additional
22 17.4 percent were considered missing. That's a total of
23 61 percent of the tortoises that have been translocated
24 within one year and nine months.

25 MR. RITCHIE: Actually can I interrupt you there.

1 MR. CASHEN: Sure.

2 MR. RITCHIE: We heard earlier this morning -- I
3 believe you just said that 44 percent of the translocated
4 tortoises were found dead and 17 percent missing, so that
5 over half of the tortoise translocations failed; is that
6 correct?

7 MR. CASHEN: Yes.

8 MR. RITCHIE: Now, earlier the Applicant had
9 stated that it was their opinion that only one in six
10 tortoises were negatively affected by the translocation. Do
11 you have an opinion on that figure?

12 MR. CASHEN: Well, when I heard that, I was a
13 little confused because it conflicted with all the data that
14 I've seen and I -- it's rapidly scanned through all the
15 annual monitoring reports associated with Ft. Irwin and
16 nowhere could I find those numbers that have been provided
17 by the Applicant.

18 However, I would be able to provide you with page
19 numbers for where my data come from if you'd like.

20 MR. RITCHIE: Do you have those at the moment or
21 is that something we should return to?

22 MR. CASHEN: I have them if you'd like them. I
23 can provide them.

24 MR. RITCHIE: We can return to that later.

25 MR. CASHEN: Okay.

1 MR. RITCHIE: So that was the issue of mortality.
2 Were there any other actual problems observed at the
3 Ft. Irwin site with respect to translocation?

4 MR. CASHEN: There were and I think it's important
5 to add that the tortoises that have been moved during the
6 Ft. Irwin effort were moved to a DWMA which is from what
7 I've heard this morning the same strategy that the Applicant
8 is proposing and the DWMA is supposed to be relatively
9 high-quality habitat with the less amount of anthropogenic
10 disturbance. And so these tortoises experience this high
11 level of mortality even though they had been moved to a
12 DWMA.

13 There was a couple other major problems with the
14 Ft. Irwin effort and the second one besides mortality that
15 was problematic was that one of the common problems was that
16 the researchers were unable to locate the tortoises after
17 they were released. And transmitters were falling off or
18 just stopped working and this makes monitoring the success
19 of a translocation effort extremely problematic and
20 potentially unreliable form of mitigation.

21 And the third thing that was interesting is that
22 coyote predation was the number one cause of death of all
23 the desert tortoises that were moved in the Ft. Irwin
24 translocation effort. There's a lot of uncertainty still
25 associated with translocating desert tortoises, but there is

1 a fair amount of evidence accruing that suggests that
2 translocating tortoises could actually do more harm than
3 good in that you're affecting off-site populations in ways
4 that you do not want to and that is caused by things such as
5 mixing diseased tortoises with healthy ones, supplementing
6 predator populations, and generating competition among
7 tortoises such that there aren't enough resources and the
8 entire population crashes.

9 MR. RITCHIE: So based on these observations of
10 the Ft. Irwin project, how do you think that the Calico
11 translocation project, to the extent that you had any
12 opportunity to review it, compares to the Ft. Irwin
13 experience?

14 MR. CASHEN: I don't see any evidence that
15 suggests that we might expect a different result than what
16 was observed at Ft. Irwin.

17 MR. RITCHIE: And to conclude, your opinion of
18 Ft. Irwin was that the translocation program was a failure,
19 correct?

20 MR. CASHEN: In my opinion, it was a failure, yes.

21 MR. RITCHIE: One moment, please. Mr. Cashen,
22 thank you. I have no additional questions at this time.

23 HEARING OFFICER KRAMER: Defenders of Wildlife?

24 MS. GANNON: Hearing Officer Kramer, we would have
25 a few questions. We read that more as the direct testimony

1 than as cross and --

2 HEARING OFFICER KRAMER: Okay.

3 MS. GANNON: -- so his testimony raised a couple
4 of points that we would like to address.

5 HEARING OFFICER KRAMER: Well, let's see.
6 Would -- Mr. Aardahl was Mr. Basofin's witness, so why we
7 don't have -- was there going to be any direct examination
8 of Mr. Aardahl by you, Mr. Basofin?

9 MR. BASOFIN: Yes.

10 HEARING OFFICER KRAMER: Okay. Why don't we do
11 that first and then we can have one round of
12 cross-examination of both of them.

13 MS. GANNON: Okay.

14 MR. BASOFIN: Thank you. Joshua Basofin with
15 Defenders of Wildlife. Good afternoon, Mr. Aardahl.

16 MR. AARDAHL: Hello.

17 MR. BASOFIN: Did you submit testimony in this
18 proceeding?

19 MR. AARDAHL: I did.

20 MR. BASOFIN: And do you have a true and correct
21 copy of your testimony?

22 MR. AARDAHL: I do.

23 MR. BASOFIN: And are the opinions in your
24 testimony your own?

25 MR. AARDAHL: They are.

1 MR. BASOFIN: Thank you. I would have Mr. Aardahl
2 summarize his qualifications, but I suspect Ms. Gannon would
3 like to stipulate to them.

4 MS. GANNON: I am happy to stipulate.

5 MR. BASOFIN: Based on past experience. Thank
6 you. Mr. Aardahl, in your testimony, you expressed --
7 actually let me back up. Sorry. Mr. Aardahl, are you
8 familiar with the proposed Calico site?

9 MR. AARDAHL: Yes, I am. I spent over the course
10 of the last year and a half approximately four field days on
11 the Calico Project site, either on my own or in conjunction
12 with others from Defenders of Wildlife or from participation
13 by other individuals such as Dr. John Wehausen.

14 MR. BASOFIN: And can you describe your
15 observations and activities on the site?

16 MR. AARDAHL: Well, for this part of the hearing,
17 I'm going to limit my discussion to desert tortoise rather
18 than big horn sheep if that's okay with you.

19 MR. BASOFIN: That's fine.

20 MR. AARDAHL: Okay. I went out to the site
21 specifically to look at the quality of the desert tortoise
22 habitat. I was looking for obviously desert tortoises,
23 locations of burrows, signs of movement. I spent part of
24 the day also examining potential north-south movements as
25 well as east-west. What struck me as significant that I

1 don't think has received sufficient attention is the
2 potential for movement north and south across Interstate 40
3 which has a number of very large bridges in addition to the
4 culverts that have been discussed.

5 Those engineered passages are certainly capable of
6 providing movement opportunities for the desert tortoise not
7 to mention big horn sheep.

8 The quality of the habitat north of the railroad
9 in my opinion becomes higher quality as you go north up to a
10 certain point and the Applicant's map shown on the screen of
11 the locations of the individual tortoises that were seen by
12 the surveyors on the -- you know, over a relatively short
13 period of time just gives us a little snapshot in time of
14 what the desert tortoise resource is on the site.

15 But if you take a look at the distribution of
16 those occurrences, such as Scott mentioned that he counted
17 that the number of tortoise burrows to the south was greater
18 than to the north. My observation is similar, but I went
19 and did an analysis of the observation data on that map and
20 what I discovered is that the number of tortoises at the far
21 north end of the project area and specifically within the
22 highly acclaimed 1,100-acre exclusion zone that's supposed
23 to accommodate movement because of its habitat quality
24 actually only supported I believe about 25 percent of the
25 desert tortoises over the project area.

1 But I'd also like to point out that that area in
2 the middle that has a black line on the south boundary which
3 is called I believe phase two in the Applicant's application
4 for certification, that area of approximately 1,600 acres
5 according to my estimation supports or at the time of survey
6 has accounted for almost 60 percent of the desert tortoises
7 on the entire project site. I am not aware of any area in
8 the Western Mojave currently that has a density of tortoises
9 that high.

10 I was also looking at the potential for tortoises
11 to move east and west and whether or not it was more likely
12 that tortoises in the far northern reaches of the project
13 boundary would have occurred there because of an east-west
14 movement or rather a north -- south to north. What I
15 concluded based on hiking across that northern reach and
16 within that area that's called phase two as well as the
17 1,100-acre exclusion area is that in my opinion because of
18 the numbers of washes that are incised with very steep banks
19 draining from the north, it would be very difficult for a
20 tortoise to navigate across those drainages and what I think
21 is occurring there is that because the population is denser
22 to the south, the northern area that's within the 1,100
23 acres is much more likely to be populated by tortoises
24 moving through the wash system as movement pathways, the
25 path of least resistance you might say.

1 This is also consistent with Jennings' studies in
2 the Western Mojave where 90 percent of the tortoises that he
3 studied were actually found associated with desert wash
4 habitat.

5 MR. BASOFIN: And, Mr. Aardahl, what would be the
6 nature of the movement of those tortoises in that desert
7 wash habitat?

8 MR. AARDAHL: The nature of the movement in terms
9 of?

10 MR. BASOFIN: In terms of would they be moving
11 across the washes or into the washes?

12 MR. AARDAHL: What I've observed in the field over
13 a couple of decades of time as well as on this site,
14 considering the terrain features of the wash banks, is that
15 the movement is very likely associated with the wash bottom,
16 the farther north you go and that the observation that
17 tortoises do take advantage of those wash banks as shelter
18 sites and hibernation burrows is accurate, but I think they
19 access those potential sites from the wash bottom itself
20 rather than from the top and dropping over the rim you might
21 say of a wash and trying to access a desirable ledge from
22 that direction.

23 MR. BASOFIN: So it's your opinion that the
24 tortoises would be moving in a north-to-south fashion into
25 the washes rather than across the washes.

1 MR. AARDAHL: I would say it's much more likely
2 based on the specific terrain on that site that that's where
3 the movement is occurring. I'm not saying that east and
4 west movement does not occur. It probably does, but the
5 most likely scenario is that the abundance of the movement
6 and the population of the tortoises in that northern area is
7 because the bulk of the population is to the south in much
8 more gentle terrain with better soil and more suitable for
9 hosting a larger population.

10 MR. BASOFIN: And in your opinion, what would be a
11 more appropriate desert tortoise movement corridor rather
12 than the 1,100-acre corridor that the Applicant has
13 proposed?

14 MR. AARDAHL: I'll make some observations based on
15 a couple of sources. The first one is just my hiking
16 through the habitat on those several days and the second
17 source is the recommendations in the desert tortoise
18 recovery plan regarding connectivity habitat and what the
19 minimum requirements would be according to the desert
20 tortoise recovery team to facilitate movement and
21 connectivity between known populations.

22 I think the one thing I would like to make clear
23 is that for the most part desert tortoises don't look at an
24 area and say I am going to move from here over to there. It
25 occurs over a very long period of time and I think the

1 movement is a result of incremental recruitment into the
2 population, tortoises expanding their population, each one
3 acquiring its own territory, so the connectivity and the
4 genetic exchange occurs from neighbor to neighbor you might
5 say rather than from individuals making very long distance
6 movements.

7 You were wanting to -- do you want to go into the
8 connectivity habitat as referenced in the recovery plan as
9 well?

10 MR. BASOFIN: Right. If you could cite the
11 sources that you relied on --

12 MR. AARDAHL: Okay.

13 MR. BASOFIN: -- in determining that that -- that
14 the corridor that's been identified is inadequate.

15 MR. AARDAHL: Okay. I received and read the
16 Desert Tortoise Recovery Office briefing paper on desert
17 tortoise movement corridors or something similar to that and
18 it was specific to the Calico Project, by the way.

19 To summarize, what they determined and what they
20 were looking for is a corridor width of approximately
21 1.5 home range widths for a desert tortoise and it said
22 relatively little about terrain features other than I think
23 general reference to the 20 degree slope that a tortoise is
24 felt to be able to negotiate and that's certainly true.

25 But I also noted that that position paper or

1 recommendation from the Desert Tortoise Recovery Office was
2 probably responding not to an agency recommendation to
3 establish a 4,000-foot buffer or corridor. It was reacting
4 to the Applicant's proposal to establish a movement corridor
5 by dropping down approximately 4,000 feet.

6 And the Service reacted to that by highlighting
7 the fact that they felt that that was the minimum width and
8 they underlined the word minimum there. Now in contrast to
9 that, I would like to call attention to the recommendations
10 of the Desert Tortoise Recovery Team in the only desert
11 tortoise recovery plan that's been approved to date and
12 that's from June of 1994. The one that you've heard about
13 in 2008 I believe is a draft plan that's undergone some
14 level of scrutiny by the public and that plan has not been
15 finalized. So we are emphasizing the importance of
16 recognizing the '94 plan as the official plan that's been
17 signed off by the agencies.

18 So with regard to connectivity and a corridor or
19 width of habitat necessary to maintain connectivity, gene
20 flow, and population persistence across the landscape, what
21 we see here is that the Fish and Wildlife Service had a
22 number of recommendations and they talked about blocks of
23 large habitat as being essential rather than small,
24 postage-stamp reserves across the landscape, and I think
25 Scott made reference to that as well. Large reserves are

1 much more resilient than small reserves in maintaining
2 populations.

3 So the Fish and Wildlife Service recommendation
4 for recovery of the tortoise stated this. Connecting
5 habitat segments should be of medium to high quality and be
6 wide enough to accommodate several desert tortoise home
7 range widths in contrast to the recommendation in the paper
8 on Calico from the Service, 1.5, which equates to a distance
9 here they refer to as several miles in width.

10 They also state that maintaining linkages among
11 habitat patches within recovery areas and between recovery
12 areas is essential and will require the maintenance of
13 connecting segments of habitat that are at least marginally
14 acceptable to the desert tortoise.

15 My judgment is, is that the 1,100-acre exclusion
16 area was developed probably with good intentions in mind,
17 but I personally don't think that it's nearly adequate
18 enough to maintain and assure a high degree of connectivity
19 across the landscape and especially connectivity between the
20 Western Mojave, the Eastern Mojave, and the Northern
21 Colorado recovery areas.

22 The project site is basically at the convergence
23 of all three of those recovery units and to me, its
24 connectivity and its importance on the landscape has not
25 been adequately assessed and revealed in the documents.

1 MR. BASOFIN: Thank you, Mr. Aardahl. That's all
2 I have, and I will make him available for cross-examination.

3 Before I do that, I'd like to request that the Committee
4 take official notice of the 1994 U.S. Fish and Wildlife
5 Service Recovery Plan.

6 HEARING OFFICER KRAMER: Is there any objection to
7 that?

8 MS. GANNON: No objection.

9 HEARING OFFICER KRAMER: Can somebody provide us
10 an electronic copy of that?

11 MR. BASOFIN: Yes, I can docket one.

12 HEARING OFFICER KRAMER: Okay. Or at least
13 circulate it to us.

14 MR. BASOFIN: Sure.

15 HEARING OFFICER KRAMER: Okay. Thank you. Okay.
16 So we will take official notice of that document. Then we
17 begin with cross-examination of both witnesses with the
18 Applicant.

19 MS. GANNON: Thank you.

20 CROSS-EXAMINATION

21 BY MS. GANNON:

22 Q Mr. Cashen, just a couple of questions. You
23 raised several concerns about the lack of criteria that's
24 included in the desert tortoise compensatory mitigation and
25 one example you gave is that there's a need for there to be

1 large blocks of mitigation land -- should be large parcels;
2 is that correct?

3 MR. CASHEN: There needs to be large parcels.
4 There condition of certification itself I do not think
5 specified a parcel size.

6 MS. GANNON: That was one of your criticisms was
7 that it didn't necessarily provide -- the criteria was not
8 adequate to ensure that there was going to be large blocks
9 of compensation lands or that compensation lands would be
10 part of large blocks of good quality habitat; is that right?

11 MR. CASHEN: Yes.

12 MS. GANNON: So in looking at the criteria that is
13 included -- and I'm specifically referencing staff
14 assessment C.2-217, the selection criteria for lands and the
15 first criteria that is listed there is 1(a) again on page
16 217, Section C.2 -- says that the land in order for it to be
17 deemed adequate needs to meet all these criteria and in the
18 first criteria is that it's going to be within the Western
19 Mojave recovery unit with the potential to contribute to
20 desert tortoise habitat connectivity and to build linkages
21 between desert tortoise designated critical habitat, known
22 populations of desert tortoise and/or preserve lands. Does
23 that establish you think any criteria that's legitimate for
24 selecting the lands? Recognize it wouldn't be the only
25 criteria, but do you think that's a legitimate criteria that

1 should be considered?

2 MR. CASHEN: I think inclusion of the word
3 potential makes this criteria unenforceable and not have any
4 rigor whatsoever.

5 MS. GANNON: But that still, it would be a
6 laudable goal, right? This would be something you would say
7 would be important that the land should contribute to desert
8 tortoise habitat connectivity and build linkages. Those are
9 legitimate considerations when you're considering the
10 appropriate compensation lands?

11 MR. CASHEN: Yes.

12 MS. GANNON: And if you look down at (c) just for
13 another example, again this compensation land needs to be
14 near larger blocks of lands that are either already
15 protected or planned for protection or which could feasibly
16 protect long term by a public resource agency. Do you think
17 that's a legitimate criteria to be looking at and it's part
18 of a larger continuum of preserve lands?

19 MR. CASHEN: I think the intent is right.

20 MS. GANNON: Okay.

21 MR. CASHEN: Could feasibly be protected again
22 makes it unenforceable and meaningless.

23 MS. GANNON: Well, we can disagree about that, but
24 that's still the -- it's a reasonable criteria to be looking
25 at, that it's part of larger blocks of land; is that

1 correct? Thank you. I just wanted to get an understanding
2 of that.

3 The other question I had for you was with regard
4 to the documentation that you docketed this morning and
5 provided and referenced in your testimony which was relating
6 to the 2009 Ft. Irwin reports; is that correct?

7 MR. CASHEN: Yes.

8 MS. GANNON: And then you said that you were
9 confused why Ms. Miller's numbers were different than your
10 numbers about mortality?

11 MR. CASHEN: Yes.

12 MS. GANNON: And Ms. Miller testified that she was
13 talking about the 2008 survey, that it was I believe the
14 short-term first survey efforts in which 600 tortoises were
15 relocated. Does that address your confusion?

16 MR. CASHEN: No.

17 MS. GANNON: The fact that she was describing a
18 different year of surveys doesn't explain why the numbers
19 might be different?

20 MR. CASHEN: I would need more time to assess
21 that, but I searched through both the 2008 and 2009 reports
22 and I did not see those numbers.

23 MS. GANNON: But she was referencing a different
24 survey and all I have is that you talked to the 2009, but if
25 she was referencing a different survey, that would explain

1 the differences, right?

2 MR. CASHEN: It could. I looked in the 2008
3 report and those numbers were not in there.

4 MS. GANNON: And the 2008 report you were talking
5 about was the translocation of 600 tortoises?

6 MR. CASHEN: I would have to check those numbers.

7 MS. GANNON: Okay. That's all I have.

8 HEARING OFFICER KRAMER: Staff.

9 MS. GANNON: Mr. Aardahl, I just have one
10 question.

11 HEARING OFFICER KRAMER: Oh, sorry.

12 MS. GANNON: Can you -- I just want to make sure I
13 didn't -- I'm not sure that I understood exactly what you
14 were saying with regard to the value of the habitat in the
15 northern part of the area where the project has been pulled
16 down. Did you say that you thought there was a smaller
17 percentage of the tortoise found in that area than there
18 were in other parts of the site?

19 MR. AARDAHL: Um-hmm.

20 MS. GANNON: Are you aware that the survey results
21 in 2010 found 104 tortoises?

22 MR. AARDAHL: I am.

23 MS. GANNON: And that 47 of them were found in
24 this 4,000-foot --

25 MR. AARDAHL: I'm not aware of that. I've heard

1 that --

2 MS. GANNON: Okay.

3 MR. AARDAHL: -- reported and according to my work
4 on the Applicant's submitted data -- in fact on that map, I
5 believe it was Figure 2.6-1 that I was using. I think that
6 came from the supplemental staff assessment. I just did a
7 manual count of the number of animals in each of those units
8 according to the project schedule. My count was that there
9 were approximately 26 tortoises within the 1,100-acre area
10 and I think the rest of my breakdown is detailed in my
11 written testimony, but I -- I couldn't not find where the --
12 that higher number came from and of course then that led me
13 to reacting to the supplemental staff assessment, the
14 introduction on desert tortoise impacts where it identified
15 that 59 tortoises would be impacted by the project and that
16 contradicted my own understanding based on my analysis of
17 the location data for that 2010 survey.

18 MS. GANNON: But just going back to it. If your
19 manual count was not correct and the survey says they were
20 reported by those who conducted them was accurate and there
21 was 47 of the tortoises found in this area and 57 found in
22 the remainder of the site, would that change your view or
23 does that influence what you think about it?

24 MR. AARDAHL: I would have to -- to me that's -- I
25 have not seen any documentation other than the map of the

1 distribution of the tortoises during the 2010 survey and
2 manually counting each one of those in the 1,100 acres led
3 me to believe that there were 26 tortoises there not 49.

4 MS. GANNON: Okay. But -- so you can't even
5 answer the hypothetical.

6 MR. AARDAHL: I won't, no,

7 MS. GANNON: If it was true. Okay. But you think
8 that the number that was there was important enough for you
9 to go through this effort. That was a significant number to
10 you about how many were in that area?

11 MR. AARDAHL: What caught my attention immediately
12 in reading that supplemental staff assessment is that it
13 described the information on desert tortoises being provided
14 by the Applicant. So I went ahead and did the analysis of
15 the data because what caught my eye initially was the
16 statement that 59 tortoises would be directly affected by
17 the proposed project considering the 1,100-acre exclusion
18 zone from construction.

19 MS. GANNON: Okay. That's fine.

20 MR. AARDAHL: In my opinion, that was not
21 accurate.

22 MS. GANNON: Okay. No further questions. Thank
23 you.

24 HEARING OFFICER KRAMER: Staff, any questions?

25 MR. ADAMS: No cross-examination of the witnesses,

1 but the -- I'm not clear on whether we're turning back to
2 the government panel and if the Committee is inclined to put
3 questions to them as they arise. It might be informative to
4 ask Ms. Blackford or one of the Fish and Game witnesses
5 about the thinking that went into that reconfiguration of
6 the northern project boundary because I think the wildlife
7 agencies were involved in those discussions.

8 HEARING OFFICER KRAMER: Okay. Well, let's finish
9 with these witnesses first and then we'll consider doing
10 that.

11 MS. GANNON: Hearing Officer Kramer, there's one
12 question -- I'm sorry. There's just one clarification I
13 wanted to make. When you were referencing the 11,000 acres
14 pull-down --

15 MR. BASOFIN: Who are you addressing your question
16 to?

17 MS. GANNON: Mr. Aardahl.

18 MR. AARDAHL: 1,100-acre exclusion --

19 MS. GANNON: 1,100 acres.

20 MR. AARDAHL: Right.

21 MS. GANNON: Are you aware that the actual acreage
22 when we pulled back 4,000 feet is 2,000 acres? The original
23 reduction in the project was 1,100 acres, but then when it
24 was expanded to be 4,000 feet, it was 2,000 acres?

25 MR. AARDAHL: It's my understanding that from

1 reading the supplemental staff assessment and the SADEIS
2 documents that the 4,000-foot pull-down which actually is in
3 the full -- a complete 4,000 foot back-down because of the
4 terrain features, but that that equated to 1,100 acres of
5 exclusion that does not include the detention basins because
6 they were considered to be part of the project where habitat
7 would be lost.

8 MS. GANNON: Did you notice in the supplemental
9 staff assessment where they repeatedly refer to the original
10 project size as being already 200 acres and that the
11 proposed project site now is 6,200 acres and change?

12 MR. AARDAHL: Right. I'm aware of that.

13 MS. GANNON: Okay. All right.

14 MR. AARDAHL: Yeah. 6,250 plus the exclusion area
15 comes up to 8,250 I think.

16 MS. GANNON: It's a 2,000-acre difference.

17 MR. AARDAHL: I was led to believe in the analysis
18 that it was actually an 1,100-acre exclusion.

19 MS. GANNON: Okay. No further questions.

20 HEARING OFFICER KRAMER: And staff said they had
21 no questions of these witnesses. San Bernardino County?
22 None. The Sierra Club of Mr. Aardahl?

23 MS. SMITH: We have no questions.

24 HEARING OFFICER KRAMER: CURE?

25 MS. MILES: No, no questions at this time.

1 HEARING OFFICER KRAMER: Basin and Range Watch?
2 Okay. I heard no. Okay. The Society for Big Horn Sheep?

3 MR. THOMAS: No, we have no questions.

4 HEARING OFFICER KRAMER: Okay. And Defenders of
5 Wildlife, of Mr. Andre -- I'm sorry. Mr. Cashen?

6 MR. BASOFIN: I have no questions of Mr. Cashen.
7 Thank you.

8 HEARING OFFICER KRAMER: Okay. Burlington
9 Northern?

10 MR. LAMB: No questions, sir.

11 HEARING OFFICER KRAMER: No questions. Okay.
12 Then I think we can excuse this panel. Oh, did you have a
13 question of the panel or of the agencies?

14 PRESIDING MEMBER EGGERT: Well, I guess maybe just
15 a comment and a question.

16 MR. BASOFIN: I'm sorry to interrupt you,
17 Commissioner. Could I ask a question on redirect?

18 HEARING OFFICER KRAMER: Go ahead. Be brief
19 though.

20 MR. BASOFIN: Thank you.

21 REDIRECT EXAMINATION

22 BY MR. BASOFIN:

23 Q Mr. Aardahl, when you were looking at the maps
24 that you had referenced and giving your account of desert
25 tortoises on the various parts of the site, were you looking

1 at the most recent maps from the most recent surveys that
2 the Applicant had submitted?

3 MR. AARDAHL: I was looking at the maps provided
4 in the most recent documents that reflected the spring 2010
5 protocol level surveys of a hundred percent of the project
6 area.

7 MR. BASOFIN: So those are the spring 2010 surveys
8 and those are the most recent --

9 MR. AARDAHL: That's correct.

10 MR. BASOFIN: Those are the most recent surveys as
11 far as you know.

12 MR. AARDAHL: As far as I know.

13 MR. BASOFIN: Thank you.

14 HEARING OFFICER KRAMER: Commission Eggert.

15 PRESIDING MEMBER EGGERT: Sure. I guess at the
16 risk of pushing us even further into the evening hours, this
17 has been actually a good discussion and I think kind of from
18 what I'm hearing there's a couple of questions that have
19 emerged. One is the efficacy of translocation activities
20 and it sounds like there's been at least a change as I
21 understand it from the 2008 assessment and the 2009
22 assessment and if your numbers are correct, that the latest
23 evidence is that there is a pretty significant mortality
24 rate associated with the methodologies and the translocation
25 activities that they did for that particular move.

1 So I think -- you know, that is of interest trying
2 to understand to the extent that we are requiring these
3 translocations what sort of an effect they're actually going
4 to have on the population. So I don't actually have a
5 specific question on that other than just noting that point
6 and I guess if I'm misunderstanding that the change occurred
7 just because of an updated analysis, somebody please correct
8 me.

9 I guess the other one is that there appears to be
10 a difference of opinion on the usefulness or effectiveness
11 of the linkage and I guess maybe I'd like to take Mr. Adams
12 up at his suggestion to see if any of the federal agency
13 folks who might still be on the line might offer their
14 opinion or also perhaps, Mr. Huntley, you had provided some
15 opinion based on your assessment of how well that would
16 serve as a linkage. So maybe subsequent to the testimony
17 that you heard from Mr. Aardahl, I don't know if you have
18 any further thoughts on that.

19 MR. ADAMS: Steve Adams here. Is --
20 Ms. Blackford, are you still on the line?

21 MS. BLACKFORD: I am, sir.

22 MR. ADAMS: Would you be willing to explain the
23 project reconfiguration that has been talked about?

24 MS. BLACKFORD: I can describe the process that
25 resulted in the creation of the document that Mr. Aardahl

1 was referring to. Is that -- would that be suitable?

2 MR. ADAMS: Well, yeah, process to some extent,
3 but the -- in particular the rationale and what in the
4 agency's views was being gained with that reconfiguration
5 and I guess the adequacy of the resulting corridor or pull-
6 back area.

7 MS. BLACKFORD: Sure. Based on the original staff
8 assessment that came out, there was a desire by all entities
9 involved to address the potential to improve the movement of
10 tortoises to the north of the project. The Applicant and
11 all of the agencies and there were some suggestions by the
12 Applicant of a reconfiguration that pulled that northern
13 boundary down a distance, but I actually don't recall at
14 this time, and then that proposal was put forth to the REAT
15 team whereupon we went to the Desert Tortoise Recovery
16 Office and began discussing with them what the -- what we
17 thought the importance of this particular area was for the
18 recovery of the tortoise and maintaining connectivity and
19 what we thought would be a sufficient width to address that
20 if it was a concern.

21 And I think some folks have laid out clearly that
22 this particular area is -- does serve a very important
23 function for the connectivity between the Western Mojave
24 recovery unit, the Eastern Mojave recovery unit, and the
25 Colorado recovery unit and the Pisgah Valley is itself very

1 important for that -- for the movement of tortoises over the
2 long term to maintain that connectivity.

3 And so we were trying to determine what a -- what
4 would be the minimum amount of area as Mr. Aardahl pointed
5 out that would be necessary to provide live-in habitat that
6 would provide for that connectivity and linkage function.

7 And we looked at the topographic features in the
8 Cady Mountains and took a 20 percent -- folks have been
9 mentioning -- and looked at that line and -- or where that
10 slope line was. There are a couple topographic features
11 that are internal to that linkage area now that are greater
12 than the 20 percent slope if folks look at some of those
13 maps. However, there -- we felt that there was potential
14 for tortoise movement both in front of those and behind them
15 and they did not create a constriction to the point that
16 tortoise movement and connectivity could not be maintained.

17 So the REAT agencies returned after consulting
18 with the Desert Tortoise Recovery Office. Our proposal of
19 maintaining a 4,000-foot buffer from the 20 percent slope of
20 the Cady Mountains and the -- Tessera came back with -- you
21 know as Mr. Aardahl pointed out, it's not exactly a
22 4,000-foot buffer. It's a reshaping and configuration -- at
23 which time the agencies went out, the BLM and the Fish and
24 Wildlife Service, including the Desert Tortoise Recovery
25 Office, to attempt to ground truth their project boundary to

1 make sure there weren't any constriction points that we had
2 concern of that would prohibit connectivity. So that --

3 MR. ADAMS: Thank you. Oh, sorry.

4 MS. BLACKFORD: That's all right. I was going to
5 say does that answer your question? I think an important
6 point that Mr. Aardahl brought up is that that 4,000 foot
7 really is truly the minimum that we feel would be necessary.

8 PRESIDING MEMBER EGGERT: That's very helpful. I
9 don't know. Mr. Huntley, do you have any further thoughts?

10 MR. HUNTLEY: This is Chris Huntley. No, I don't.
11 We were part of the process in trying to evaluate the width
12 of that and in our staff assessment, we do conclude that it
13 would be adequate to provide passage and for live-in
14 dwellers, but we still document that it is a substantial hit
15 to desert tortoise in the region.

16 PRESIDING MEMBER EGGERT: And any comment on
17 Mr. Aardahl's point about washes and features that might
18 make movement difficult or --

19 MR. HUNTLEY: I think as we pointed out in the
20 staff analysis and as we previously discussed, there are
21 features in that area that do inhibit tortoise movement, but
22 as a whole, the area will still provide connectivity to east
23 and west locations, in staff's opinion.

24 PRESIDING MEMBER EGGERT: Okay. I think that's --
25 and then I guess since we're probably going to revisit --

1 well, we are going to revisit the translocation plan, I
2 think it would be interesting when we do just to get perhaps
3 a further update on what we know -- or revisit what we know
4 about how successful these past plans have been. Thanks.

5 MR. BASOFIN: Mr. Kramer, I'd like to ask a couple
6 questions of Ms. Blackford. I think she's now introduced
7 new direct testimony and I think in fairness the parties
8 ought to be able to ask her a few questions.

9 HEARING OFFICER KRAMER: That's fine. Go ahead.

10 MR. BASOFIN: Hi, Ms. Blackford.

11 MS. BLACKFORD: Hello.

12 MR. BASOFIN: Thank you for your testimony. You
13 had mentioned that there were some features in the
14 4,000-foot reduction area that exceeded the 20 percent
15 slope. That's something that a few expert witnesses have
16 commented on here today from both the Applicant and the
17 staff. I think we're trying to get a sense of, you know,
18 where those are and how many there are. Can you tell us
19 that?

20 MS. BLACKFORD: I can. I'm wondering -- I'm
21 pulling up the current map that on WebEx and you notice that
22 the detention basins are currently projecting higher than
23 the sun catcher boundary in the eastern portion of the
24 project, yes?

25 MR. BASOFIN: Right.

1 MS. BLACKFORD: Right. And so just east of that
2 large detention basin, you can see in the shading there that
3 there is a -- basically a rock outcropping. It's -- but
4 that is the -- the particular features that we did not do a
5 buffer around that are greater than 20 percent.

6 MR. RITCHIE: Excuse me, Mr. Kramer. This is
7 Travis Ritchie. I believe we have another photo that we
8 could put up of this area that may be able -- easier -- able
9 to illustrate this point.

10 MS. BLACKFORD: Sure.

11 HEARING OFFICER KRAMER: Okay. First of all,
12 what's been on the screen for a while is Biological
13 Resources Figure 3 from the supplemental staff assessment,
14 correct?

15 MS. BLACKFORD: Correct.

16 MR. RITCHIE: That's correct.

17 HEARING OFFICER KRAMER: Okay. And when you refer
18 to detention basins, were you speaking of the shaded areas?

19 MS. BLACKFORD: No. That is the Not A Part area.

20 HEARING OFFICER KRAMER: Right.

21 MS. BLACKFORD: The detention basins are the
22 northernmost strip of the eastern edge of the project.
23 They're -- it's highlighted all in red. It's part of phase
24 one and it extends that -- that narrow strip extends up into
25 that widened portion and then again narrows down. That's

1 the current proposal's detention basin.

2 HEARING OFFICER KRAMER: Okay. Thank you for
3 clarifying that. Okay. So let's move onto the next slide
4 then.

5 MR. RITCHIE: If we could have Slide No. 2 please
6 on that same file.

7 MS. BLACKFORD: All right. Then you currently can
8 see below the letter C the red project boundary line that
9 extends to the south and the dark formations that are just
10 to the west of that. Those are the topographic features of
11 which I was speaking.

12 But you can see that behind those features there's
13 a large amount of wash area that extends -- I think, you
14 know, we've discussed that the exclusion portion and the
15 project reduction, but there's actually habitat that extends
16 also up into the Cady Mountains where we do anticipate that
17 you're getting that north-south movement up and down those
18 washes and then the east-west movement across.

19 MR. BASOFIN: Thank you. So just to clarify,
20 the -- and the detention basins there, there wouldn't be an
21 ability for tortoises to move in an east-west motion; is
22 that correct?

23 MS. BLACKFORD: Correct. Detention basins are --
24 the current proposal is that there will be desert tortoise
25 exclusion fence around the entire project inclusive of the

1 detention basins.

2 MR. BASOFIN: Right. And you also testified that
3 tortoises are moving mostly in the north -- south to north
4 fashion; is that right?

5 MS. BLACKFORD: Oh, no. I wasn't saying that they
6 mostly moved in the north-south direction. I'm just saying
7 that the linkage area as it has been referred to, that
8 exclusion, the 4,000-foot area that in addition to that,
9 that's from the toe slope of the Cady. There is additional
10 north-south movement of available to tortoises in those
11 features around the mountains. Is that more clear?

12 MR. BASOFIN: Yes. Thank you.

13 MS. BLACKFORD: Okay.

14 MR. BASOFIN: And just one more question. In
15 considering the necessary size of that reduction to
16 facilitate movement in the northern portion of the site, did
17 you consider the recommendations in the desert tortoise
18 recovery plan?

19 MS. BLACKFORD: I worked with the Desert Tortoise
20 Recovery Office and I trust their expertise in working
21 through this.

22 MR. BASOFIN: Thank you. That's it.

23 MR. RITCHIE: And, Mr. Kramer, this is Travis
24 Ritchie. If I may elaborate on this image that we're seeing
25 right now a little bit and --

1 HEARING OFFICER KRAMER: Go ahead.

2 MR. RITCHIE: So I'd like to ask Mr. Cashen about
3 this image and this is labeled as Sierra Club Exhibit
4 No. 1020. If we can -- I can distribute this image to the
5 Service list. We did not have this in time for our -- the
6 prehearing conference statement. However, it's essentially
7 a more clear version of various other maps that have been
8 introduced.

9 Mr. Cashen, are you familiar with this map?

10 MR. CASHEN: Yes.

11 MR. RITCHIE: And what does the green line
12 indicate that's moving across the map?

13 MR. CASHEN: The green line is supposed to
14 represent the 4,000-foot corridor as depicted by the
15 Applicant. This green line came right out of the
16 Applicant's documents.

17 MR. RITCHIE: And then of course the red line
18 would also depict the modified project version. So this is
19 the boundary of the project as it's being considered today,
20 correct?

21 MR. CASHEN: Well, one of the intents of
22 generating this map was that I did not think it was clear to
23 everyone that there will not be 4,000 feet between the
24 project fence and these features that will limit tortoise
25 movement, the rock features. And that was -- there's been a

1 lot of talk about how there's a 4,000-foot corridor, but
2 there is not a 4,000-foot corridor.

3 We measured several points and these are shown by
4 the letters A through G on this map and we measured the
5 distance from the project fence to large rock outcroppings
6 or -- yeah, large outcroppings that tortoises would not
7 be -- that tortoises have to go around and what this shows
8 is that there are several bottlenecks and those bottlenecks
9 are as narrow as approximately 2,400 feet.

10 MR. RITCHIE: Thank you.

11 MS. GANNON: Hearing Officer Kramer, I have
12 question about this. First off, what witness is sponsoring
13 this exhibit so I can ask questions? It's a Sierra Club
14 exhibit; is that correct?

15 MR. RITCHIE: It is a Sierra Club exhibit.

16 MS. GANNON: So who is sponsoring it that I could
17 ask some questions. I just -- we have never seen an image
18 like this before and I'm having trouble reconciling with
19 what we know it to be on the site.

20 MS. MILES: Sierra Club and CURE worked together
21 in preparing Scott Cashen with regard to the testimony and
22 so Scott Cashen is the expert to direct your question to.

23 MS. GANNON: So he's the one who prepared this?

24 MS. MILES: Yes.

25 MS. GANNON: So where did you get this -- the base

1 that these -- the figure is placed upon?

2 MR. CASHEN: This is a Google Earth image.

3 MS. GANNON: And you lined up the project
4 boundaries according to what? When you were overlaying
5 them, you had a GIF -- how did you do that on this Google
6 Earth image?

7 MR. CASHEN: Well, what might help is that this
8 map is really sort of irrelevant. There's a map that was
9 produced by the Applicant that shows --

10 MS. GANNON: Can we look at that one?

11 MR. CASHEN: Sure.

12 MS. GANNON: I mean I would object to admitting
13 this into evidence. It just does not look -- it looks
14 skewed. The closeness to the mountains and the project
15 site, it does not -- it just doesn't look accurate to us.

16 MR. RITCHIE: We'd be happy to show another map
17 that is a little more convoluted, but I believe shows the
18 same boundary problems.

19 MS. GANNON: Well, if you show an Applicant's map,
20 we would be happy --

21 MR. RITCHIE: The Applicant -- if we could do to
22 Slide No. 13.

23 MS. GANNON: This looks accurate. Absolutely.
24 Yes.

25 MR. RITCHIE: This is a map you're familiar with.

1 MS. GANNON: And this is right, yes.

2 MR. RITCHIE: And this I believe was provided by
3 the Applicant --

4 MS. GANNON: Right.

5 MR. RITCHIE: -- and it shows the same green line
6 with the 4,000-foot corridor.

7 MS. GANNON: And it shows mountains much higher.

8 MR. RITCHIE: And it shows the same points of the
9 project boundary on the other side of that green line within
10 that 4,000-foot corridor which --

11 MS. GANNON: Yes.

12 MR. RITCHIE: -- I believe correspond to the other
13 map that we just had up on the screen.

14 MS. GANNON: This looks accurate to me. So we'd
15 be happy to discuss this -- any future discussions about
16 this point, we would prefer to use this map.

17 HEARING OFFICER KRAMER: And what's the source?

18 MS. GANNON: This is --

19 MR. RITCHIE: This is the alternative project
20 layout. I believe the Applicant provided a letter around
21 June something.

22 MS. GANNON: We can find it. I believe it's in
23 the SSA as well.

24 MR. CASHEN: I'm not willing to stipulate to the
25 accuracy of this map.

1 HEARING OFFICER KRAMER: Okay. Well, I'm just
2 trying to get an exhibit number so when I go to read the
3 transcript I can pull this thing up again. It's sort of
4 important to me.

5 MS. MILES: This is -- well, I know it's Figure 2
6 in the project. It's called Project Description Figure 2
7 and it's at the end of the proposed project section in the
8 supplemental staff assessment.

9 HEARING OFFICER KRAMER: Oh. Okay. Let me find
10 that.

11 MS. MILES: It's at the end of the B.1 chapter.

12 HEARING OFFICER KRAMER: Okay. Project
13 Description Figure 2 in the supplemental staff assessment
14 which is Exhibit 300. Did you have more questions?

15 MS. GANNON: No. We were just -- I -- we were
16 just confused by that image and wanted to raise the point.

17 (Pause)

18 HEARING OFFICER KRAMER: All right. I'm a bit
19 lost about where we are right now, but any more questions or
20 points to be made about this --

21 MR. RITCHIE: I guess I can try and sum this up.
22 Mr. Cashen, whatever map you look at, is it clear that
23 actual project boundary is not 4,000 feet from the base of
24 the Cady Mountains at every point?

25 MR. CASHEN: It's clear to me and I think one of

1 the other points that -- one of the other reason that I --
2 we had had that Google Earth image is if you look at
3 Biological Resources Figure 3 in the supplemental staff
4 assessment -- and I'll give people time to turn to that if
5 they'd like -- you can see these rock outcrops that were not
6 mapped on the map that we're looking on the screen right
7 now. I'd be happy to point those out if you'd like. That's
8 why I thought the Google Earth image was more effective.

9 HEARING OFFICER KRAMER: Okay. Well, your point
10 is that you believe it points the corridor is less wide than
11 4,000 feet. Now, does that mean that no tortoise will pass
12 there before they have a 4,000 foot standard or does it just
13 affect the value of the corridor in some way in your mind.
14 Does it reduce the effectiveness of the corridor but not to
15 zero?

16 MR. CASHEN: It definitely reduces the
17 effectiveness of the corridor. It means that there's more
18 edge effects that tortoises will be associated with in that
19 bottleneck and I have not seen any data that has convinced
20 me that this -- there will remain a viable corridor along
21 the northern project boundary.

22 HEARING OFFICER KRAMER: Okay. What's an edge
23 effect every so briefly?

24 MR. CASHEN: It's a change in the phenomenon that
25 occur when you have a distinct boundary between two

1 different habitat types and in this case, it would be the
2 project development and the remaining desert. And these are
3 things that were addressed in the supplemental staff
4 assessment and they include things like shading and weeds
5 and heightened predator populations.

6 HEARING OFFICER KRAMER: Okay. Mr. Otahal, you
7 seem to want to say something?

8 MR. OTAHAL: This particular discrepancy, let's
9 call it, was analyzed in discussions with BLM, Fish and
10 Wildlife, Fish and Game, and also the Desert Tortoise
11 Recovery Office. We realize that strictly speaking we did
12 not take a measuring tape and say that there are 4,000 feet
13 everywhere. Part of this is because we needed to snap these
14 two lines because we cannot make little squiggles on a map
15 and try to maintain that in the field. That's just
16 impossible.

17 So what we did is we looked at and said yeah,
18 there are a couple places where this does -- or a few that
19 it does intrude on that 4,000 feet, but it was not enough to
20 cause a barrier that would create, you know, any kind of
21 reduction in movement. So this was something that we did
22 look at closely and we do understand that we did not have a
23 measuring tape out there.

24 HEARING OFFICER KRAMER: So is it fair to say you
25 do not share Mr. Cashen's concern that it significantly

1 reduces the value of the corridor?

2 MR. OTAHAL: No, I do not agree.

3 HEARING OFFICER KRAMER: Okay. I think we've --
4 it sounds like we've achieved --

5 MR. OTAHAL: Yeah. The second thing that they
6 brought up was north-south movement and I would actually
7 like to add a little bit to that because we did consider
8 that as well.

9 HEARING OFFICER KRAMER: Okay. If you could share
10 your thoughts on that.

11 MR. OTAHAL: If you go back to the figure that you
12 had previous that shows the entire project and it had the
13 Not A Parts there --

14 MR. RITCHIE: Wait. I believe that was Slide 8 is
15 what we were on that was Biological Resources Figure 3 in
16 the SSA. The mapping of the --

17 HEARING OFFICER KRAMER: Slide 8?

18 MR. OTAHAL: Yes.

19 HEARING OFFICER KRAMER: Can you give us Slide 8,
20 Keno?

21 MR. OTAHAL: Yeah. In this particular map, it
22 doesn't show the features that I would like. I would
23 actually like the one that shows the culverts, but I can at
24 least explain visually where the culverts are because one of
25 the analyses that we did to look at north-south movement is

1 to look at the culverts and the bridge crossings both going
2 under the freeway and also under the railroad.

3 And unfortunately this doesn't show those
4 culverts, but to the east where you get into the Pisgah ACEC
5 where you see the railroad and the freeway crossing, you
6 kind of see a little cross there in the lower left-hand --
7 lower right-hand corner, that is actually where there is a
8 large number of culverts that are being provided and we've
9 concluded that that could produce some of that north-south
10 movement corridor connection there.

11 Also if you look at that Not A Part that's between
12 the two pieces of the project, you see the -- to the -- on
13 the eastern side, the little island of the project --

14 HEARING OFFICER KRAMER: Pretty much in the middle
15 of the frame?

16 MR. OTAHAL: Yes. Basically the eastern Not A
17 Part, that -- you see the shaded area?

18 HEARING OFFICER KRAMER: Right.

19 MR. OTAHAL: That is also another concentration of
20 culverts underneath the freeway and that we concluded -- and
21 this was in discussions with the other agencies as well, but
22 I'll speak at least to myself. That is also another
23 concentration of culverts. So we did look at north-south
24 movement and I think we did a pretty good job of trying to
25 maintain as much as we had and also it does need to be

1 recognized that it is a very limited north-south movement.
2 It's very restricted at this point already. It's not nearly
3 as important as the east to west.

4 HEARING OFFICER KRAMER: All right. You said the
5 eastern Not A Part, but that one is completely fenced off to
6 the north. So did you mean the western one?

7 MR. OTAHAL: I'm sorry. Yes, the western one.
8 I'm sorry.

9 HEARING OFFICER KRAMER: Okay. Ms. White had a
10 question.

11 MS. WHITE: Just a point of clarification. So
12 when you were looking at the northernmost portion that --
13 the section that's captured by the purple on the north and
14 the red on the south, did you take into consideration
15 density and whether or not -- if you were to relocate those
16 tortoises to the nearest possible area and increase that
17 density, do you get the same -- did you agree that that was
18 going to be sufficient of connectivity if you increase the
19 population moving within that?

20 MR. OTAHAL: Yeah. One of the things that we have
21 done is in the translocation plan, we have different groups
22 of animals, some that will be moved shorter distances and
23 some that will be moved longer distances. And in that
24 particular linkage, we have a certain maximum number of
25 animals that we have calculated to be acceptable in that

1 linkage, and what we base that on is the number of
2 animals -- the density that is in I believe it's the DWMA
3 that's -- the Ord-Rodman I believe is what we used as the
4 base.

5 And we said that in the linkage we could increase
6 the number up to 20 percent I believe of that background
7 number. So --

8 MS. BLACKFORD: I'm sorry. This is Ashleigh from
9 the Service. Chris has got a couple numbers messed up and
10 so I just want to be able to clarify that at the end.

11 MR. OTAHAL: Okay. That's good. Yeah. Go ahead
12 and catch me if I have the numbers wrong. I don't have them
13 in front of me.

14 But we did set an upper limit on the number of
15 animals that we could move into the linkage area and the
16 reason would be moved long distance into the Ord-Rodman
17 DWMA. And the reason that we want to move as many animals
18 as show a distance as possible is that we want to try to
19 keep them within their home range and not move them a
20 greater distance than we need to.

21 HEARING OFFICER KRAMER: Ms. Blackford, did you
22 want to clarify then?

23 MS. BLACKFORD: Yes. I mean to support what Chris
24 is saying that, yes, we did indeed take density in that
25 linkage area into consideration. It was not the Ord-Rodman

1 DWMA that we used as a base for that -- a baseline density.

2 It's actually an average of the West Mojave recovery unit
3 which is 4.7 desert tortoise per kilometer squared and the
4 8,230 I believe project site density which was 5.29 desert
5 tortoise per kilometer squared, so a baseline of 5 for that
6 corridor area.

7 We do recognize that because it is a more
8 constricted area that we do not want to put additional
9 strain on that. So the agencies agreed that a 10 percent
10 increase would be appropriate for that area, keeping in mind
11 that the goal of that was to move the tortoises whose
12 territories were probably overlapping the project to allow
13 them to maintain their home range and not be transferred
14 outside of the valley altogether.

15 MS. WHITE: Okay. So following up on that,
16 looking at the number of tortoise that could be below those
17 -- the top red line, that's a significantly larger number
18 than the 10 percent that could move above that line. So
19 where would those go?

20 MR. OTAHAL: Those animals go over to the
21 Ord-Rodman translocation receiver area that we already have
22 identified.

23 MS. BLACKFORD: This is Ashleigh with the Service
24 again. Or depending on the density of the receptor location
25 in the Pisgah ACEC to the east, some of those individuals

1 may be moved to the Pisgah ACEC.

2 HEARING OFFICER KRAMER: Okay.

3 MS. BLACKFORD: And that is outlined in the
4 translocation plan I believe. I'd also just like to say at
5 this point, I know everyone is planning on reviewing the
6 plan that was docketed and that is still a draft plan.

7 HEARING OFFICER KRAMER: Okay. Thank you.

8 MR. RITCHIE: Mr. Kramer, can I address one more
9 point on this with another map? We spoke to connectivity
10 here and this map goes directly to that issue and --

11 HEARING OFFICER KRAMER: Okay. And then we're
12 going to move on.

13 MR. RITCHIE: And then we're going to move on. If
14 I could please have Slide No. 10 and what I'm pulling up now
15 is Biological Resources Figure 8 from the SSA.

16 HEARING OFFICER KRAMER: Exhibit 300.

17 MR. RITCHIE: Now, I'm sorry, sir. I forgot your
18 name.

19 MR. OTAHAL: Oh, Chris Otahal.

20 MR. RITCHIE: Chris Otahal. Mr. Otahal, I
21 apologize for that.

22 MR. OTAHAL: Sure. No problem. That's Figure 8.

23 MR. RITCHIE: So would you agree then, is this the
24 more -- a more zoomed out picture of essentially the same
25 project boundaries that we were talking about?

1 MR. OTAHAL: Yes, it is.

2 MR. RITCHIE: And that area to the southwest of
3 the yellow is the project area, correct?

4 MR. OTAHAL: Correct.

5 MR. RITCHIE: And the area to the southwest is the
6 Ord-Rodman critical habitat, correct?

7 MR. OTAHAL: Correct.

8 MR. RITCHIE: Now, you had stated before that you
9 believe there would still be north-south connectivity based
10 around the eastern side of the project. Based on this, does
11 it --

12 MR. OTAHAL: Yeah. I'm sorry. It would be on the
13 western side of the project. So it's between the two --
14 it's between the larger yellow project and the small island
15 of yellow.

16 MR. RITCHIE: Okay. That was one portion where
17 you identified it.

18 MR. OTAHAL: Correct.

19 MR. RITCHIE: I believe you identified another
20 portion where the railroad and I-40 crossed --

21 MR. OTAHAL: Yes.

22 MR. RITCHIE: -- as being another area of
23 connectivity. Now, based on this, the red outlines appear
24 to be locations for future foreseeable projects, correct?

25 MR. OTAHAL: That is where we may have future

1 applications; that's correct.

2 MR. RITCHIE: Would that potentially disrupt the
3 north-south connectivity if there was a block there?

4 MR. OTAHAL: It could, yes, but that would be
5 considered in any other future analysis of those projects.

6 MR. RITCHIE: Thank you. No other questions.

7 HEARING OFFICER KRAMER: Okay. Thank you. Let's
8 move on to the other non-plant species.

9 MS. GANNON: Could we take a five-minute break?

10 HEARING OFFICER KRAMER: I'm okay with that.

11 Any -- no. I'm going to overrule any objections. Let's
12 come back at 4:00 o'clock.

13 MS. GANNON: Thank you.

14 (Off the record.)

15 HEARING OFFICER KRAMER: And I think we can excuse
16 the -- well, release from the hot seat for the moment the
17 witnesses from the desert tortoise panel and we're going to
18 go on to the other species who are not desert tortoise or
19 plants. And we'll have the Applicant's witness first.

20 MR. ADAMS: Hearing Officer Kramer, this is Steve
21 Adams. I was wondering if we could take a minute to check
22 on the government panelists and I am concerned we may start
23 losing them and we've thought of two areas that might --
24 actually in this next section, other animals, that it might
25 be helpful to hear from them on before they have to go. And

1 I can identify those people in areas if that would help.

2 HEARING OFFICER KRAMER: Go ahead.

3 MR. ADAMS: Well, one is on the issue of golden
4 eagle jurisdiction as the Fish and Wildlife Service and that
5 would be of course Ms. Blackford. The other was a couple of
6 the intervenor witnesses have questioned consistency of this
7 project with the West Mojave plan and I think it'd be
8 helpful to hear from Chris Otahal on that issue.

9 HEARING OFFICER KRAMER: Okay. Mr. Otahal, are
10 you immediate danger of having to leave us?

11 MR. OTAHAL: No. I'm for the duration.

12 HEARING OFFICER KRAMER: Okay. Ms. Blackford, how
13 much longer do you have?

14 MS. BLACKFORD: You have me until 5:15.

15 HEARING OFFICER KRAMER: Okay. Well, I'm pretty
16 sure the Applicant's witness won't take that long, so why
17 don't we go ahead with the normal order with the Applicant's
18 witness. Then we'll have the staff panel which will include
19 the agency representatives and then the a panel from the
20 intervenors. So --

21 MS. GANNON: The Applicant calls Dr. Patrick Mock.

22 HEARING OFFICER KRAMER: Okay. And Dr. Mock, you
23 were previously sworn, so please proceed.

24 DIRECT EXAMINATION

25 BY MS. GANNON:

1 Q Dr. Mock, are you the same Patrick Mock who has
2 presented testimony in this proceedings marked as Exhibit 73
3 and 87?

4 DR. MOCK: Yes, I am.

5 MS. GANNON: And we've gone over your resume
6 earlier today. With regard to the testimony included in
7 those two exhibits regarding what we're calling other
8 species -- other wildlife species, do you have any
9 corrections or additions to make to your testimony?

10 DR. MOCK: I do not.

11 MS. GANNON: Thank you. Turning first to your
12 overall view of the analysis included in the supplemental
13 staff assessment, can you give us just a brief summary of
14 your view of that analysis?

15 DR. MOCK: Generally we agree with it. I think
16 the main issue of concern at least from a CEQA perspective
17 is their conclusion that there is unmitigable cumulative
18 impacts to the Mojave fringe toed lizard. Given the amount
19 of habitat that's being lost and its context in the
20 landscape as well as the extensive amount of habitat
21 conservation that BLM and Park Service has accomplished to
22 date and are likely to continue with in the future, at least
23 from a local -- a regional perspective, we don't agree with
24 that conclusion.

25 MS. GANNON: And turning to your basis for your

1 disagreement in the staff -- supplemental staff assessment,
2 it notes that there was a fairly major diversion of
3 assessments about the amount of habitat that is found on the
4 site from the Applicant's original calculations to the
5 staff's calculations. Can you speak to that?

6 DR. MOCK: I don't think it was that big of a
7 diversion. I mean we allocated slightly under 17 acres of
8 core or typical habitat which as everyone would agree was
9 lizard habitat and they have evidently found maybe four or
10 five additional acres. I haven't had a chance to look at
11 their figures. They hadn't been provided to me when I asked
12 for them, so I have yet to see that figure that references
13 their current distribution of their figure -- of the
14 habitat.

15 But still it only added another four acres of core
16 habitat and then they added a 45-foot -- a 45-meter buffer
17 to those patches to get to the acreage that they have and
18 that -- those patches are basically habitat that might be
19 used by the species, but I don't think we have any reliable
20 information that they actually are used, and so it was a
21 very conservative assessment in terms of the area that might
22 be used by the fringe toed lizard.

23 MS. GANNON: So the 106 -- was it 106 acres?

24 DR. MOCK: 143 acres.

25 MS. GANNON: 143 acres. That includes both the

1 core habitat and then the buffer or the areas around it --

2 DR. MOCK: It was 21 point something acres of core
3 habitat and then they put that 45-meter buffer around that
4 habitat to get to the grand total that they achieved.

5 MS. GANNON: And do you agree that that buffer
6 could occasionally be used by the Mojave fringe toed lizard?

7 DR. MOCK: They cited a study that justified their
8 conclusions and I don't dispute it.

9 MS. GANNON: And in looking at the level of impact
10 to this species, how would you evaluate the project's
11 impact?

12 DR. MOCK: It's minor. 22 acres of core habitat
13 is 22 acres and it's -- but the location is important. It's
14 in between the highway and the railroad, so it's somewhat
15 isolated already. Just like we were claiming the habitat
16 was isolated for tortoise, this would be the same.
17 Basically the railroad is -- acts as a barrier between the
18 patch of occupied habitat and the habitat in the ACEC that's
19 already been conserved. So there's a filter at a minimum.
20 The lizards would have to go underneath the trestles to
21 access -- to go between these patches. And so that's going
22 to limit the movement of individuals between that patch and
23 the nearest patch in the ACEC.

24 MS. GANNON: And so in your view is the impact to
25 the lizard really limited to the loss of the habitat?

1 DR. MOCK: That was my -- my conclusion was, you
2 know, it's occupied habitat, it should be mitigated for
3 because it's a BLM sensitive species. It's consistent with
4 the West Mojave Plan that it should be mitigated for. But
5 to say that there's a cumulative, unmitigated impact for
6 this such a small amount of acreage flies in the face that
7 that's not consistent with the conclusions of the EIS for
8 the West Mojave Plan. And the amount of conservation in the
9 general vicinity is really, really large. It's on the order
10 of 57,000 acres of area that is known to support habitat for
11 the species.

12 MS. GANNON: That 57,000 acres is currently
13 preserved areas?

14 DR. MOCK: Yes. Either in an ACEC wilderness area
15 or in national park lands that are managed for that purpose.

16 MS. GANNON: And is it your opinion that in
17 assessing the cumulative impacts that number should have
18 been taken into consideration?

19 DR. MOCK: Yes. The level of risk in the
20 immediate vicinity of the project is low. So we are not
21 going to see an extirpation of that because of -- on a
22 cumulative scale.

23 MS. GANNON: Thank you. And I would note that the
24 applicant has submitted proposed revisions to the condition
25 relating to the Fringe-Toed Lizard mitigation, which largely

1 relates to the monetary calculations, which is similar to
2 that to which Ms. Bellows described with regard to Condition
3 10. I don't think there is any reason for us to go into
4 that in detail unless the Committee would like to hear it
5 again. But we'd propose that we discuss that at the
6 workshop. Hearing no desire to hear it again we will move
7 on.

8 BY MS. GANNON:

9 Q So just briefly, Dr. Mock. With regards to the
10 other species that are discussed in detail in the
11 Supplemental Staff Assessment, specifically the Bighorn
12 Sheep, the Burrowing Owl, the Golden Eagle, the Desert Kit
13 Fox, the American Badger. Are you generally in concurrence
14 with the staff's assessments and their conclusions?

15 DR. MOCK: Yes, generally we agree with them, they
16 seem to be reasonable. I'm checking my notes here to see if
17 there was anything specific that would have been contrary to
18 that conclusion.

19 MS. GANNON: The applicant --

20 DR. MOCK: I believe, I believe we're consistent,
21 we agree with their conclusions on those species.

22 MS. GANNON: The applicant has submitted a request
23 to change or amend several of the conditions. Are you
24 familiar with those proposed revisions, Dr. Mock?

25 DR. MOCK: I tried to remember, yes.

1 MS. GANNON: Well I can walk you through them.

2 DR. MOCK: Yes, prompt me, please.

3 MS. GANNON: This is Attachment A, again, to
4 Exhibit 82. And we have gone over some of the changes
5 already and I won't go back to those that we discussed with
6 staff earlier. And we will not discuss the plant species
7 yet.

8 But with regard to -- if you can turn to Bio 21,
9 which is related to the Burrowing Owl mitigation. I'll give
10 you a minute to find that.

11 DR. MOCK: I'm not sure whether I have that in
12 front of me. Can someone --

13 MS. GANNON: Can you describe -- you don't have it
14 in front of you?

15 DR. MOCK: I don't have it in front of me. Yes,
16 okay.

17 MS. GANNON: Can you describe the basis for the
18 proposed changes.

19 DR. MOCK: I think this is in regard to the
20 addition of the change in this condition that was made
21 during going from the Draft to the SSA was they added an
22 additional compensation requirement, of habitat compensation
23 requirement for the burrowing owl. And we felt that that
24 was not appropriate because of its status and it's current
25 level of risk is not as severe to justify that.

1 We are doing the appropriate removal from the site
2 so there won't be any incidental take of the species as
3 defined under state law, which is prevailing regs for this
4 species. And we're providing the artificial burrows just
5 off-site to compensate for loss of burrow habitat on-site.

6 MS. GANNON: I know that would probably occur in
7 the ACEC, is that correct?

8 DR. MOCK: The ACEC and the Odwalla Corridor area.
9 We have identified five locations, we'll use at least four
10 of them to build the artificial burrows.

11 MS. GANNON: And you reference the fact that this
12 condition changed between the Staff Assessment and the
13 Supplemental Staff Assessment. Did the impacts to the
14 species change as well between the Staff Assessment and the
15 Supplemental Staff Assessment?

16 DR. MOCK: Oh yes. The actual sighting, most of
17 the sightings of the own occur in the area that got excluded
18 due to the wildlife movement corridor area. And so the
19 actual direct impacts to at least occupied habitat is
20 diminished and the number of territories affected is
21 probably cut in half.

22 MS. GANNON: Thank you. That ends my direct
23 testimony, he is available for cross examination.

24 HEARING OFFICER KRAMER: Let me just ask instead
25 which parties wish to ask some questions. Basin then Range

1 Watch, go ahead.

2 Gloria, your purse is on the cable.

3 MR. EMMERICH: I got it, it's fine.

4 CROSS EXAMINATION

5 #####BY MR. EMMERICH:

6 Q Okay. For the Mojave Fringe-Toed Lizard I just
7 have a few questions. First of all I'd like to know, you
8 based all the numbers for the Mojave Fringe-Toed Lizard on
9 what kind of survey? Was it just a present/absent survey?
10 For Dr. Mock.

11 DR. MOCK: Yes. We had identified the suitable
12 habitat on site that we considered suitable for --

13 MR. EMMERICH: Can you say why you didn't want to
14 --

15 DR. MOCK: Suitable --

16 MR. EMMERICH: Oh, I'm sorry.

17 DR. MOCK: Suitable at the time. And we did a
18 presence/ absence survey to confirm that it was occupied.
19 All the habitat patches we surveyed were deemed occupied.

20 MR. EMMERICH: Okay. And why didn't you do
21 mark/recapture surveys or any other types of surveys?

22 DR. MOCK: That was not requested of us, the BLM
23 specifically requested presence/absence surveys.

24 MR. EMMERICH: Do you think you would have gotten
25 a more accurate number if you did a different type of

1 survey?

2 DR. MOCK: We would have gotten an idea of
3 relative occupation over the acreage that we surveyed.

4 MR. EMMERICH: Yeah, or like even just a better
5 population estimate.

6 DR. MOCK: Well that wasn't the point of the
7 presence/absence survey, it was to determine occupation of a
8 patch of habitat. And since every patch we checked was
9 occupied we deemed it all occupied and reported it as such.

10 MR. EMMERICH: Okay. Do you think that -- are you
11 sure that -- what do you think the barrier of Highway 40 is
12 to these lizards? Does it completely block off their
13 connectivity to the south?

14 DR. MOCK: It really depends on the structure of
15 the culvert and whether it's sandy on both sides. If the
16 culverts are perched in some way on either side due to
17 erosion after major flood events than at least during those,
18 under those conditions you might have a blockage just due to
19 them unable to access the culvert. But assuming the
20 culverts are functional and have sandy or easy ramping up to
21 the entrance to the culvert. They might use the culverts if
22 they don't mind going down a dark tube or a box culvert that
23 may or may not support sandy bottom habitat.

24 MR. EMMERICH: What in your view are the chances
25 that lizards could cross the highway itself?

1 DR. MOCK: Well the highway maybe. It really
2 depends on how Caltrans has maintained the verge, the road
3 verges there and whether that is suitable for their use. I
4 am more concerned about it was the northern movement from
5 the patch to the ACEC where the patches of occupied habitat
6 were identified in our surveys. I felt that the way the
7 railroad is constructed was more of a barrier and they'd
8 have to go under the trestles and so it was more of a filter
9 in that regard as well.

10 MR. EMMERICH: Okay. Given that railroad and the
11 highway I'm wondering what do you think this population, how
12 does it maintain its connectivity? Do you have any opinions
13 on where the lizards come from, where they go to and how
14 they maintain that connectivity flow?

15 DR. MOCK: I'm sure it's a fairly rare event but
16 it does occur occasionally that you get some individuals
17 moving from one patch to the other. The rate of flow would
18 be the determining factor for maintaining any occupied
19 patch. Since we found all the patches occupied that would
20 indicate that there's some movement to some degree. And
21 whether the patch that is being lost is productive enough to
22 exchange individuals or they are just accepting individuals
23 from the more productive habitat or presumably the more
24 productive habitat in the larger landscape to the north is
25 unclear and we can't determine.

1 MR. EMMERICH: Do you think the reconfigured or
2 the reduced acreage alternative would have any benefits for
3 Fringe-Toed Lizard?

4 DR. MOCK: Well certainly it provides a movement
5 corridor, like any other wildlife species that could use
6 that habitat. Obviously the Fringe-Toed has to go through
7 non-dune habitat to get to patches of dunes that are
8 disjunct from one another and so presumably they are capable
9 of using the Creosote Bush Scrub habitat that's intervening
10 between occupied patches.

11 MR. EMMERICH: Are there any sandy habitats in
12 that area of the reduced acreage that's not going to be
13 built on that would support Mojave Fringe-Toed Lizard?

14 DR. MOCK: After build-out, you mean?

15 MR. EMMERICH: Right.

16 DR. MOCK: Certainly the patch that's occupied.
17 It's going to be used for sun catchers and so there might be
18 some remnant population left after the project is built out.

19 But whether they are -- would sustain themselves through
20 time is unknown so the worst case scenario is it's a loss.
21 That wa the staff's assessment, that it was assumed to be
22 lost.

23 MR. EMMERICH: What about as it stands now? Is
24 there any habitat that's existing in the area of the reduced
25 acreage alternative? In other words, the area that is not

1 going to be built on and this new alternative that now
2 supports Mojave Fringe-Toed Lizard.

3 DR. MOCK: We don't have any data to suggest that,
4 no.

5 MR. EMMERICH: And are you familiar with the
6 volcanic lava flow habitat that's directly, I guess, west of
7 the project site? And it's right next to Highway 40.

8 DR. MOCK: It's part of the Pisgah Crater?

9 MR. EMMERICH: I don't know if that's part of the
10 Pisgah Crater, maybe I'm confused about that. I'm talking a
11 little bit --

12 DR. MOCK: South of I-40?

13 MR. EMMERICH: Towards Newberry Spring, but it's
14 on the same side of the highway as the project site.

15 DR. MOCK: So it's on the north side of I-40.

16 MR. EMMERICH: Right. And it would be -- I'm
17 getting my directions confused. But it would be the north
18 and it would be west of, directly west of the project. It's
19 a large lava flow and it has some very substantial sand
20 blow-ups on it that are very suitable looking Fringe-Toed
21 Lizard habitat.

22 DR. MOCK: Yes, that's potential habitat. That's
23 farther west from the project.

24 MR. EMMERICH: And finally, do you think that if
25 the project is built that the project could block the

1 connectivity of the Mojave Fringe-Toed Lizard habitat on the
2 project site and that volcanic flow habitat?

3 DR. MOCK: I don't think so. The wildlife
4 corridor to the north would provide an access point as well
5 as habitat along the main drainage that flows through that
6 lava flow area would presumably have some sandy habitat that
7 the lizard might follow. Certainly there's some opportunity
8 for the lizards to pass through the site itself if they're
9 able to get past the perimeter fencing that's put up for
10 desert tortoise.

11 MR. EMMERICH: Okay, well thank you, I think
12 that's all I've got.

13 HEARING OFFICER KRAMER: Any other parties?

14 Staff?

15 Just a couple questions, thank you, Steve Adams.

16 CROSS EXAMINATION

17 #####BY MR. ADAMS:

18 Q Did you detect any, find any Fringe-Toed Lizards
19 north of the railroad tracks?

20 DR. MOCK: There was one incidental siting during
21 the tortoise surveys in 2010.

22 MR. ADAMS: When you use the term "incidental" are
23 you discounting that as an outlier or what?

24 DR. MOCK: No, it was just incidental to another
25 survey.

1 MR. ADAMS: And did you, what is your thought on
2 habitat north of the railroad tracks where you found the
3 lizard?

4 DR. MOCK: Well, like I said --

5 MR. ADAMS: Was there suitable --

6 DR. MOCK: Like I said, I haven't seen the staff's
7 map that indicates their assessment of habitat. I presume
8 there's some small patches of habitat north of the railroad
9 that they identified and presumably includes where we found
10 the Fringe-Toed Lizard during our survey effort. So some of
11 the extra habitat acres that they assessed presumably occur
12 north of the railroad but it's a smaller, presumably a
13 smaller area than the 17 acre area that we identified south
14 of the railroad.

15 MR. ADAMS: Did the applicant survey that area for
16 suitable habitat or occupied habitat?

17 DR. MOCK: No, we didn't assess it as suitable at
18 the time since it was smaller patches of sandy habitat that
19 we didn't really key into as being potentially occupiable.

20 MR. ADAMS: Okay. And the last question is on the
21 Burrowing Owl. You're aware the Burrowing Owl Consortium
22 guidelines call for protection of habitat for relocated or
23 displaced burrowing owls?

24 DR. MOCK: Yes.

25 MR. ADAMS: Okay, thank you, that's all.

1 HEARING OFFICER KRAMER: Sierra Club.

2 CROSS EXAMINATION

3 #####BY MR. RITCHIE:

4 Q Dr. Mock, this is Travis Ritchie from Sierra Club.

5 I just had one quick point I wanted to go back to. I
6 believe Ms. Gannon asked if it was your testimony that with
7 respect to the Mojave Fringe-Toed Lizard the impact was
8 limited to loss of habitat. Was that your testimony?

9 DR. MOCK: We have one patch, we had assessed one
10 patch of habitat occupied and the SSA assessment added some
11 additional acreage to our accounting.

12 MR. RITCHIE: Do you agree with staff's conclusion
13 that the project will result in the complete extirpation of
14 the population on site?

15 DR. MOCK: Our original proposal, the 82-30
16 proposal, we had excluded that patch from being developed
17 because we thought that it would be, it could be sustained
18 if you sustained the dune habitat and kept it as an open
19 space area. Because we felt that the Fringe-Toed Lizard
20 would be able to go between -- through the solar array field
21 and exit the site in exchange. But the staff disagreed with
22 us and chose to discount that and not, and basically said,
23 we are going to assume a complete loss and allow for the
24 habitat to be developed and included as part of the solar
25 array field.

1 MR. RITCHIE: So based on the project proposal as
2 it exists now do you agree that it will result in the
3 complete extirpation of the Mojave Fringe-Toed Lizard?

4 DR. MOCK: I think that's the worst case --

5 MR. RITCHIE: At that site.

6 DR. MOCK: That's the worst case scenario. I'm a
7 little more optimistic with this species that if there is
8 dune habitat present you might have some at least short-term
9 extant population. But whether it sustains through time
10 we'd have to do some surveys every, every five or ten years
11 to see if that's true or not.

12 MR. RITCHIE: So is it your testimony then that
13 the extirpation of a BLM sensitive species population on the
14 area is not an impact?

15 DR. MOCK: No. My position is that it's a
16 significant impact but it's mitigable.

17 MR. RITCHIE: No further questions.

18 HEARING OFFICER KRAMER: Any other cross
19 examination?

20 Okay, we'll move on to the staff's witnesses,
21 including the agencies.

22 MR. ADAMS: Thank you. Steve Adams here.

23 Just a very quick follow-up on the noise issue
24 this morning for our, for our staff witness, witnesses.

25 HEARING OFFICER KRAMER: Can we be clear who is

1 still here with us so let's name them again.

2 MR. ADAMS: Yes, I'm sorry. Chris Huntley is
3 still here, as is Scott White.

4 DIRECT EXAMINATION

5 #####BY MR. ADAMS:

6 Q The Staff Assessment had a figure of 84 DBA as the
7 anticipated sound for operation of the sun catchers on site.

8 We heard in testimony this morning that that figure is
9 probably somewhere over 75 but not 84. What affect would
10 that have on your analysis of noise impacts, which I think
11 you found less than significant in the Staff Assessment.
12 What affect would that have on that assessment for beyond
13 the project boundaries?

14 MR. HUNTLEY: This is Chris Huntley. I think
15 actually for some species we determined that noise would
16 have a potential significant effect and we had proposed
17 mitigation such as to avoid nesting birds and other species.

18 But the lower noise levels associated with the power box
19 and the individual sun catchers would mean that the noise
20 would attenuate at a shorter distance than what we had
21 previously discussed. I think we said 850 feet to get the
22 60 DBs. We're going to have to work with the noise staff
23 here to find out what that means. But ultimately it means
24 that the distance from the project that is exposed to higher
25 noise levels would be reduced. And then those edge effects

1 would be reduced or attenuated kind of concurrently.

2 HEARING OFFICER KRAMER: Let me toss in a question
3 here. How does that affect your conclusion that the noise
4 levels effectively excluded many of the species from the
5 site because they would just be driven away?

6 MR. HUNTLEY: Well there's a couple -- this is
7 Chris Huntley.

8 We still believe that the noise levels, not just
9 from the sun catchers but the noise levels from the washing
10 at night, the vehicles, the repair and maintenance and other
11 activities, will functionally eliminate most of the habitat
12 value on the site for all but the most disturbance-tolerant
13 species. Coupled with the fencing and the translocation
14 efforts they are going to relocate many species out of the
15 project area. So ingress to the site or even opportunities
16 for many species of animals will be very limited. So we
17 believe that the conclusion of noise impacts to the species
18 is the same, even with the lower noise levels.

19 HEARING OFFICER KRAMER: Thank you. Go ahead and
20 continue, Mr. Adams.

21 MR. ADAMS: If we can try to be very brief in the
22 responses to these so we can get to the government panel
23 before 5:15.

24 MR. HUNTLEY: Yes.

25 MR. ADAMS: Could you describe your interpretation

1 of habitat suitability for the Mojave Fringe-Toed Lizard on
2 the project site?

3 MR. HUNTLEY: Yes, sir. Staff disagrees somewhat
4 with Dr. Mock's interpretation of habitat on the project
5 site. We conducted a series of surveys on the project site.
6 Looking at the sand sheets, the drainages, soft hillocky
7 sand, things of that nature, and believe the habitat was
8 much more widespread. Not just the core habitat but that
9 habitat associated with the 45 meter buffer.

10 This is important because the habitat within that
11 45 meter buffer contains much of the same elements, in some
12 cases small hillocks of sand and other features that are
13 critical to the life history of the species.

14 We also detected Fringe-Toed Lizards at multiple
15 locations. I think a couple north of the railroad. We
16 looked at or we found animals west of where the previous
17 survey was conducted. So we felt that the habitat was just
18 underestimated.

19 MR. ADAMS: And can you describe for the Committee
20 the basis for your conclusion that the direct impacts of the
21 project on Mojave Fringe-Toed Lizard would be mitigated to a
22 level less than significant by BIO-13 and the other
23 mitigation. But that the project's contribution to
24 cumulative impacts would remain at a significant level
25 without mitigation.

1 MR. HUNTLEY: Certainly. This is Chris Huntley.

2 We felt that the project could mitigate impacts to
3 the species through the acquisition and preservation of
4 offsite habitat. We were concerned, based on the
5 configuration of the project, that the project would sever
6 linkages or sever the ability for populations to disperse to
7 the east and to the west.

8 It is going to be very challenging, since there is
9 a paucity of habitat as you go up towards the mountains. We
10 do recognize, and that's one of our points, that this
11 species does move across a wide variety of habitat and is
12 not just solely limited to sand sheets. But on the northern
13 side of the project, especially that linkage area, the
14 habitat is not very conducive for this species, although
15 there may be a patch here or a patch there. So we feel that
16 populations moving from the east and moving from the west
17 would have some challenges.

18 MR. ADAMS: Thank you. And finally, you have had
19 a chance, you indicated previously, to review the
20 applicant's proposed changes to our conditions of
21 certification proposed by staff. Have you had the
22 opportunity to review BIO-13?

23 MR. HUNTLEY: Yes we have. We -- Yes we have. It
24 just came yesterday. I don't believe we would recommend the
25 changes because we have asked for a refinement of habitat on

1 the project site. We're fairly confident of what's there
2 but we want to verify things through the process.

3 MR. ADAMS: BIO-13 we probably should say is a
4 measure for mitigation of Mojave Fringe-Toed Lizard impacts.

5 MR. HUNTLEY: Yes, sir.

6 MR. ADAMS: Have you had an opportunity to review
7 BIO-19, which regards nests and migrating bird mitigation,
8 and BIO-21, which is mitigation for the Burrowing Owl?

9 MR. HUNTLEY: Yes we have. At this time we would
10 not recommend any changes to those measures. We thought
11 that the buffers proposed by the applicant were inadequate
12 and there's already a mechanism within the measure to allow
13 those buffers to be reduced based on consultation with CPM
14 and the regulatory agencies.

15 Regarding Burrowing Owls, we felt that if
16 Burrowing Owls were present in the project area and would
17 have to be excluded through passive relocation the applicant
18 would have to acquire appropriate mitigation lands
19 consistent with the Burrowing Owl Consortium guidelines.
20 Recognizing that those mitigation lands could be nested
21 within the tortoise mitigation provided owls were present on
22 those areas.

23 MR. ADAMS: Okay, thank you.

24 The next question would be for the Service. And a
25 very general question.

1 DIRECT EXAMINATION

2 #####BY MR. ADAMS:

3 Q I wonder, Ms. Blackford, if you could describe the
4 Bald and Golden Eagle Protection Act provisions as they
5 apply to the Golden Eagles found in the vicinity of the
6 project.7 MS. BLACKFORD: I will do my best. Currently the
8 Bald and Golden Eagle Rule as it is being implemented has
9 determined that there is the ability for a project proponent
10 or any entity to apply for a permit to quote/unquote take
11 under the ESA a Bald or Golden Eagle, based on the
12 populations that are present across the nation.13 When they ran the numbers for allowable take for
14 each species they determined appropriate numbers for the
15 Bald Eagle. And they determined that for the Golden Eagle
16 that the population across the nation could not actually
17 withstand any take at this time. For that reason across the
18 country there is no allowable take for Golden Eagles at this
19 time, even though the mechanism exists for those permits to
20 be issued.21 So current guidance is that any project that moves
22 forward should not result in any net loss of Golden Eagles.23 Under the current rule take of Golden Eagles applies not
24 just to mortality of eagles but anything that would decrease
25 their ability to reproduce, such as the loss of foraging

1 habitat.

2 So for Calico -- I guess in addition to that the
3 Service is currently requesting that applicants determine
4 what impacts they could have on Golden Eagles by conducting
5 Golden Eagle Surveys during the breeding season that expand
6 from a ten mile radius outside of their project boundaries.

7 We feel that that is the appropriate distance to determine
8 which territories could potentially be impacted by any
9 project.

10 And so at this time if you find any territories
11 within that ten mile radius we'd be looking to address
12 whether or not the proposed project would result in any form
13 of take for those territories.

14 MR. ADAMS: Have you reached conclusions you can
15 share as to this project's compliance with those rules or is
16 that still in the works?

17 MS. BLACKFORD: It is my understanding that this
18 project conducted the breeding surveys and I actually just
19 sent a email to the BLM today because I actually don't know
20 that I ever received the final results of those surveys. It
21 is my understanding from other documents that there are
22 territories within that ten mile radius.

23 The Service is concerned about the loss of 6,000
24 acres of foraging habitat and our current guidance is to use
25 Avian Bat Protection Plans developed for the projects to

1 develop appropriate measures that would reduce any impacts
2 to achieve a no net loss. We are intending to work with the
3 applicant to develop their Avian Bat Protection Plan so that
4 we can implement measures that would effectively achieve no
5 net loss for Golden Eagles.

6 HEARING OFFICER KRAMER: That's avian what
7 protection plan?

8 MS. BLACKFORD: Avian Bat Protection Plan.

9 HEARING OFFICER KRAMER: B-a-t.

10 MS. BLACKFORD: Yes.

11 HEARING OFFICER KRAMER: Best, available --

12 MS. BLACKFORD: They're for all things flying.

13 So traditionally the Avian Bat Protection Plans
14 were developed for transmission lines, wind energy projects
15 and those types of things. However, we do recognize that
16 other development also has impacts on migratory birds. The
17 intention of using the Avian Bat Protection Plan as a
18 template would be addressing basically Golden Eagles as a
19 chapter in that Avian Bat Protection Plan. And the measures
20 that the applicants would put forth to minimize their
21 project impacts and to demonstrate the measures that they
22 will implement in order to achieve no net loss for the
23 species.

24 MR. ADAMS: Thank you. And last question for
25 Chris Otahal.

DIRECT EXAMINATION

1
2 #####BY MR. ADAMS:

3 Q Chris, you're still there?

4 MR. OTAHAL: Yes I am.

5 MR. ADAMS: A couple of the witnesses in written
6 testimony have questioned this project's consistency with
7 the West Mojave Plan. And I may be misstating this slightly
8 but I think those concerns cover bats, Fringe-Toed Lizards
9 as well as plants. Have you been able to assess consistency
10 with the West Mojave Plan? Come to any conclusions as to --

11 MR. OTAHAL: Yeah. To my knowledge it is
12 compliant with the West Mojave Plan, it's consistent. All
13 three of those issues that were brought up.

14 MR. ADAMS: And can you also tell us which of the
15 alternative plans was the one adopted by BLM and the other
16 agencies?

17 MR. OTAHAL: Yes. I believe this is in reference
18 to the Beard-Tongue. I believe one of the testimonies, I
19 don't remember which one specifically, was alluding to a 50
20 acre limit on impacts to Beard-Tongue. And that comes from
21 the West Mojave --

22 MR. BASOFIN: Mr. Kramer, I'm a little confused
23 we're not into botany yet and the witnesses aren't here to
24 hear this testimony concerning botany.

25 MR. OTAHAL: Okay. We can defer that to the plant

1 discussion.

2 MR. BASOFIN: That would be my preference.

3 MR. OTAHAL: Okay, sorry.

4 HEARING OFFICER KRAMER: And he will be here then
5 so it won't be a timing issue. So did you have anything to
6 add that relates to the other species?

7 MR. OTAHAL: As far as the bat and the Fringe-Toed
8 Lizard, I believe that we are consistent with the Mojave
9 Plan. If there's any specifics I can try to address those.

10 HEARING OFFICER KRAMER: Okay. We can let the
11 intervenors toss those specifics in your direction during
12 their cross examination.

13 MR. OTAHAL: Sure.

14 MR. ADAMS: That's all of staff's questions.

15 HEARING OFFICER KRAMER: Okay, then cross
16 examination. From the applicant first.

17 MS. GANNON: Yes, thank you.

18 CROSS EXAMINATION

19 #####BY MS. GANNON:

20 Q Mr. Huntley, I have one question, or one possible
21 line of questioning, with regard to the Mojave Fringe-Toed
22 Lizard with regard to the determination of the cumulatively
23 significant and unmitigable impact. In making that
24 determination Did you consider the amount of preserved
25 habitat that exists within the project vicinity?

1 MR. HUNTLEY: This is Chris Huntley. Yes we did.
2 And we considered it in light of also the proposed solar
3 developments within the region. And we also considered it
4 in light of the fact that there is large ACECs adjacent and
5 other areas that preserve habitat. But the acreages of
6 those ACECs do not support or uniformly support Mojave
7 Fringe-Toed Lizards as a component of those acreages.

8 We felt that not so much as a small population of
9 Fringe-Toed Lizards would probably be eliminated from the
10 Project site. It was more related to the fact that we
11 believe because of the project features, the tortoise
12 fencing, the multiple miles of fencing, it would preclude
13 Fringe-Toed Lizards from moving east/west on the project
14 site.

15 MS. GANNON: And again, if you can just describe
16 briefly the basis for the conclusion that that east-west
17 movement corridor currently exists.

18 MR. HUNTLEY: Could you restate the question,
19 please.

20 MS. GANNON: If you could just briefly summarize
21 the basis upon which you made the determination that there
22 is a currently existing, viable, east/west movement
23 corridor.

24 MR. HUNTLEY: Certainly. Based on site
25 inspections of the project area moving from east to west or

1 west to east, whichever way you go, there's large,
2 contiguous patches of sand sheets, alluvial drainages full
3 of soft, sugary sands, and other features that would support
4 these species.

5 In addition, we could see where animals are
6 moving. You, I guess, have not seen the map. But we could
7 find the species associated with the drainages. These
8 animals are also known to use drainages and these other
9 features for movement. There are known populations to the
10 east and there are known populations to the west. Because
11 there was a connectivity of habitat we assumed it would be
12 reasonable that animals could move to the east or to the
13 west.

14 MS. GANNON: And there are no other areas --

15 MR. WHITE: Pardon me, this is Scott White. I
16 would like to expand just a tiny bit on that --

17 MS. GANNON: Absolutely.

18 MR. WHITE: If you don't mind.

19 We did some work with a hydrogeologist, a
20 gentleman named Andy Collison from Phil Williams Associates.
21 Did quite a bit of work trying to figure out how sand moves
22 across the site, both by fluvial and the aeolian processes.

23 In a nutshell, sand originates in the mountains.
24 Washes and flash floods carry sand downslope across the
25 bajada. As it moves downslope it gets sorted into finer and

1 finer sand deposits. Towards the southern margin of the
2 project site or towards the center of the project site near
3 the railroad tracks. Around the railroad tracks and in the
4 washes north of the railroad tracks the sand is pretty fine
5 and it's -- The texture is, I guess -- I guess you could say
6 it's not distinguishable, at least to me, from aeolian sand
7 such as the 17 acre sand mapped by the applicant as suitable
8 habitat.

9 The sand continues to move south. Underneath the
10 railroad bridges it ends up in an unnamed tributary that
11 eventually flows to the Mojave River. From there, there's
12 sort of a seesaw process that goes on. The flood waters
13 carry the sand to the west but prevailing winds blow the
14 opposite direction and move the sand towards the east. So
15 this sorted, fine grain sand spreads out both east and west
16 around the southern part of the project site between the
17 railroad and I-40.

18 As opposed to east, it actually blows all the way
19 into the adjacent ACEC where there is suitable and occupied
20 habitat for Mojave Fringe-Toed Lizards. And you sort of
21 find, thin veneers of sand laying over the Bajada. And as it
22 moves to the west by fluvial processes it continues to move
23 suitable soil, suitable substrate westward into the Mojave
24 River watershed.

25 So certainly there is suitable habitat for Mojave

1 Fringe-Toed Lizards east and west of the site and on the
2 project site. The project itself, the disturbances, and
3 also the tortoise exclusion fence, are going to be a
4 substantial barrier if not a complete barrier to Mojave
5 Fringe-Toed Lizards moving east and west about the project
6 site. And I think Chris has already talked about what we
7 think was a relatively unsuitable movement and habitat for
8 Mojave Fringe-Toed Lizards east and west, up north of the
9 project area where we are real pleased with the movement
10 opportunities for Bighorn Sheep and Desert Tortoise.

11 MS. GANNON: Thank you, Mr. White. And maybe you
12 were just getting to -- my final question would be, so is
13 this east-west movement corridor that you believe exists on
14 the site, it's unique in the area?

15 MR. HUNTLEY: This is Chris Huntley. I think we
16 need to be very cautious when we talk about movement
17 corridors and linkages. These are generational events, the
18 same way that the linkage area on the northern area that we
19 are trying to preserve is likely a generational event for
20 many species. Fringe-Toed Lizards are probably not likely
21 to decide to move from the ACEC miles and miles to the west,
22 or vice versa. This happens as animals reproduce and
23 disperse and it happens over multiple years.

24 And we believe that placing the project in that
25 location further fragments these populations. And as you

1 know, this is well-documented for the species, many
2 populations do occur in small and isolated areas and they
3 are very vulnerable to extirpation. That's why we
4 considered this a cumulative effect in light of the ongoing
5 or the proposed project in the area, as well as past and
6 foreseeable projects.

7 MS. GANNON: Thank you. No further questions.

8 HEARING OFFICER KRAMER: Thank you.

9 Staff witnesses, so any other intervenors wish to
10 cross examine these witnesses? Sierra Club.

11 MR. RITCHIE: This is Travis Ritchie from Sierra
12 Club.

13 Just so I'm clear on the process, we are crossing
14 for staff witnesses, correct, and government as well?

15 HEARING OFFICER KRAMER: Yes, the agencies.

16 MS. HOLMES: We're having trouble hearing again.

17 MR. RITCHIE: Okay, I will do better.

18 CROSS EXAMINATION

19 ####BY MR. RITCHIE:

20 Q So I guess I'll start with the Mojave Fringe-Toed
21 Lizard. And I'll direct my questions to Mr. White and
22 Mr. Huntley. And I believe, Mr. White, you just discussed
23 the movement of the fine sands from the mountains down to
24 the existing habitat on site. Is it correct that --

25 MR. WHITE: Yes.

1 MR. RITCHIE: -- that the movement -- and those
2 sands provide the habitat for Fringe-Toed Lizards, both on-
3 site and also similar lands in nearby areas such the Pisgah
4 ACEC, correct?

5 MR. WHITE: We haven't done actual field surveys
6 on Pisgah ACEC. The applicant did and found several
7 occurrences. So yeah, I think what you're saying is
8 correct.

9 MR. RITCHIE: But generally speaking, Mojave
10 Fringe-Toed Lizards rely on those sands, those fine-grained
11 sands and their movement for their habitat.

12 MR. WHITE: In large part we would say not
13 absolutely exclusively but in large part, yes.

14 MR. RITCHIE: So is it also true that the
15 development of the project on the location will disrupt the
16 movement and flow of those sands across the bajada and
17 potentially disrupt project areas outside or areas outside
18 of the project boundary?

19 MR. WHITE: This was something that we looked at
20 pretty closely in terms of geomorphology. Let's see. I
21 have to change gears a little bit and think about it in
22 those terms. The project site involves detention basins and
23 other structures to control flood waters running across the
24 site. Those would to some extent interrupt sediment
25 transport across the site.

1 The analysis that the geomorphologist carried out
2 indicated that the fine sand, the aeolian sand on the site
3 in these areas that we're talking about for the Fringe-Toed
4 Lizard, doesn't move much towards the east. It doesn't
5 contribute in large part towards sands in the east in the
6 Pisgah ACEC. Which was, which was sort of an important part
7 of our analysis. I think I've answered your question.

8 MR. RITCHIE: So is it your testimony that the
9 project will not have an impact on aeolian sands anywhere
10 outside of the boundaries of the project?

11 MR. WHITE: Well no. I guess my testimony would
12 be that my understanding from the geomorphology work is that
13 it will have a limited affect on transport of sands to the
14 east and to the west. But that impact would not be
15 substantial.

16 MR. RITCHIE: Thank you. Now I'd like to move on
17 to Golden Eagles.

18 And my first question I guess I'll address to
19 staff although if any of the other agencies would like to
20 answer as well I'd appreciate it.

21 I believe that the SSA noted that US Fish and
22 Wildlife Service had raised concerns about the potential
23 threat of avian collisions with solar technology, is that
24 correct?

25 MR. HUNTLEY: Yes it is.

1 MR. RITCHIE: And so do those concerns include the
2 potential collisions by Golden Eagles with solar
3 technologies?

4 MR. HUNTLEY: Yes it does.

5 MR. RITCHIE: And is it also true that bird
6 responses to glare from proposed sun catchers is poorly
7 understood at this point?

8 MR. HUNTLEY: I believe that is what we said in
9 our testimony.

10 MR. RITCHIE: And so we testified before that as a
11 mitigation measure an avian protection plan would
12 potentially address -- sorry, I'll withdraw that question.

13 An avian protection plan that would be proposed
14 would require study of the project site, correct?

15 MR. HUNTLEY: Yes.

16 MR. RITCHIE: And so at the time that construction
17 would commence and that sun catchers would begin to be
18 installed, that protection plan would not be complete,
19 correct?

20 MR. HUNTLEY: The study would not be complete. If
21 I may point out or elaborate. We don't know what the
22 effects the sun catchers will have on bird collisions. We
23 know from other studies in other projects in the region that
24 birds do collide with these kinds of structures. And I
25 believe in our analysis we indicated that that would occur.

1 We also indicated that we do not know what would happen
2 with Golden Eagles regarding a collision.

3 However, it is our expectation that because of the
4 build-out and the development of the project site Golden
5 Eagles are likely to not forage in and amongst the sun
6 catchers because they tend to shy away from heavily
7 urbanized, developed areas. We are not expecting large
8 numbers of birds to be foraging on-site.

9 I believe it's a little bit speculative for us to
10 have made a conclusion on whether or not the sun catchers
11 would pose a significant, unmitigable risk to those species.

12 So we proposed that the applicant conduct a study. And
13 should birds be seen colliding at large or high numbers that
14 remedial actions would be implemented, whether it's
15 diversion structures or other kinds of actions, to help
16 minimize those effects.

17 MR. RITCHIE: Thank you. Give me just one moment,
18 please.

19 Thank you. I have no further questions for staff.

20 MR. HUNTLEY: Thank you.

21 HEARING OFFICER KRAMER: Thank you. Any other
22 intervenors?

23 Okay, seeing none -- we had one question, it's
24 kind of general. It's illustrated by a map in the desert
25 tortoise translocation plan that was passed out today,

1 Exhibit 93. And if you look at the first figure, number.
2 It shows the Pisgah ACEC. And then overlaid on that is a
3 hatched area that the legend says corresponds to the
4 potential future BLM renewable energy projects.

5 And I just wonder if -- maybe I don't understand
6 what an ACEC is. I was gathering that development wouldn't
7 be a first choice for a place like that. Could somebody
8 explain either why I'm confused or the paradox here.

9 MR. OTAHAL: Yes. This is Chris from BLM.

10 Those overlays that show the potential
11 applications does not indicate approved applications nor
12 ones that will necessarily come on-line. But those are
13 applications that we have at least of hint of that they may
14 be coming in the future. And just because we get an
15 application does not mean the project will go forward.

16 In the ACEC at present we do not preclude
17 development. We have a one percent threshold in the desert
18 wildlife management areas that can be developed out. ACECs
19 we have to be sure that the proposed project will be
20 consistent with the ACEC plan that we have. And each ACEC
21 has a plan and so it varies from ACEC to ACEC. So we would
22 have to --

23 MS. HOLMES: We're having trouble hearing again.
24 I'm sorry, I seem to be the designated person to say things
25 aren't loud enough. But we really can't hear what's going

1 on.

2 MR. OTAHAL: Sure.

3 HEARING OFFICER KRAMER: Actually we've missed you
4 for most of the day.

5 MR. OTAHAL: There you go. I was just explaining
6 that in a ACEC it does not preclude other development but
7 the development would have to be consistent with the ACEC
8 plan. And again, just because we have a potential
9 application does not mean that we have received the
10 application yet.

11 HEARING OFFICER KRAMER: Okay. So it's certainly
12 not a preserve equivalent, an ACEC?

13 MR. OTAHAL: Strictly speaking, no. It's not like
14 it has a conservation easement over it where there is no
15 development.

16 HEARING OFFICER KRAMER: You need to really be
17 close to the microphone.

18 MR. OTAHAL: Okay.

19 HEARING OFFICER KRAMER: And ignore the fact that
20 you may sound rather loud to yourself in the room. That's
21 actually a good sign in this case. We have another
22 question.

23 ADVISOR WHITE: Just a follow-on to that. So when
24 you're looking at areas for relocation or recommending
25 relocation do you take into consideration any of the

1 information that you have on future proposals?

2 MR. OTAHAL: Yes. That was, that was one of the
3 layers that we looked at. And we do have these potential
4 application areas and those were all excluded from receptor
5 areas for the translocation.

6 ADVISOR WHITE: Okay, but I'm confused. Because I
7 have heard a couple of times that to the east of the project
8 would be a proposed relocation area for tortoises. But to
9 the east, on this map at least, is a lot of hash marks. I
10 mean, if anything were to be proposed here you could
11 possibly create an island. Would that be considered as part
12 of this?

13 MR. OTAHAL: Yes. If you look at the Staff
14 Assessment's Figure 8 it shows the potential application
15 areas.

16 HEARING OFFICER KRAMER: Figure number 5.

17 MR. OTAHAL: I'm looking at Biological Resources
18 Figure 8. I think that's from the Staff Assessment.

19 HEARING OFFICER KRAMER: Okay, thank you. Did you
20 have some more to add, Mr. Otahal?

21 MR. OTAHAL: Yes. And you can see between the
22 yellow project footprint and the red area that's indicated
23 as being a potential application, there is a patch there and
24 --

25 MS. HOLMES: Excuse me for just a second. We're

1 not seeing a map up on the WebEx. Is there one that's being
2 referred to?

3 HEARING OFFICER KRAMER: No, you would need to
4 look at the --

5 MS. HOLMES: I was just looking at it in the
6 document, okay, thank you.

7 HEARING OFFICER KRAMER: -- the relocation plan.

8 MR. RITCHIE: Actually I believe if we want to put
9 it up it's slide number ten, just for convenience sake.

10 HEARING OFFICER KRAMER: Go ahead, Mr. Otahal, and
11 then we'll --

12 MR. OTAHAL: Right. So there is a area there that
13 is not within any of the development footprints. And we
14 have concluded that approximately 11 animals can be
15 transferred into that area. And that's based on the
16 populations that are present that is based on the 2010
17 surveys that were conducted.

18 MS. BLACKFORD: This is Ashleigh from the Service.
19 And I think to add to that, I believe part of the question
20 was a concern of the island. And the project proposed in
21 the Pisgah Crater ACEC is a wind development project, not a
22 solar project.

23 HEARING OFFICER KRAMER: And that means what?

24 MS. BLACKFORD: Currently the belief is that
25 desert tortoises may be able to survive effectively

1 underneath wind projects. That's based on a study done down
2 in the south. I don't think at this point the service is
3 willing to say that that's an end-all be-all answer. You
4 know, a single study does not truth make. But it is still a
5 viable potential that that is a -- that desert tortoise
6 populations will be able to exist underneath such --

7 HEARING OFFICER KRAMER: So the wind turbines
8 could be part of the raven mitigation strategy.

9 MS. BLACKFORD: Unfortunately no, they're too
10 smart.

11 (Laughter.)

12 MR. OTAHAL: And actually down south in the
13 Coachella Valley there are a lot of wind projects that are
14 associated with occupied desert tortoise habitat.

15 ADVISOR WHITE: Then as a clarification for
16 myself. I take it those wind, those wind developments don't
17 have fences around them?

18 MR. OTAHAL: We can't say for sure because we
19 don't have an application in front of us.

20 ADVISOR WHITE: No, I mean the one that you're
21 referencing doesn't have fences around it?

22 MR. OTAHAL: The potential wind development?

23 ADVISOR WHITE: No.

24 MR. OTAHAL: Oh, in the Coachella Valley.

25 MS. BLACKFORD: This is Ashleigh Bradford again.

1 ADVISOR WHITE: Yeah, the one you just referenced.

2 MS. BLACKFORD: Typically wind farms either A, do
3 not have fencing around the complete project, or they have
4 wildlife compatible fencing such as four-wire barb wire.
5 They do not implement desert tortoise exclusion fencing.

6 ADVISOR WHITE: Okay, thank you.

7 MR. OTAHAL: And also --

8 MS. JONES: This is Becky Jones with the
9 Department of Fish and Game. That area is fenced to keep
10 out any other uses, it's just wind energy where that study
11 was completed.

12 HEARING OFFICER KRAMER: Well is another use a
13 tortoise or a Fringe-Toed Lizard?

14 MS. JONES: Tortoises were within that study area.
15 It's just that it appeared that the tortoises could survive
16 well but they didn't have to deal with things like off-road
17 vehicle use and other uses within the area. The area has
18 been closed to keep other uses out.

19 HEARING OFFICER KRAMER: But I think what Ms.
20 White was getting at was they could migrate off the site as
21 well, and on, so effectively the fence was not a fence for
22 the tortoises or the lizards.

23 MS. JONES: It is a chain link fence that is all
24 the way to the ground so it's not like there is easy access
25 in and out.

1 HEARING OFFICER KRAMER: Well, okay. We're doing
2 a lot of speculation here but it sounds like it could be
3 possible.

4 MR. OTAHAL: Yeah. And we would also include that
5 in our analysis whenever we looked at that project. What
6 effects it would have on tortoise and other resources there.

7 HEARING OFFICER KRAMER: Okay. Ms. Blackford, you
8 want to leave in a couple minutes, correct?

9 MS. BLACKFORD: That is correct.

10 HEARING OFFICER KRAMER: Okay, does anybody --

11 MS. BLACKFORD: I apologize. I had a previous
12 engagement. And I guess at this time I'd also just like to
13 clarify whether -- it sounded like there's several other
14 meetings and I'm not sure whether or not I need to mark
15 those off my calendar today before I get an email tomorrow
16 morning that says I'm needed somewhere else.

17 HEARING OFFICER KRAMER: It sounds like there is
18 the possibility we will be continuing some of this
19 discussion at our August 18 hearing.

20 MS. BLACKFORD: Okay.

21 HEARING OFFICER KRAMER: Which we'll discuss
22 later. Currently the start time is 10 a.m. but the
23 Committee is thinking about moving that up to 9 a.m. So
24 look for word about that.

25 Then there is the workshop on August 10th that

1 you're already aware of, I believe. But I think your
2 presence would be helpful at that as well it sounds like.

3 MS. BLACKFORD: Okay, thank you. I'm good for a
4 couple more questions.

5 HEARING OFFICER KRAMER: Okay. Do we have any
6 more questions for her because we're about to lose her?

7 No? Thank you. I would say get while the getting
8 is good.

9 MS. BLACKFORD: All right, thank you all, have a
10 nice evening.

11 HEARING OFFICER KRAMER: Thank you.

12 (Thank yous from the participants.)

13 MS. BLACKFORD: Good night.

14 HEARING OFFICER KRAMER: Okay. That completes the
15 staff panel, I believe. I didn't see any more questions
16 from the intervenors.

17 So now let's convene a panel of the intervenor
18 witnesses. Mr. Cashen is up there, Mr. Aardahl is up there.
19 Mr. Burke and Mr. Thomas we are now right square in your
20 area of interest so if you would join the panel. And it
21 would be also Mr. -- I keep wanting to say Bleich because I
22 served on a board with a man who pronounced it that way but
23 it's --

24 MS. MILES: Bleich.

25 HEARING OFFICER KRAMER: Bleich.

1 DR. BLEICH: Yes, in this case it's Bleich.

2 HEARING OFFICER KRAMER: Okay. and then also
3 Laura Cunningham from the Bsin and Range Watch.

4 So is anybody here who has not been sworn as a
5 witness or on the phone?

6 DR. BLEICH: Yes, Dr. Bleich has not.

7 HEARING OFFICER KRAMER: Okay, Dr. Bleich and
8 Ms. Cunningham, if you would raise your right hand. And
9 Mr. Burke and Mr. Thomas.

10 (Thereupon the witnesses were sworn, by the
11 Hearing Officer to tell the truth, the whole
12 truth and nothing but the truth.)

13 HEARING OFFICER KRAMER: Let's begin with CURE.
14 Mr. Bleich and Mr. Cashen are your witnesses.

15 What we'll do is we'll present the direct
16 testimony of each of the witnesses and then we'll allow
17 cross examination of the panel as a group. And when that
18 occurs, if one of the panel members feels that they have a
19 response to add to one of the questions, even if it wasn't
20 directed at you, feel free to step in and add your response.

21 DIRECT EXAMINATION

22 ####BY MS. MILES:

23 Q Mr. Cashen.

24 MR. CASHEN: Yes.

25 MS. MILES: Is your microphone on? I couldn't

1 hear you.

2 MR. CASHEN: Yes.

3 MS. MILES: Okay, there you are.

4 Do you have any changes to your sworn testimony
5 relating to animal resources on the site other than desert
6 tortoise?

7 MR. CASHEN: No.

8 MS. MILES: Do you have any responses that you'd
9 like to add to Dr. Mock's live testimony today?

10 MR. CASHEN: A few.

11 MS. MILES: Okay, go ahead.

12 MR. CASHEN: Dr. Mock has testified that the
13 applicant is proposing to not adhere to Fish and Game and
14 California Burrowing Owl Consortium Mitigation Guidelines.
15 There has been, to the best of my knowledge, no information
16 presented on where these artificial burrows would be located
17 or how they would be monitored and maintained.

18 Dr. Mock testified that owls have no -- Burrowing
19 Owls have no special status and that is not true. The
20 species has actually be proposed for listing in the past and
21 it's declining across most of its range in California. To
22 the point that a consortium of professionals was put
23 together to address this decline.

24 According to the Application for Certification
25 page 5.6-23 the applicant stated: Impacts on resident

1 Burrowing Owls would be considered significant. The
2 establishment of artificial burrows does not offset impacts
3 to 6200 acres of Burrowing Owl habitat. There is no
4 indication that the artificial burrows would be conserved.

5 Dr. Mock's written rebuttal testimony said that by
6 dropping the northern project boundary down it would enable
7 a corridor for Mojave Fringe-Toed Lizards. There is no
8 Mojave Fringe-Toed Lizard habitat up there to the best of my
9 knowledge, and I think this is what Basin and Range Watch
10 was getting at earlier.

11 And finally, Dr. Mock's written rebuttal testimony
12 stated that the project would comply with the West Mojave
13 Plan. The Pisgah ACEC was established in part for the
14 conservation of Mojave Fringe-Toed Lizards. And page 2-92
15 of the West Mojave Plan says that construction of wind
16 breaks upwind of occupied Mojave Fringe-Toed Lizard habitat
17 should be restricted. And the project is directly upwind of
18 the Pisgah ACEC that was established to protect existing
19 Mojave Fringe-Toed Lizard habitat.

20 That's it.

21 MS. MILES: Thank you. And also I had a question
22 about, are you aware of any protocols that exist for
23 surveying for Golden Eagles?

24 MR. CASHEN: Yes. The US Fish and Wildlife
25 Service has issued interim protocol survey guidance for

1 Golden Eagles.

2 MS. MILES: And in your review of the documents
3 put forth by applicant is it your opinion that they
4 followed the survey protocols for Golden Eagles?

5 MR. CASHEN: No, they did not follow the protocol.

6 MS. MILES: And can you elaborate on what they did
7 in their survey.

8 MR. CASHEN: The applicant conducted one
9 helicopter survey that searched for Golden Eagle nests. The
10 protocol requires a minimum of two surveys that are
11 separated by at least 30 days. And I guess there was not
12 enough other information in the applicant's survey report
13 for me even to tell whether they complied with the survey
14 guidelines during that one survey that they conducted.

15 MS. MILES: Thank you.

16 Now instead of going through every point that
17 Mr. Cashen made in his written testimony we are going to
18 have him do a short presentation, a very brief presentation
19 on some of the resources on the project site, if that's all
20 right.

21 HEARING OFFICER KRAMER: How long will it take?

22 MR. CASHEN: Less than ten minutes.

23 HEARING OFFICER KRAMER: Okay, go ahead. This is
24 a multimedia presentation?

25 MS. MILES: Yes.

1 MR. CASHEN: For your special entertainment.

2 HEARING OFFICER KRAMER: Okay.

3 MS. MILES: It's all images, I believe, that are
4 in the record already.

5 HEARING OFFICER KRAMER: Okay. And it will become
6 a part of the public domain. Go ahead.

7 MR. RITCHIE: I believe this is the PowerPoint
8 labeled Exhibits that we provided or Sierra Club Exhibits.

9 MR. CASHEN: I'll just go ahead and start talking
10 while he pulls up that image.

11 The project site is a pretty special place. It
12 contains a complex assemblage of sensitive species that are
13 all coexisting. As the Supplemental Staff Assessment points
14 out, it has several unique habitat features.

15 There are color variance of several animals
16 because of the Pisgah Crater. That's evolution. You cannot
17 mitigate evolution.

18 There's a large swath of high-quality desert
19 tortoise habitat. The site is an essential connectivity
20 corridor, a link between the eastern and western deserts.
21 There's numerous species representing all trophic levels on
22 this site. And the applicant's survey data indicate an
23 extremely high number of California Partners in Flight focal
24 species, which I put in my written testimony.

25 This and the other portions of the applicant's

1 survey data indicate an intact ecosystem. No compensation
2 site would offset impacts to these elements. Not to mention
3 the ecosystem provided by the inter-relationship among these
4 elements.

5 And I guess we're starting here?

6 MR. RITCHIE: I believe it's on slide show but we
7 can stop them if you wanted to go bit by bit. I'm sure
8 that --

9 MR. CASHEN: I can just go real quick on these.
10 There's the Google Earth image that I was going to show but
11 we can start with an eagle. Since we're on an eagle.

12 MR. RITCHIE: If we could actually take it off
13 slide show and maybe Mr. Cashen could direct as we move
14 through the slides.

15 And I believe -- we could start with -- slide
16 number 11 I think is the image that you're referring to.

17 MR. CASHEN: This is just a picture of the site
18 from Google Earth. The red line represents the proposed
19 project. And you can see that the project site is located
20 in an undisturbed area and it's -- it's across an
21 elevational gradient with several unique features in it,
22 including the toe of the Cady Mountains, the alluvial fan
23 down into the desert flats there.

24 HEARING OFFICER KRAMER: If you could refer to
25 these by the exhibit numbers that would help the record. So

1 this is Exhibit 1010.

2 MS. GANNON: Is this in the record? Is there
3 someplace we can find this image?

4 MR. RITCHIE: Yes, this was attached to the
5 prehearing conference list of exhibits from the Sierra Club.

6 MS. GANNON: Thank you.

7 MR. CASHEN: Next slide.

8 MR. RITCHIE: So if we could go back to Slide
9 number 1 and then at Mr. Cashen's direction go from 1 to 2
10 to 3. One.

11 MR. CASHEN: This is just a picture of Bighorn
12 Sheep. A bunch of Bighorn Sheep were seen in the project
13 area when they did the helicopter survey. There's been
14 sheep signs seen on the project site. And during that
15 helicopter survey they observed rams, ewes and lambs. Next
16 slide, please.

17 More sheep. Next slide, please.

18 This is a Golden Eagle. Golden Eagles are now
19 known to nest in the Cady Mountains. Based on the
20 applicant's survey data, Golden Eagles were commonly
21 observed foraging over the project site. Next slide.

22 A golden eagle foraging. Next slide.

23 Desert tortoise. We've talked about this a lot
24 today. This is the state reptile. I don't know if many
25 people knew that. And it has extreme cultural significance

1 to Native American people. It's also recognized as a symbol
2 of the American desert. Next slide.

3 Another tortoise. Next slide.

4 This is White Margin Beard Tongue. This is a very
5 rare plant that only occurs in the Pisgah Crater region.
6 There are several occurrences of this plant species on the
7 site and the Supplemental Staff Assessment concluded that
8 the project would threaten the occurrence of not only the
9 plants that occur on the project site but those that also
10 occur in the adjacent Pisgah ACEC. And that pretty much
11 takes care of the entire population of this species in
12 California. Next slide.

13 Another picture of the Beard Tongue. Next slide.

14 This is Mojave Fringe-Toed Lizard. This is the
15 species that the Staff Assessment concluded could be
16 extirpated by direct and indirect project impacts. A pretty
17 cool little lizard. Next slide.

18 Head-on view. Next slide.

19 We saw that one. Next slide.

20 This is a Burrowing Owl. it's a little bit hard
21 to see in this photo but if we go to the next one, next
22 slide, you can see he's gulping down a small rodent of some
23 kind. This is the only raptor species in North America that
24 uses burrows. And it occurs on the project site. As I
25 mentioned, been declining across its range in California.

1 Next slide.

2 Just one more of the Burrowing Owl looking at the
3 camera. Next slide.

4 Next slide. This is Townsend's Big-Eared Bat.
5 This is a bat species that was detected on the project site.
6 There are several other bat species that staff has concluded
7 could occur. And overall almost all of the bat species in
8 the United States are on the decline. Next slide.

9 This is a Townsend's Big Eared bat roosting. Next
10 slide.

11 This is Desert Kit Fox. It's protected from take
12 under the California Fish and Game Code. The applicant
13 detected over 36 Kit Fox burrows on the project site. Next
14 slide.

15 This is an American Badger. It's a California
16 species of special concern and it's present on the project
17 site. And next slide. I think that might be it.

18 Another badger. And that's it.

19 MS. MILES: Thank you. And that was less than ten
20 minutes as promised, good job.

21 So I believe that that's it. Should we move on to
22 direct examination of Dr. Bleich or should we take questions
23 at this point?

24 HEARING OFFICER KRAMER: No, we'll examine
25 everyone directly and then we'll have mass cross

1 examination.

2 MS. MILES: Okay.

3 HEARING OFFICER KRAMER: Probably fueled by dinner
4 right before that.

5 MS. MILES: So should I move on to Dr. Bleich?

6 HEARING OFFICER KRAMER: Yes, please, go ahead.

7 MS. MILES: Okay.

8 DIRECT EXAMINATION

9 #####BY MS. MILES:

10 Q Dr. Bleich, are you available?

11 DR. BLEICH: Yes.

12 MS. MILES: Whose testimony are you sponsoring
13 today?

14 DR. BLEICH: It would be my rebuttal testimony and
15 associated exhibits.

16 MS. MILES: And do you have any changes to your
17 sworn testimony?

18 DR. BLEICH: No, I do not.

19 MS. MILES: And are the opinions in your testimony
20 your own?

21 DR. BLEICH: Yes they are.

22 MS. MILES: Thank you.

23 I guess I will wait to move his exhibits into the
24 record. Can you please --

25 HEARING OFFICER KRAMER: But just for our benefit

1 if you can just identify them so if we want to look them up
2 we can.

3 MS. MILES: Sure. It's Exhibits 413 through 423.

4 And should I go ahead and have him summarize his
5 qualifications or we can skip that?

6 HEARING OFFICER KRAMER: Does anybody wish to
7 examine his qualifications? Seeing none, go ahead.

8 MS. MILES: Dr. Bleich, can you please describe
9 for us what it was that CURE asked you to do.

10 DR. BLEICH: The organization asked me to evaluate
11 the impacts of the Calico Solar Project with respect to
12 Bighorn Sheep. And they requested that I review the
13 applicant's submittals, environmental documents associated
14 with the project and the scientific literature on Bighorn
15 Sheep and Bighorn Sheep habitat in general. And I also took
16 it a step further and conducted my own investigations with
17 respect to the literature, personal contacts and unpublished
18 material.

19 HEARING OFFICER KRAMER: Would it be possible --
20 Are you on a speaker-phone, by chance?

21 DR. BLEICH: Yes I am, sir.

22 HEARING OFFICER KRAMER: Would it be possible for
23 you to pick up a handset? I think that would make it a lot
24 easier for us to understand you.

25 DR. BLEICH: Sure. Let's see what happens here.

1 I'll call right back if something goes awry. Is that
2 better?

3 HEARING OFFICER KRAMER: Much better, thank you.

4 DR. BLEICH: Okay.

5 MS. MILES: Can you please describe what is known
6 about populations of Bighorn Sheep in the project region.
7 And just for everyone's benefit, we're putting up a map that
8 hopefully will be up in just a moment that he can sort of
9 refer to as he's describing the populations.

10 DR. BLEICH: Would you like me to wait for the
11 map?

12 MS. MILES: Go ahead and begin.

13 DR. BLEICH: Okay. Until recently the population
14 of Bighorn Sheep inhabiting the Cady Mountains was thought
15 to be relatively small, numbering perhaps as few as 50
16 individuals. However, during the last several years with
17 some more thorough aerial survey work and additional on the
18 ground work. The population is now thought to be close to
19 300 animals. So it has increased substantially, or at least
20 our estimate of the population size has increased
21 substantially since the early 1990s.

22 Bighorn Sheep in the Cady Mountains were
23 historically thought to spend a great deal of time along the
24 Mojave River, and particularly female sheep along the Mojave
25 River because of forage and water resources available there.

1 There have been two habitat enhancement projects conducted
2 in the Cady Mountains that may have contributed to the
3 increase in population size.

4 To make a long story short, there's a lot more
5 animals there than there was thought to be 20 years ago. Is
6 the map up yet?

7 MS. MILES: Yes, the map is up. And I believe
8 when you're talking about the Cady Mountains you're
9 referring to letter C on the map; is that correct?

10 DR. BLEICH: That is correct.

11 MS. MILES: And the red asterisk is the project
12 site, is that correct?

13 DR. BLEICH: That is correct.

14 MS. GANNON: For clarification, where can we find
15 this map? Do we have this figure someplace?

16 MS. MILES: The map is attached to one of the
17 exhibits that accompanied Dr. Bleich's rebuttal testimony.
18 And if you give me a moment I will find the exhibit.

19 MS. GANNON: Thanks.

20 MS. MILES: Or Dr. Bleich, can you tell me, what
21 was the name of the, of the study?

22 DR. BLEICH: It's Figure 3.8 of Spencer, et al.
23 And it actually appears on page 64 of the Spencer, et al
24 document which was the essential connectivity document that
25 I've cited in my testimony.

1 MS. GANNON: It was cited but it wasn't provided,
2 is that correct?

3 MS. MILES: That might be the case.

4 MS. GANNON: So we don't have it, okay.

5 MS. MILES: We can circulate this document.

6 MS. GANNON: Thanks.

7 MS. MILES: Actually, it's a Defender's exhibit
8 also. And what was -- Exhibit 603.

9 MS. GANNON: Six-O-three.

10 HEARING OFFICER KRAMER: Okay, so let's not add
11 another one. Let's jut have one copy in the record.

12 MS. MILES: Sure.

13 MS. GANNON: Six-O-three you said was provided
14 as --

15 MR. RITCHIE: Defender's Exhibit 603.

16 MS. GANNON: Was that rebuttal testimony or
17 opening testimony?

18 MR. RITCHIE: It was done today.

19 MS. GANNON: Rebuttal, thanks. I'm just trying to
20 get it here, okay.

21 DR. BLEICH: May I say something for
22 clarification?

23 MS. MILES: Please.

24 DR. BLEICH: The image your looking at has got
25 several letters on it and those are applied to the original

1 image from the Spencer et al. document merely for the
2 purposes of simplifying what we're talking about while
3 describing these Bighorn Sheep populations.

4 S stands for the South Soda Mountains. ODP
5 represents the population of Bighorn Sheep at Old Dad Peak.

6 B is the location of the Bristol Mountains. ODM represents
7 the Old Dad Mountains, not to be confused with Old Dad Peak.

8 G the Granite Mountains. As the individual mentioned, C
9 the Cady Mountains. And then R and N, the Rodman and
10 Newberry Mountains respectively. And to the west of the
11 Newberry Mountains the Ord Mountains are labeled on the
12 original figure.

13 The arrows, the solid arrows represent documented
14 movements of Bighorn Sheep between populations. These
15 movements have all occurred in the vicinity of the Cady
16 Mountains. And with that would you like me to continue my
17 description of these other populations?

18 HEARING OFFICER KRAMER: Before we do that, for
19 the sake of the record then, we'll need an electronic copy
20 of this which has the letters overlaid. Is that possible
21 for you to provide that? Actually we have it here.

22 DR. BLEICH: Yes.

23 HEARING OFFICER KRAMER: We will call this or
24 label this as Exhibit 440 then. We'll rely on CURE to
25 distribute that electronically to us this evening if you

1 can.

2 (Intervenor CURE'S Exhibit 440 was marked
3 for identification.)

4 MS. MILES: Would it be all right if it was
5 tomorrow morning?

6 HEARING OFFICER KRAMER: Okay.

7 DR. BLEICH: Okay, now continuing. As you can see
8 on the map the Bristol Mountains are located immediately
9 east of the Cady Mountains. They also support a permanent
10 population of Bighorn Sheep. It is unknown or unconfirmed
11 as to what the total number of animals in that population
12 is. But those animals have moved back and forth to the Cady
13 Mountains. And also to the Old Dad Mountains to the South
14 and East of the Bristol Mountains. And these are based on
15 radio telemetry records collected over the last 20 years.

16 To the north of the Bristol Mountains lie the
17 South Soda Mountains. And there is documented movement
18 based on telemetered animals between the Soda Mountains and
19 Old Dad Peak to the northeast back and forth.

20 The Bighorn Sheep in the Rodman and Newberry
21 Mountains move between those ranges or among those ranges.
22 And also to the Ord Mountains. And these data are not based
23 on telemetry work but are in fact based on observations and
24 photographic surveys and the reading of sign by individuals
25 expert in tracking and locating Bighorn Sheep and evidence

1 of movements.

2 MS. MILES: Dr. Bleich?

3 DR. BLEICH: Yes.

4 MS. MILES: So can you please explain if the
5 proposed project site is in an area that might impact these
6 populations.

7 DR. BLEICH: Yes. The project site is on a direct
8 line between the south end of the Cady Mountains and the
9 north end of the Rodman Mountains. And connectivity among
10 these sub-populations that we have been talking about,
11 including the Cady Mountains, is contingent upon -- or
12 metapopulation function is contingent upon continued
13 connectivity. So there is the potential for this project to
14 disrupt metapopulation function and movement from the Cady
15 Mountains to the south, and equally importantly, from the
16 Rodman Mountains northward to the Cady Mountains.

17 MS. MILES: Thank you. In the Staff Assessment
18 the staff concluded that construction and operation of the
19 project could reduce some foraging opportunity for Bighorn
20 on the lower bajadas. However, the Supplemental Staff
21 Assessment concludes that the project site does not contain
22 year-round habitat for Bighorn Sheep. And is that also your
23 understanding?

24 DR. BLEICH: That's a tough, a tough one. I
25 believe that the -- In fact I know that the supplemental

1 staff assessment acknowledges that within a half a mile of
2 the northern boundary of the project site there is a
3 permanent habitat use area. And in the absence of telemetry
4 data there's no indication that that half a mile is
5 meaningful and there is no reason to believe that the
6 southern boundary of this permanently occupied -- the
7 hypothetically permanently occupied Bighorn Sheep habitat
8 shouldn't extend southward to Interstate -- Highway 40.

9 MS. MILES: Which would, if I understand you
10 correctly, that would encompass the project site.

11 DR. BLEICH: That would be correct.

12 MS. MILES: Okay. And in your estimation what are
13 the primary impacts to Bighorn Sheep from this project
14 development?

15 DR. BLEICH: Well there will be the direct loss of
16 close to three square miles of habitat. Obviously that will
17 have an effect on the ability of Bighorn Sheep to forage in
18 the area. Additionally a second and equally disconcerting
19 and perhaps even more onerous impact would be the continued
20 fragmentation of Bighorn Sheep habitat, particularly as it
21 provides movement or the opportunities for movement from
22 south to north and north to south.

23 MS. MILES: Sorry, just give me one moment.

24 ASSOCIATE MEMBER BYRON: Ms. Miles, may I
25 interrupt with a question?

1 MS. MILES: Yes.

2 ASSOCIATE MEMBER BYRON: You go ahead and look.

3 MS. MILES: Okay.

4 ASSOCIATE MEMBER BYRON: Just a quick question,
5 Dr. Bleich, this is Commissioner Byron.

6 DR. BLEICH: Yes.

7 ASSOCIATE MEMBER BYRON: Could you please tell me,
8 not a biologist, how the Bighorn Sheep currently traverse
9 the freeway between C and R.

10 DR. BLEICH: There are a series of bridges and
11 culverts under the freeway. And Bighorn Sheep are also
12 capable of passing over the freeway fences. So Bighorn
13 Sheep are not fully constrained from moving from south to
14 north or north to south. That freeway is not considered to
15 be an impermeable barrier to movement. But as someone
16 mentioned earlier, it's probably more of a filter in that it
17 decreases the amount of movement that historically occurred.

18 But sheep do use culverts in other areas. We have
19 not documented their use of culverts here. We are working
20 -- individuals are working on that question. But Bighorn
21 Sheep do use culverts in other areas. And they also cross
22 four lane freeways almost unimpeded in many, many portions
23 of their range.

24 ASSOCIATE MEMBER BYRON: Okay, thank you. I'm
25 sorry, Ms. Miles, go right ahead.

1 MS. MILES: No, thank you.

2 Dr. Bleich, why is important to maintain foraging
3 habitat?

4 DR. BLEICH: Well, the project site is located in
5 a low elevation area and the nutrient content of forage
6 species of plants in these low elevation areas, low-lying
7 areas, is especially high following appropriate amounts of
8 rainfall that occurs at the right time of the year.

9 These areas are not necessarily used every day but
10 when they are used they are very important to Bighorn Sheep.

11 And development of the project will make essentially three
12 square miles of this type of habitat unavailable for use by
13 Bighorn Sheep. These low-lying areas are particularly
14 important to female Bighorn Sheep in late gestation when
15 they are growing fetuses at an exponential rate. They are
16 also important for females who may not be pregnant but they
17 are important in helping those animals regain body condition
18 and probably contribute substantially to the successful
19 rearing of -- I'm sorry, successful conception and rearing
20 of young the following year, even though a female may not be
21 pregnant in a given springtime.

22 MS. MILES: Okay. I know that you have reviewed
23 the applicant's change to the project site to reduce the
24 project along the northern boundary and there is a claim
25 that that has opened up a movement corridor for Bighorn

1 Sheep. And I wanted you to provide your opinion on the
2 relevance of this project modification to the project's
3 impacts on Bighorn.

4 DR. BLEICH: Well the applicant -- in moving the
5 project southward, the northern boundary of the project
6 southward, the applicant has removed it from some of the
7 more hilly terrain associated with the former project
8 boundary. But even with this alteration the staff, the
9 Supplemental Staff Assessment still acknowledges on page C-
10 2, I think it's page 111, that the reconfigured project
11 footprint will continue to constrain movements from north to
12 south or south to north. Therefore, moving the project
13 southward has done nothing to mitigate the potential for the
14 project to further block opportunities for movement from the
15 Cady Mountains to the Rodman Mountains or vice versa.

16 MS. MILES: And will this result in reduced gene
17 flow?

18 DR. BLEICH: Ultimately, yeah, there will be two
19 primary effects. One would be overall decreased movement by
20 Bighorn Sheep from one occupied area to another. But it
21 would further constrain opportunities for Bighorn Sheep to
22 recolonize vacant habitat from which they may become
23 extirpated in the future as the result of, say a disease
24 process or something of that nature. It would also
25 certainly have an impact on transfer of genetic material

1 from geographic area to geographic area.

2 MS. MILES: And could you comment briefly on the
3 mitigation proposed by staff for the impacts to Bighorn
4 Sheep.

5 DR. BLEICH: Yes. The only mitigation
6 specifically for Bighorn Sheep that I was able to locate in
7 the documents that I reviewed is in BIO-23. And that
8 mitigation consists of a commitment that a Bighorn Sheep
9 monitor will look for Bighorn Sheep on a daily basis. Which
10 is undefined. I don't know if that means once a day or
11 eight hours a day every day. But if Bighorn Sheep wander
12 within 500 feet of an ongoing construction project that
13 construction is mandated to cease until the animal or
14 animals move more than 500 feet from the construction site.

15 I view this as really being worse than no
16 mitigation from the standpoint that large mammals living in
17 highly predictable environments adapt pretty well. The
18 starting and cessation of construction activities, which
19 probably do provide some measure of disturbance to Bighorn
20 Sheep, in my opinion would be far worse than just
21 maintaining the construction activities in an ongoing manner
22 and allowing sheep to become habituated to them.

23 If such activities occur in a highly predictable
24 way, they are not threatening to sheep, they are benign from
25 the standpoint of the sheep's perception of the threat

1 associated with the activities, these animals do a pretty
2 good job of accepting these what I'll refer to as
3 disturbances or incursions into their daily cycle.

4 There are examples -- the literature is replete
5 with examples of such things. For those of you who have
6 ever seen deer standing along a busy highway, they virtually
7 ignore vehicles going by. You pull up and you stop, roll
8 down the window and take a picture of those deer and they're
9 essentially gone. And those deer are perceiving the same
10 thing that Bighorn Sheep would perceive, it's a change in
11 their routine.

12 A Bighorn Sheep isn't going to differentiate being
13 600 feet versus 400 feet from an ongoing construction site.

14 And the cessation of activity for an unknown reason, or at
15 least an unknown reason to the sheep, and then the
16 resumption of that activity for an unknown reason or a
17 reason not perceived by the sheep, is I think, going to
18 create a situation that is less good than it would be with
19 the construction ongoing. I do not view this as a real form
20 of mitigation.

21 One other thing in BIO-23 that is mentioned is the
22 project applicant would continue or would provide access for
23 management or conservation purposes to the South Cady
24 Mountains. And I would point out that that access is
25 ongoing right now. You know, continuing an ongoing thing is

1 not -- an ongoing activity, in my mind is not mitigation
2 because it does nothing to correct the harm that is being
3 done by the project, it simply maintains the status quo.
4 And I don't really view that as being a suitable mitigation
5 proposal.

6 MS. MILES: So just to summarize. In your opinion
7 do you feel that there are still significant, unmitigated
8 impacts to Bighorn Sheep associated with the proposal in the
9 Staff Assessment?

10 DR. BLEICH: I do.

11 MS. MILES: Thank you.

12 DR. BLEICH: I do.

13 MS. MILES: I have no further questions of
14 Dr. Bleich. I'm not sure which witness should go next.

15 HEARING OFFICER KRAMER: Oh, is that my job?

16 ASSOCIATE MEMBER BYRON: Mr. Kramer, may I ask just
17 a couple of questions?

18 HEARING OFFICER KRAMER: You certainly may.

19 ASSOCIATE MEMBER BYRON: I know this is a little
20 bit out of order and I apologize. Mr. Bleich, there's a
21 couple of things that -- two things. And short answers are
22 fine for these. One is, can you give us a sense of in the
23 region that you have shown on the map with all the letters,
24 approximately how many Bighorn Sheep are we talking about in
25 this region?

1 DR. BLEICH: Okay, we can go population by
2 population. It's simply Old Dad Peak, between 250 and 300.
3 The Soda Mountains between 40 and 100. A minimum of 40
4 have been seen at one time. The Bristol Mountains, unknown.
5 The Old Dad Mountains represents transient habitat that is
6 occupied only by animals moving through. As far as we know
7 there are no permanent populations. The Granite Mountain
8 population is somewhat less than 50. Probably between 25
9 and 50 animals. The Cady Mountains, close to 300 animals.
10 The Rodman, Newberry and Ord Mountains collectively, my best
11 -- I'm not going to use the term estimate, that has a
12 statistical connotation to it. But my best prediction would
13 be between 100 and 150 animals among those three ranges.

14 ASSOCIATE MEMBER BYRON: No, that's great, that
15 gives us a sense of how many animals we're talking about.
16 And of course it's over a pretty large region.

17 The other question that I had is completely
18 unrelated but it's something I've always been curious about.

19 And that is, why is it that humans place water for these
20 animals? Why is that important to their existence?

21 DR. BLEICH: Well Bighorn Sheep are physically
22 dependant upon water. During portions of the year they can
23 acquire water adequate for physiological needs from the
24 forage that they consume. During the hot period though,
25 surface water or freestanding water is necessary for Bighorn

1 Sheep to physiologically meet their water needs. They can't
2 do it through forage alone because it is so -- the forage is
3 so dry and the water content is so low that they aren't able
4 to, you know, get much in the way of moisture from the
5 forage.

6 Water sources have been used for several purposes.

7 One is to replace historical sources, areas that have dried
8 up. Others have been developed to modify the distribution
9 of Bighorn Sheep from the standpoint of making portions of a
10 mountain range that may be uninhabitable during the hot
11 season habitable and thereby increasing the overall number
12 of Bighorn Sheep in a mountain range.

13 Even if forage is the factor that limits the
14 number of sheep in a range. If you can make more of the
15 mountain range available that equates to more forage and
16 therefore you have the potential to have a larger number of
17 sheep in that mountain range. And the idea is to try to
18 correct some of the misdeeds that we have promulgated over
19 the decades with respect to habitat loss and other factors
20 associated with the human presence across the landscape.

21 ASSOCIATE MEMBER BYRON: Very good, thank you.

22 DR. BLEICH: Yes, sir.

23 HEARING OFFICER KRAMER: Okay. Our next witness
24 -- we might as well go down the list. And the way I had it
25 would be Laura Cunningham.

1 enough genetic samples from this whole region but there
2 might actually be distinct population segments such as in
3 this particular Pisgah Valley.

4 The Mojave Fringe-Toed Lizards that are here are
5 actually very light colored. They're the whitest color of
6 any population of the species and they could be another
7 distinct population segment. I just wanted to bring up that
8 there are definite cumulative impacts from this project and
9 all the other renewable energy projects proposed that there
10 could be a threat that little, isolated populations like
11 this will be extirpated. We have actually seen small
12 populations at Mirage Dry Lake and Harper Dry Lake go
13 extinct. That's in this lineage. So it has happened in
14 historic times.

15 And so I just wanted to emphasize that we would
16 like to not have to list this distinct population segment
17 because of cumulative impacts in the future. Thank you.

18 HEARING OFFICER KRAMER: Okay, our next witness is
19 Mr. Burke and Mr. Thomas from the Society for the
20 Preservation of Bighorn Sheep.

21 MR. THOMAS: I'll just summarize what we have
22 here.

23 HEARING OFFICER KRAMER: You need to get really
24 close to that microphone.

25 MR. THOMAS: I'll just summarize what we have

1 here.

2 HEARING OFFICER KRAMER: Please identify yourself.

3 MR. THOMAS: Gary Thomas with the Society for the
4 Conservation of Bighorn Sheep.

5 Our concern at this time is that there wasn't a
6 study done of the cumulative noise factor with 34,000 sun
7 catchers going on and what it would do to the Bighorn Sheep
8 in that area. There could be resonance that we don't
9 understand, there could be echoes, there could be a lot of
10 things.

11 (Commissioner Byron stepped out
12 of the meeting room.)

13 We do know that once sheep identify a noise or a
14 sight as some type of a threat then they will leave the
15 area. And that will get into the herd memory and stays
16 there for a long, long time before they eventually lose it
17 and begin to come back into the area. So our concern at
18 this time is once this project comes on line there is a
19 possibility that the sheep will leave that particular area.

20 And as Dr. Bleich identified at least three square miles of
21 lost habitat it could be significantly more for a very long
22 period of time. So that's our concern at this time.

23 And we think that maybe the sheep should be
24 monitored in that area once this thing starts so that if we
25 do see a movement of sheep from that area that some type of

1 a mitigation could be done to mitigate that. And that's all
2 I have at this time.

3 HEARING OFFICER KRAMER: Mr. Burke, anything from
4 you?

5 DIRECT EXAMINATION

6 # MR. BURKE: Bob Burke, Society for the
7 Conservation of Bighorn Sheep. What I would like to say --
8 and I'm sorry that Commissioner Byron has left.

9 One of the reasons, as Dr. Bleich had talked
10 about, over 20-some odd years ago there was water placed in
11 strategic areas to help the wildlife in those areas. We're
12 rapidly losing water in Afton Canyon, which is part of the
13 Cady Mountain herd.

14 When you take on a responsibility such as
15 providing water for wildlife it's incumbent that you don't
16 just walk away from it and let it go.

17 That's pretty much all I have. Dr. Bleich and
18 Mr. Aardahl are much more sheep orientated biology-wise than
19 us field people. Thank you.

20 HEARING OFFICER KRAMER: Thank you.

21 Okay, next, Dr. Aardahl then.

22 MR. AARDAHL: Mr. Aardahl.

23 HEARING OFFICER KRAMER: Mr. Aardahl, I'm sorry.
24 I gave him the same field promotion.

25 MR. BASOFIN: Thank you. Joshua Basofin with

1 Defenders of Wildlife.

2 Mr. Aardahl, a portion of your testimony relates
3 to Bighorn Sheep and that's what I'd like to focus on here
4 just briefly.

5 Could we put up Defenders Exhibit 603? While
6 that's going up: Mr. Aardahl, in your testimony relating to
7 Bighorn Sheep you referenced the California Essential
8 Habitat Connectivity Project Study by Spencer, et al., is
9 that right?

10 MR. AARDAHL: That's correct.

11 MR. BASOFIN: And in that study is included a map
12 which, a similar version of which was on the screen before,
13 and this is Defender's Exhibit 603. And I'd just like to
14 briefly ask you a couple of questions about it, recognizing
15 that Dr. Bleich has discussed it. I think you might be able
16 to add a layer of information as well.

17 HEARING OFFICER KRAMER: So this is the map marked
18 as page B-51 in Exhibit 603.

19 MR. BASOFIN: It actually is the entire exhibit;
20 it's an excerpt from the study itself.

21 HEARING OFFICER KRAMER: Okay.

22 DIRECT EXAMINATION

23 #####BY MR. BASOFIN:

24 Q Mr. Aardahl, can you briefly explain what this map
25 illustrates in terms of Bighorn Sheep movement.

1 MR. AARDAHL: Sure. This is one map out of a
2 series in this referenced document, the Spencer, et al.
3 2010. This one happens to be showing in somewhat greater
4 detail the Mojave eco-region but the study looked at
5 connectivity in all regions of California. So we are going
6 to focus in on the Mojave eco-region at this time.

7 The Spencer document I think is a very not only
8 timely but its significant, especially because it was
9 sponsored by the California Department of Transportation,
10 the California Department of Fish and Game and the Federal
11 Highway Administration. So this is a multi-agency sponsored
12 study. I believe the source for our copy of this document
13 was the California Department of Fish and Game web site.

14 I'd like to just briefly read for you a
15 description of what these connectivity designations mean in
16 this particular article. I think it's probably the most
17 concise statement and then I'll say a few more words after
18 that. According to the Spencer, et al. article, regarding
19 connectivity areas it states this:

20 "In the relatively undeveloped forest and
21 desert eco-regions of California such as the
22 Sierra Nevada and the Mojave Desert, many
23 essential connectivity areas connect highly
24 intact wilderness park lands across private or
25 federally managed, multiple use lands."

1 Now I want to call attention to that latter one
2 because this is the situation we're dealing with in respect
3 to the Calico project, is namely federally managed multiple
4 use lands which support mostly natural land cover and are
5 relatively permeable to wildlife movement. These low-
6 contrast situations, managing to sustain wildlife movements
7 between protected areas may be the primary conservation
8 approach.

9 So let's turn to the map. And I'll try to kind of
10 explain for you what those words in the article mean on this
11 map. Essential connectivity areas are shown in gold or are
12 yellow colored and you can see that they are basically
13 bridges connecting blocks of high quality, pristine
14 habitats, largely represented here by wilderness, park lands
15 and probably wilderness study areas on the public lands.

16 And focusing in a little bit more on the Calico
17 project we have specific connectivity area number 79. It's
18 basically a bridge from the mountainous regions north of
19 Interstate 40 near the project site, spanning to the south
20 across and including Pisgah Crater and areas to the west
21 that eventually merge into the high quality pristine
22 habitats represented in the green area that Dr. Bleich
23 described as the Rodman, Newberry and Ord Mountain complex.

24 The Cady Mountains is part of this essential linkage
25 habitat that's on the map. And just taking a look at it, in

1 general it looks to be relatively small compared to some of
2 the others. And I believe that it represents connectivity
3 potential for all species and not just Bighorn Sheep.

4 MR. BASOFIN: Thank you. In light of the
5 statements from the Spencer study and your interpretation of
6 the map and the potential for connectivity there do you
7 believe that the staff adequately analyzed the potential for
8 Bighorn Sheep to move through in a north to south fashion
9 across Highway 40?

10 MR. AARDAHL: That's an interesting question
11 because in reading the document I did come to the conclusion
12 that staff analyzed basic east/west movements between the
13 Cady Mountains and the Bristol. They also called attention
14 to the Spencer study as a connectivity study within the
15 region but I did not find any analysis of the north/south
16 connectivity potential for Bighorn Sheep. It appeared to me
17 -- I concluded that they assumed that I-40 was a blockade to
18 movement but it was never analyzed to any greater extent
19 than that.

20 MR. BASOFIN: And can you describe from your
21 personal observations on the site the mechanism by which
22 Bighorn Sheep might move from the site to the mountains to
23 the south?

24 MR. AARDAHL: In the, I think the spring of this
25 year I spent a day searching along I-40 for evidence of

1 engineered structures that had the potential to provide for
2 wildlife movement. Not only for the desert tortoises but
3 for Bighorn Sheep as well. And I mapped those crossings and
4 I was, I was surprised at how many there were. There are
5 several bridges and there are numerous culverts of fairly
6 large size. I am not aware of any study being conducted
7 that would provide evidence of movement.

8 And I think Dr. Bleich and others have mentioned
9 that the Cady Mountains Bighorn herd has grown in size
10 considerably over the past 20 years. I also believe that it
11 has never been the subject of any radio telemetry work, so
12 therefore documenting movements of Bighorn from the Cady,
13 Bristol Mountains over to the south and to occupy the Rodman
14 and Newberry and Ord, would happen to be just by
15 opportunistic sighting of a sheep crossing the highway or
16 running under the bridge or through a culvert.

17 And we don't have any evidence of anybody ever
18 making those observations. But it's almost impossible to
19 rule that out because of the infrequent opportunities to
20 witness that kind of movement. But certainly the structures
21 are there. And we know that Bighorn Sheep are capable of
22 moving not only over highways but under them and using
23 bridges as well.

24 MR. BASOFIN: Thank you. I have no further
25 questions.

1 HEARING OFFICER KRAMER: Okay. Dinner is going to
2 be here pretty soon. But because it's not let me ask,
3 though, the Sacramento folks. Do you need to start moving
4 cars? Isn't the deadline seven o'clock? The Public Adviser
5 says, yes.

6 MR. MEYER: Yes, at seven o'clock we have to have
7 our vehicles moved.

8 HEARING OFFICER KRAMER: Okay. Well we're
9 expecting our food to arrive in just a few minutes so we'll
10 definitely be able to give you that window of opportunity.

11 That was the last -- Mr. Phillips didn't have
12 anything on this, did he?

13 MR. LAMB: Steve Lamb for BNSF. Apparently we
14 have the technology but we don't know how to use it.

15 No, Mr. Phillips doesn't have anything on this.
16 But I would note as we're kind of in a lull. That I believe
17 that together with the applicant we have reached an
18 agreement or an accommodation regarding one of our witnesses
19 who has some scheduling problems. He's been here for
20 awhile, his name is Thomas Schmidt. His testimony is really
21 regarding soil and groundwater, which is going to happen
22 tomorrow morning. But I think it's relatively
23 uncontroversial, number one. And number two, his testimony
24 will be written.

25 We just want to basically present what we have

1 come to an agreement about with the applicant regarding
2 working together for a condition of certification in
3 relation to one aspect of his testimony. And also to offer
4 him for cross examination if any of the other parties want
5 to cross examine him, although I doubt they will.

6 HEARING OFFICER KRAMER: Okay. What was the one
7 area you're speaking about, the topic?

8 MR. LAMB: If you look at your schedule, Mr.
9 Kramer, it would be in Soil and Water Resources.

10 HEARING OFFICER KRAMER: No, but the sub-topic is
11 what I was getting at.

12 MR. LAMB: it's detention basins.

13 HEARING OFFICER KRAMER: Okay. I realize the
14 other parties are perhaps a little bit surprised but do you
15 anticipate wanting to speak to Mr. Schmidt about the topic
16 of detention basins, any of the other parties?

17 I am seeing a shake of the head no around the
18 room. Staff?

19 MR. MEYER: Ms. Holmes is not the in room and she
20 would be the one who would know that.

21 HEARING OFFICER KRAMER: Is she still there,
22 though, in the building?

23 MR. MEYER: Yeah, I can try to contact her, just a
24 second.

25 MS. GANNON: And to be clear, Hearing Officer

1 Kramer. The subject matter of detention basins will still
2 be presented tomorrow. This is really a very narrow issue
3 about information and reports that the applicant is agreeing
4 to provide to the railroad relating to the performance of
5 the detention basin. And also regarding the potential for
6 subsistence to happen near the --

7 MR. LAMB: Subsidence.

8 MS. GANNON: Subsidence, thank you. It's a long
9 day.

10 MR. LAMB: Subsistence will come in 30 minutes.

11 HEARING OFFICER KRAMER: Actually that's
12 sustenance.

13 MR. ADAMS: Excuse me. I'm calling in for Caryn
14 and I can't hear.

15 HEARING OFFICER KRAMER: You couldn't hear which
16 one? If you can't hear me I'm in trouble.

17 MR. ADAMS: I only caught a little bit of what
18 Ella was saying, sorry.

19 MS. GANNON: Sorry, Chris. I was trying to
20 clarify that the subject matter of detention basins will be
21 the subject of testimony tomorrow morning. We will be
22 putting on our witnesses. The agreement that Mr. Lamb is
23 referencing to goes to a very narrow point which was
24 addressed in their testimony, which relates to the
25 applicant's agreement to provide reporting, monitoring

1 reports to the railroad and notification provisions. And we
2 have a written condition which we would be willing to
3 stipulate to, as I believe the railroad would be willing to
4 stipulate. So again, I just wanted to clarify that we are
5 not trying to -- the subject of the detention basins will
6 not be removed from discussions.

7 HEARING OFFICER KRAMER: Okay. And Mr. --

8 MR. ADAMS: Mr. Kramer, what is the question then?

9 HEARING OFFICER KRAMER: Well we are trying to see
10 if we can accommodate Mr. Lamb's request that Mr. Schmidt be
11 submitted for cross examination that will probably be non-
12 existent, I think he's assuming, tonight, and therefore he
13 doesn't have to come back tomorrow.

14 MR. ADAMS: Tonight, okay. Yeah, I think we can
15 stipulate to that.

16 HEARING OFFICER KRAMER: Okay. Does anybody wish
17 -- did I ask already if anyone wants to cross examine
18 Mr. Schmidt? Okay, we had nos all around. Then I gather
19 nobody will be resisting the entry of his testimony, which
20 is Exhibit 1202, at the end of the day tomorrow.

21 MR. LAMB: If I might then just read into the
22 record what we had agreed upon. Would that be okay?

23 HEARING OFFICER KRAMER: Will you be able to
24 circulate that as a written document at some point? It's a
25 condition, correct?

1 MR. LAMB: No, we are going to formulate the
2 actual conditions later. There's a little bit more to --

3 HEARING OFFICER KRAMER: Okay.

4 MR. LAMB: It will take two minutes.

5 HEARING OFFICER KRAMER: Go ahead.

6 MR. LAMB: Obviously subject to Ms. Bellows and
7 Ella, your -- but applicant has reviewed the testimony of
8 Thomas Schmidt submitted as Exhibit 1202. Applicant finds
9 that the following condition of certification referred in
10 Mr. Schmidt's testimony is reasonable. Calico Solar is
11 required to provide BNSF with quarterly groundwater supply
12 reports. And that a notification procedure be put into
13 place for any noted subsidence, whereby BNSF maintenance
14 teams would be alerted of the issue. Applicant agrees to
15 coordinate with BNSF to present the Commission with a
16 stipulated condition to be delivered to the Commission prior
17 to the August 18th hearing.

18 Additionally, applicant represents that applicant
19 will deliver the following documents to BNSF: 1) Final
20 drainage report; 2) final detention basin designs/plans; and
21 3) maintenance plan. At the time of delivery applicant will
22 address any comments or concerns of BNSF. If there are any
23 amendments to these documents or if there are alterations to
24 any of the detention basins applicant will deliver such
25 revisions to BNSF.

1 And that concludes it although we would offer,
2 obviously, Mr. Schmidt to testify if you want to swear him
3 in. He's in the room.

4 HEARING OFFICER KRAMER: Okay. Well since nobody
5 wants to examine him and his testimony was accompanied by a
6 declaration I don't think we need to swear him in.

7 Can I just ask, roughly when would these reports
8 be delivered?

9 MS. GANNON: The monitoring reports?

10 HEARING OFFICER KRAMER: The design reports I
11 think he also referred to.

12 MS. BELLOWS: The reports will be delivered under
13 the compliance conditions that we have. We have certain
14 dates for submitting certain reports. And so whatever we
15 would be turning in to the CPM we would then therefore also
16 be turning it in to BNSF at the same time.

17 HEARING OFFICER KRAMER: Okay. And most of those
18 would be prior to the start of construction, I presume?

19 MS. BELLOWS: That's correct.

20 HEARING OFFICER KRAMER: Okay. Does any party
21 want to comment on that, including the applicant, on that?
22 I guess it's more or less a stipulation.

23 MS. GANNON: No, we agree to the language. And we
24 can distribute this. We can docket this and distribute it
25 to the parties in writing if you want.

1 HEARING OFFICER KRAMER: I guess that's not
2 necessary. But certainly circulate the proposed condition
3 ahead of the hearing on the 18th so that people can see it
4 and there will be no surprise for them.

5 MS. GANNON: We will do so.

6 HEARING OFFICER KRAMER: Okay. With that we're
7 ready for our sustenance here. Staff, could you be back by
8 -- do you need basically the 40 minutes to seven o'clock to
9 move the cars and get your sustenance?

10 MR. MEYER: This is Christopher. Yeah, there's a
11 few pieces of follow-up business we need to do to follow-up
12 on some of the issue items today and then get some food and
13 move the cars. So yes, seven o'clock would be a good
14 restart time for staff.

15 HEARING OFFICER KRAMER: Okay, then we will
16 reconvene at seven o'clock.

17 (Off the record.)
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1 E V E N I N G S E S S I O N

2 HEARING OFFICER KRAMER: We are back on the
3 record. Where we left off before dinner was the beginning
4 of cross examination of the intervenor witness panel. Am I
5 correct in that? The court reporter says yes. Let's begin
6 then with the applicant.

7 CROSS EXAMINATION

8 #####BY MS. GANNON:

9 Q Mr. Cashen, a couple questions for you. First
10 off, the pictures that you showed in your presentation.
11 Were those pictures taken on the site or were they just
12 intended to demonstrate what the animals look like?

13 MR. CASHEN: I believe maybe one or two of them
14 came from the site but other ones were just for
15 demonstration.

16 MS. GANNON: Okay. And then just one
17 clarification too. I thought I heard you say in your
18 testimony that the staff had concurred that the site could
19 lead to extirpation-- I'm sorry, my words are getting a
20 little rough--of the species, of the Mojave Fringe-Toed
21 Lizard. Is that what you testified to?

22 MR. CASHEN: I testified that the Staff Assessment
23 said that. Not the Supplemental Staff Assessment, the Staff
24 Assessment said that.

25 MS. GANNON: And what did the Supplemental Staff

1 Assessment say?

2 MR. CASHEN: Well it took that sentence out but I
3 have not seen anything that has changed that would --

4 MS. GANNON: But my recollection was, and it's
5 still in the Supplemental Staff Assessment on C2-68 and it
6 talks about extirpation of the lizard on the site, not the
7 total population. Is that what you were intending to say?

8 MR. CASHEN: I was just trying to relay what the
9 Staff Assessment said.

10 MS. GANNON: Okay. If you look at that, at 6.2-68
11 it talks about extirpation on the site. So I just wanted to
12 make sure we had clarified that.

13 MR. CASHEN: Give me a minute here.

14 MS. GANNON: Sure.

15 MR. CASHEN: So you're saying C.2-68 of the Staff
16 Assessment or the Supplemental?

17 MS. GANNON: The Supplemental Staff Assessment.

18 MR. CASHEN: Okay. The statement I was referring
19 to was in the Staff Assessment.

20 MS. GANNON: I believe it's the same. But the
21 statement that I'm referencing on that page, am I
22 representing that accurately? Extirpation on the site. Is
23 that what that says or am I reading it wrong?

24 MR. CASHEN: Well I'm not going to question
25 whether you're reading it right or not. If it's a question

1 about what was intended by the statement I guess it would be
2 best to ask the staff about that.

3 MS. GANNON: Excellent, thank you. Turning to --
4 is Dr. Bleich on the telephone still?

5 DR. BLEICH: Yes he is.

6 CROSS EXAMINATION

7 ##### BY MS. GANNON:

8 Q Dr. Bleich, I have a couple of questions for you.
9 You testified earlier that -- and I didn't get the exact
10 words so you can correct me if I don't capture this exactly
11 right. But I think you said that it's difficult to tell
12 without telemetry data whether most of the site is being
13 used for spring foraging or how it's being used. Is that a
14 correct paraphrase of what you were saying?

15 DR. BLEICH: Yes, I think that what I was trying
16 to convey is that in the absence of telemetry data it is
17 impossible to rule the site out as being year-round habitat
18 or being used for foraging.

19 MS. GANNON: And would the telemetry data, would
20 telemetry data lead you to conclude that it wasn't if there
21 was negative results or if there had been studies done and
22 it didn't show any sighting on a regular basis?

23 DR. BLEICH: Well, negative data are very
24 problematic in the sense that you can't conclude a lack of
25 use if you do not detect it. The way telemetry data work,

1 sometimes fixes are infrequent. There are now new automated
2 systems that will record on a minute by minute basis if you
3 can get a battery big enough to power the thing over time.
4 And the sample size would have to be adequate to be able to
5 make statistical inferences about the population.

6 MS. GANNON: I guess that's what led me to the
7 question. And you may recall last week in the Imperial
8 Valley proceedings we had a conversation about what you can
9 derive from negative telemetry data. Do you recall that
10 conversation?

11 DR. BLEICH: Yes, I recall the conversation. I'm
12 not going to guarantee I'll remember all the details.

13 MS. GANNON: My point was, I guess, in that
14 proceedings as I recall, you had testified that that type of
15 negative data really wasn't conclusive or even that
16 informative as to whether a site was used or how it was
17 used. Is that your position here or is there something
18 different about this site?

19 DR. BLEICH: No. From the absence of telemetry
20 data in both Imperial and the Calico site it's impossible to
21 conclude that there is not use of the site.

22 MS. GANNON: So is there any positive data that
23 would indicate that this is used year-round?

24 DR. BLEICH: There is evidence of what, two, the
25 remains of two sheep were found adjacent to or on the site.

1 And Bighorn Sheep scat was located either on or near the
2 site. But there is not data per se that indicates that that
3 site is used year-round. And by year-round I'm not
4 inferring that it is used every day. More of I think the
5 context would be, used during all seasons would be year-
6 round use.

7 MS. GANNON: I understand that. And just for
8 clarification, I understand that the two carcasses that you
9 were referencing were found in the very northern part of the
10 site, is that correct?

11 DR. BLEICH: I have not -- as far as I know, yes.
12 I understand that they were found not within the project
13 footprint but very close to it.

14 MS. GANNON: And I think you testified that the
15 reduction of the project site by 2,000 acres and pulling it
16 down 4,000 feet on average from the mountain didn't have a
17 positive -- didn't reduce impacts to the sheep. Is that
18 your testimony?

19 DR. BLEICH: My testimony is it did nothing to
20 reduce impacts in the movement of animals from north to
21 south or south to north.

22 MS. GANNON: Did it reduce impacts to the animals?

23 DR. BLEICH: Not animals moving -- It did not
24 affect the ability of animals to move from north to south or
25 south to north.

1 MS. GANNON: Thank you. We have a figure we'd
2 like to put up now. I'm not sure if you have access to
3 WebEx.

4 DR. BLEICH: I do not. Here where I am the
5 telephone cuts the computer out, the email out.

6 MS. GANNON: I think this will be a figure you're
7 familiar with. It's from an article co-authored by you. By
8 Epps, Wehausen, Bleich, Torres and Brashares in 2007, which
9 was published in the Journal of Applied Ecology, called
10 Optimizing Dispersal and Corridor Models Using Landscape
11 Genetics. Do you recall that article?

12 DR. BLEICH: Yes I do.

13 MS. GANNON: Okay. I'm going to just put up a
14 figure that was published in that article.

15 MS. MILES: Dr. Bleich?

16 DR. BLEICH: Yes.

17 MS. MILES: Do you have access to that figure?

18 DR. BLEICH: I'm looking for it right now.

19 MS. GANNON: It was submitted as part of our
20 evidence as well. It was Exhibit 19.

21 DR. BLEICH: Yes, and it's submitted as part of
22 CURE's evidence. I am trying to locate it. Let's see. I
23 know I could get it but I'd have to get off the phone to do
24 that, again because of the interference.

25 MS. GANNON: Are you familiar with what this

1 shows? Do you recall or would it be more helpful for you to
2 have it? If it's more helpful for you to have it I can, I
3 can come back to you.

4 DR. BLEICH: It would be more helpful for me to
5 have it.

6 MS. GANNON: Okay, that's acceptable to me.

7 DR. BLEICH: Would you like me to get it right
8 now?

9 MS. GANNON: This is going to be the end of my
10 cross is discussing this figure but I'm happy to let him get
11 a copy of it.

12 HEARING OFFICER KRAMER: Okay. I suspect others
13 may have questions for him, though. Do any of the other
14 intervenors have questions for Mr. Bleich? I'm seeing no.
15 Okay. Mr. Bleich, do you know enough to be able to find
16 this figure and then come back to us on the phone?

17 DR. BLEICH: Yes, I know exactly where to get it.
18 I just do not have it here in these files that I'm looking
19 at. But I can get it right away.

20 HEARING OFFICER KRAMER: Okay. Well then why
21 don't you do that and rejoin us on the phone call.

22 DR. BLEICH: Okay. I'll be back in five minutes.

23 HEARING OFFICER KRAMER: Okay. We'll continue on
24 then, thank you.

25 DR. BLEICH: Yes, sir.

1 HEARING OFFICER KRAMER: Okay.

2 MS. GANNON: That would be the end of my direct
3 (sic).

4 HEARING OFFICER KRAMER: Okay. Staff, do you have
5 any cross examination for the intervenor panel?

6 MR. ADAMS: I'm sorry, Steve Adams. Are you
7 asking staff about cross?

8 HEARING OFFICER KRAMER: Yes, of the intervenor
9 panel.

10 MR. ADAMS: Yeah, one question for Dr. Bleich. Is
11 he still on the phone?

12 HEARING OFFICER KRAMER: We actually just sent him
13 away for a moment to go download an exhibit.

14 MR. ADAMS: Okay.

15 HEARING OFFICER KRAMER: So you'll have to hold on
16 to that one. Do you have any others?

17 MR. ADAMS: No others.

18 HEARING OFFICER KRAMER: Okay. Let me head down
19 the list. County of San Bernardino? None.

20 Sierra Club?

21 MS. SMITH: No questions.

22 HEARING OFFICER KRAMER: None.

23 CURE?

24 MS. MILES: No questions.

25 HEARING OFFICER KRAMER: Actually I suppose you

1 wouldn't at this point.

2 Basin and Range Watch? No questions.

3 The Society for Bighorn Sheep?

4 MR. BURKE: No, sir.

5 HEARING OFFICER KRAMER: No questions. Defenders
6 of Wildlife?

7 MR. BASOFIN: No questions.

8 HEARING OFFICER KRAMER: None from him.

9 Burlington Northern? No questions.

10 I'm just repeating what they say for the benefit
11 of the record.

12 HEARING OFFICER KRAMER: Okay. I guess the rest
13 of the panel can be excused then. Actually I might have a
14 question. I'll stall here.

15 (Laughter.)

16 HEARING OFFICER KRAMER: My question was for the
17 panel. And this is about the Mojave Fringe-Toed Lizard. I
18 think somebody said -- it might not have been from your
19 group. But that there were on the order of 50,000 acres
20 that had been set aside in various places that would be
21 considered habitat, suitable habitat for the lizard. And I
22 believe we were talking about the habitat on site being on
23 the order of -- was it 20-some acres? Twenty-two.

24 First of all, is the 50,000 number, am I
25 understanding that correctly? I guess we can bring

1 Mr. Otahal back too, if he knows.

2 MR. OTAHAL: No, I do not know specifically the
3 acreage of Fringe-Toed Lizard habitat that is now preserved.
4 I don't know that.

5 MS. GANNON: That was in Dr. Mock's testimony.

6 HEARING OFFICER KRAMER: Okay. Could Dr. Mock
7 then just have the mic for a moment.

8 DR. MOCK: We looked at the ACECs that are labeled
9 Fringe-Toed Lizard ACECs as well as the Pisgah ACEC. And
10 those acres --

11 MR. ADAMS: Excuse me, we can't hear this at all.

12 DR. MOCK: We looked at the ACEC boundaries that
13 were labeled as Fringe-Toed Lizard ACECs as well as the
14 Pisgah ACEC to add up to that, to 25. I think it's on the
15 order of 25,000 acres that BLM has dedicated as ACECs. And
16 then in addition to that in the northeast portion of the
17 vicinity of the site there's the National Park Service Lands
18 and they have designated some Fringe-Toed Lizard habitat as
19 for conservation and management. And that adds an
20 additional whatever the addition is to make it around 57,000
21 acres total between the two agencies.

22 HEARING OFFICER KRAMER: Now are those lands,
23 they're not totally precluded from development, is that
24 correct?

25 MS. CUNNINGHAM: Can I just jump in and point out

1 that like Pisgah ACEC probably has ten percent, five percent
2 actual habitat patches of sand in that ACEC and so the
3 entire ACEC is not Mojave Fringe-Toed Lizard habitat. It's
4 sort of a boundary drawn around a lot of little tiny sand
5 patches that are much less acres. More like you would see
6 on the Calico site. So that number of 50,000, maybe one to
7 five percent of that would actually be habitat.

8 HEARING OFFICER KRAMER: Okay. But even compared
9 to one percent of that, that would be what, 500 acres?
10 Twenty-two acres is a relatively small percentage. So I'm
11 just wondering if it is appropriate to say that that's a
12 significant impact, to lose 22 out of 500 or 5,000?

13 MR. HUNTLEY: Hearing Officer Kramer, this is
14 Chris Huntley. I think it's important to point out that we
15 do not believe there's merely 21 acres of Fringe-Toed Lizard
16 habitat on our project site. It's more on the order of 164
17 acres. We considered the prime, kind of sand sheet areas to
18 consist of one component and then the secondary sand and
19 vegetation communities adjacent to those washes to play an
20 important role in the life history of the species. So the
21 number is much higher.

22 And the reason, just to reiterate, we talked about
23 a little bit earlier was, it's not just the acreage of
24 habitat, it's the position of the project vis-a-vis
25 fragmenting habitats and fragmenting populations to the east

1 and populations to the west. That really drove what we were
2 considering in addition to the proposed cumulative projects
3 that are expected to occur in the same general vicinity.
4 That's really what drove our conclusion for that.

5 HEARING OFFICER KRAMER: Okay, thank you.

6 MR. HUNTLEY: You're welcome.

7 HEARING OFFICER KRAMER: I think I've got my
8 answer, Mr. Cashen, unless you really feel the need to add
9 something.

10 MR. CASHEN: Well I do, briefly. (Laughter). And
11 that is, this is a species that's known to occur in a
12 metapopulation structure. And as I mentioned earlier, you
13 can think of it as a spider web. You don't know how many
14 portions of the web you can remove before the whole thing
15 collapses. And so you can't -- it's unfair to look at it
16 strictly as, well, this is only one percent. Because it
17 could be the one percent that causes the whole web to
18 collapse. And that's what staff was getting at with the
19 extirpation.

20 HEARING OFFICER KRAMER: Okay, thank you.

21 And Mr. Bleich, are you back with us yet?

22 DR. BLEICH: Yes I am, sir.

23 HEARING OFFICER KRAMER: Okay. Let's return to
24 your cross examination then.

25 MS. GANNON: Thank you.

1 CROSS EXAMINATION

2 #####BY MS GANNON:

3 Q And thank you, Dr. Bleich for getting the exhibit.
4 Can you describe what the -- this is Figure 7, 4
5 from your article. Can you describe what the heavy black
6 lines on this figure are showing?

7 DR. BLEICH: According to the legend they are
8 showing the most likely corridor or highest predicted use.

9 MS. GANNON: And are you able to locate
10 approximately where the project site is on this figure?

11 DR. BLEICH: Approximately, yes.

12 MS. GANNON: If you're looking you can see where
13 40 is and 15 is coming in to meet and there is the -- sort
14 of in that triangle there's the two green blobs that are to
15 the right of where 15 and 40 meet. And the site would be
16 right in around the southern green blob.

17 DR. BLEICH: Correct.

18 MR. MEYER: For those of us who are remote could
19 you use your hand tool or something just to point on the
20 WebEx, that would be really helpful for us.

21 MS. GANNON: Just a minute, Christopher.

22 HEARING OFFICER KRAMER: Let me just point out
23 though that we won't be recording the little dot floating
24 around the screen so you also need to describe where it's
25 going for benefit of the transcript.

1 MS. GANNON: I was trying with my green blobs
2 definition but I will try to be clearer, if that's possible.

3 Pat, if you can show along where 40 is on this
4 figure, which is the I-40, which is a red line running east-
5 west. It goes right through the figure. And above it is
6 Highway 15, Interstate 15. Which is going, it goes off from
7 Highway 40 up continuing to the east but then goes below it
8 and to the south. That's 40. Now show them where 15 is.
9 Fifteen is to the north and the east. And if you directly
10 east from the intersection of those two highways over
11 towards -- as I said there are two -- I will continue to
12 call them, green blobs. Right south of, right by the green
13 blobs would be the approximate location of the project site.
14 Just before the yellow line. Is everyone clear?

15 HEARING OFFICER KRAMER: Staff, are you seeing
16 this?

17 MR. ADAMS: Yes, we can see that.

18 MS. GANNON: Dr. Bleich, can you describe what the
19 most likely movement corridor is from this area of the
20 project site.

21 DR. BLEICH: Based on this modeling exercise it is
22 eastward through the Bristol Mountains.

23 MS. GANNON: Thank you. I have no further
24 questions.

25 HEARING OFFICER KRAMER: Okay.

1 DR. BLEICH: May I offer a clarification?

2 HEARING OFFICER KRAMER: Go ahead.

3 DR. BLEICH: I think there's a statement in this
4 paper on page 722 that the Committee would appreciate being
5 aware of. It says at the bottom of the first column on that
6 page: "For this reason we reiterate that the relative
7 likelihood of corridor use should be considered, rather than
8 merely a corridor or non-corridor assessment."

9 MS. GANNON: Thank you for that clarification.
10 But again going to the table. So I understand the way this
11 figure shows is that the darkest line was called out as the
12 most likely corridor, highest predicted use, is that
13 correct?

14 DR. BLEICH: That is what the table shows. The
15 limitation is that this reflects the potential for gene
16 flow, more so than a colonization of empty habitat patches.
17 So it's important that these points be considered in the
18 context in which they were rendered in the paper.

19 MS. GANNON: Thank you for that clarification. No
20 further questions.

21 HEARING OFFICER KRAMER: For the record,
22 applicant's Exhibit 19 includes the chart we have been
23 discussing. And that's at page Bio-3. But the article
24 itself, Ms. Miles, is that a CURE exhibit?

25 MS. MILES: It was referenced in Dr. Bleich's

1 testimony but we did not include it as an exhibit.

2 HEARING OFFICER KRAMER: Okay. So then we have
3 been referring to Exhibit 19 page Bio-3.

4 And we have finished then with the intervenors'
5 panel and all the cross examination.

6 MS. GANNON: The staff had one question for --

7 HEARING OFFICER KRAMER: That's right, I'm sorry,
8 yes. Mr. Adams, you had one question.

9 MR. ADAMS: Yes, for Dr. Bleich.

10 CROSS EXAMINATION

11 #####BY MR. ADAMS:

12 Q In light of your testimony about the habituation
13 of Bighorn Sheep I'm wondering what the impact in your view
14 of the project would be and the sheep's ability to go around
15 the project. In other words, what impact is that going to
16 have on movement in the area?

17 DR. BLEICH: If sheep are going to -- clearly if
18 they are going to move from those slopes immediately to the
19 north of the projected project area or the anticipated
20 project area that will fenced they would have to move either
21 to the east and then southward or to the west and then
22 southward.

23 MR. ADAMS: I understand they would have to walk
24 around the project but is that going to, in your view, be --
25 how large an impediment would that be, given the fact they

1 tend to be habituated to noise over time?

2 DR. BLEICH: I can't say how large of an
3 impediment that it would be. I don't know.

4 MR. ADAMS: Okay, thank you.

5 HEARING OFFICER KRAMER: That then concludes the
6 intervenors' panel, thank you all.

7 And we will continue with the plants. Beginning
8 with the applicant's witnesses on that topic, that sub-topic
9 rather.

10 MS. GANNON: We are calling Dr. Mock.

11 DR. BLEICH: Hearing Officer Kramer?

12 HEARING OFFICER KRAMER: Go ahead.

13 DR. BLEICH: Yes. This is Vern Bleich. Is there
14 a reason for me to remain? Will we be coming back to any of
15 this?

16 HEARING OFFICER KRAMER: No, I don't believe so
17 this evening.

18 DR. BLEICH: Okay. Then unless I hear otherwise I
19 will leave the meeting.

20 HEARING OFFICER KRAMER: Okay. And you did not
21 have anything to say about desert tortoise, correct?

22 DR. BLEICH: That is correct, sir.

23 HEARING OFFICER KRAMER: Okay. Because that's
24 probably not done. It is today but I think we'll be coming
25 back to that in the future. And similarly, you are not

1 involved in the plant discussion, correct?

2 DR. BLEICH: Not directly, no sir.

3 HEARING OFFICER KRAMER: Okay. Well then thank
4 you for attending and have a good evening.

5 DR. BLEICH: Thank you for the opportunity and you
6 all have a good evening too.

7 MR. HUNTLEY: Thank you, Dr. Bleich. Bye.

8 HEARING OFFICER KRAMER: Okay. So let's begin
9 with the applicant's witness. Is it Dr. Mock?

10 DR. MOCK: Yes.

11 HEARING OFFICER KRAMER: Go ahead, please.

12 DIRECT EXAMINATION

13 ####BY MS. GANNON:

14 Q Dr. Mock, have you reviewed the testimony which
15 was prepared and submitted by Sean Johnson and offered as
16 Exhibit 70 in these proceedings?

17 DR. MOCK: Yes I have.

18 MS. GANNON: And are you a supervisor, the direct
19 supervisor of Sean Johnson?

20 DR. MOCK: I'm the head of the biology --

21 MS. HOLMES: We can't hear.

22 DR. MOCK: Of the biology group. I supervised his
23 work on this project.

24 MS. GANNON: And Mr. Johnson is not available to
25 testify in these proceedings. Have you reviewed the

1 testimony that he prepared?

2 DR. MOCK: Yes I have.

3 MS. GANNON: And was this done under your
4 direction?

5 DR. MOCK: Yes it was.

6 MS. GANNON: And can you adopt this testimony as
7 your own?

8 DR. MOCK: Yes I do.

9 MS. GANNON: We will be offering Mr. Johnson's
10 testimony through Dr. Mock.

11 Dr. Mock, can we put up Exhibit -- we're going to
12 put up a figure which was submitted as part of Exhibit 61,
13 which shows the late spring surveys showing the special
14 status species. Did you all see that?

15 (Laughter.)

16 HEARING OFFICER KRAMER: And this comes from?

17 MS. GANNON: It comes from Exhibit 61.

18 HEARING OFFICER KRAMER: Thank you.

19 MS. GANNON: Figure 2.

20 Dr. Mock, can you explain what this exhibit shows.

21 DR. MOCK: This is the summary figure showing the
22 results of two spring surveys in 2010 showing the extent of
23 the species, sensitive species that were detected on site.
24 We have point locations for all the species except for the
25 Androstephium, which is shown in the green as a polygon.

1 MS. GANNON: And can you summarize the special
2 status plant species and indicate where they were found on
3 the site, referencing this exhibit.

4 DR. MOCK: The Androstephium, as you can see in
5 the green, was found in the southern third or half of the
6 site. The Beard Tongue was also found in the same general
7 vicinity but in much smaller quantities.

8 We had -- Emory's Crucifixion Thorn was detected
9 in the northern area in the areas that were subsequently
10 excluded from the site after the survey was completed. And
11 then we also had sightings of I think one List IV species.

12 MS. GANNON: And you just referenced the fact that
13 the reduction in the project's boundary or the size altered
14 the level of impacts potentially associated with the
15 project. Can you describe that in a little bit more detail.

16 DR. MOCK: Primarily the Crucifixion Thorn was
17 completely excluded from the project footprint, all four. I
18 think there were four individuals that were detected during
19 the survey and all four occur in the excluded area to the
20 north. The largest cluster of Beard Tongue was excluded
21 from the project. It is now part of that not a part in the
22 center of the figure surrounded by the green polygon.

23 And I believe there are four other locations of
24 Beard Tongue that are still within the project boundary but
25 they represent eight individuals.

1 MS. GANNON: And can you describe how the
2 applicant is proposing to treat the species that are found
3 within the project site.

4 DR. MOCK: We're complying with the original BIO-
5 12 condition where they requested an environmentally
6 sensitive area buffer be provided for the Beard Tongue. And
7 so all of the locations that are within the project boundary
8 footprint are excluded through that buffering of those point
9 locations.

10 And the Androstephium is not being addressed
11 because it was too common on-site as well as within the
12 project vicinity to be considered a significant impact.

13 MS. GANNON: And did the staff have a conclusion
14 about the impacts associated with Androstephium presented in
15 the Supplemental Staff Assessment?

16 DR. MOCK: They were consistent with their
17 original assessment in that the species is just too common
18 to assess a significant impact and therefore the impacts are
19 less than significant.

20 MS. GANNON: And just by way of summary. The
21 species, they're ranking the species that were found on the
22 site. The List I species were?

23 DR. MOCK: The Beard Tongue is the List I species.

24 MS. GANNON: And that species is going to be
25 completely avoided?

1 DR. MOCK: Yes. Per their direction, yes.

2 MS. GANNON: And the List II species?

3 DR. MOCK: The Androstephium was the one that was
4 less than significant. And the Crucifixion Thorn is a List
5 II but it is being avoided completely as well.

6 MR. MEYER: Excuse me, this is Christopher Meyer.
7 If the witness could speak up just a little louder it would
8 help us, we're missing a few words.

9 DR. MOCK: That's usually not a problem for me.
10 Okay. And then the List IV species we did not consider
11 significant due to its low sensitivity status. And it
12 doesn't meet the criteria for CEQA significance.

13 MS. GANNON: Thank you. I would like to now add
14 to this panel Ms. Bellows to discuss briefly our proposed
15 revisions to Bio Condition 12. Again, anticipating that we
16 may have a workshop. We will be brief to go over the main
17 proposed approach that we are suggesting. This is in
18 Exhibit 92 that was distributed yesterday.

19 MR. MEYER: We have that. You won't be surprised
20 to hear that we haven't had a chance to review it much yet
21 though.

22 MS. GANNON: I was anticipating that answer.

23 DIRECT EXAMINATION

24 ####BY MS. GANNON:

25 Q Ms. Bellows, can you describe the overall proposed

1 revisions to BIO-12.

2 MS. BELLOWS: I can do that. The first thing I'd
3 like to do though is make a correction. On the second
4 bullet point under Section A we state: "The ESAs will be a
5 minimum of 55.7 acres identified as part of the alternative
6 site layout number 2." That was a mistake on our part and
7 it should really be 18 acres as opposed to 55.7.

8 MS. GANNON: And was that number, the 55.7
9 included the areas that were excluded from the project site
10 that Dr. Mock was referring to earlier but is not
11 technically the ESAs, is that correct?

12 MS. BELLOWS: Correct.

13 MS. GANNON: Thank you.

14 MS. BELLOWS: Okay. So the overall concern that
15 we have here. I'm just going to go over it all as opposed
16 to detail here since I know you're still reviewing this, is
17 that we want to clarify that the Androstephium and the Utah
18 Vine Milkweed don't have to be avoided. That would be
19 consistent with the SSA analysis as well as the condition
20 that was in the SA.

21 Also, what we would like to do in terms of off-
22 site compensatory mitigation is we would like to restructure
23 that to be similar to what is being offered in the Ivanpah
24 project. Where the anticipation is that the plants would
25 exist on the desert tortoise mitigation lands. And if they

1 are not then we would do surveys and find those specie on
2 other public lands.

3 In addition we would like to limit our activities
4 to the project footprint and exclude the notion of buffers
5 outside --

6 MS. GANNON: You mean buffers outside the project.

7 MS. BELLOWS: Outside the project footprint.

8 Since we have no intention of working outside of that
9 footprint.

10 MS. GANNON: Thank you. Can we put up the next
11 figure with the county species.

12 (ADDITIONAL) DIRECT EXAMINATION

13 #####BY MS. GANNON:

14 Q Dr. Mock, it's described in the Supplemental Staff
15 Assessment that San Bernardino County has provisions
16 relating to county-designated species. Can you describe the
17 species that are on the site that would under this
18 classification?

19 DR. MOCK: These are species that in the SSA they
20 call them microphyllus species. They're basically a species
21 that have a tendency to occur associated with some of the
22 more substantial washes, was habitat. These would include
23 Mesquite, Smoke Tree and Cat Claw specifically for this
24 project.

25 MS. GANNON: Have you reviewed county documents

1 which indicate the way the county has approached
2 implementation of their ordinances relating to the special
3 status species?

4 DR. MOCK: Yes. I was able to find a couple CEQA
5 documents where this ordinance was being addressed and
6 implemented as a condition of approval. In those documents
7 the county did not require a salvage per se but just a
8 replacement of the individuals on a one-to-one or a two-to-
9 one basis, I believe, using nursery stock.

10 MS. GANNON: And are you aware, were there
11 conversations with the CEC regarding how the applicant would
12 be addressing potential impacts to the species? Was there a
13 request that an inventory of these species be conducted?

14 DR. MOCK: Yes. Thank you.

15 MS. GANNON: It's late in the day.

16 DR. MOCK: It is getting late.

17 Yes. I believe it was Chris Huntley that
18 requested that we -- actually I think it was, it was --
19 originally we started the inventory at the request of Becky
20 Jones of the Fish and Game Department. And so during the
21 Burrowing Owl survey we started the inventory. And then
22 Mr. Huntley added another species which Becky didn't
23 mention. So we inventoried that species during the botany
24 surveys.

25 MS. GANNON: And have those inventories been

1 submitted to the CEC?

2 DR. MOCK: Yes they have.

3 MS. GANNON: And was your anticipation that that
4 was going to be the extent of the mitigation required for
5 these species?

6 DR. MOCK: My expectation was through Fish and
7 Games' request to replace lost individuals with nursery
8 stock.

9 MS. GANNON: And can you describe the condition
10 that's included in the Supplemental Staff Assessment with
11 regard to these species.

12 DR. MOCK: Sorry. Is that Section D? What
13 section is that? I forgot. Sorry.

14 MS. GANNON: That's okay. I'm sure staff can
15 speak to what they wrote and what their intent was.

16 DR. MOCK: Here it is, I'm sorry. So we deleted
17 the last two sections of this requirement.

18 MS. GANNON: Which would have required?

19 DR. MOCK: Would have required a protective plant
20 salvage plan for San Bernardino County plant species.

21 MS. GANNON: And would you consider impacts to
22 these species, particularly given the inventory and any
23 other potential mitigation that you've just discussed, would
24 you consider impacts to these species as being significant?

25 DR. MOCK: No, these are very, very common

1 species. And in terms of the site, the vast majority of the
2 individuals we inventoried are now outside the project
3 footprint. So the total number of individuals that are
4 being potentially affected because some of them could remain
5 on-site even with the project build-out are in the
6 hundreds, around hundreds, one or two hundred maybe.

7 We gave them an accounting in a email, which I
8 don't recall the details. But the species are very common
9 and their density is very low on-site. On the order of one
10 individual per acre as a gross density. Certainly it occurs
11 in clusters in certain areas but the vast majority of them
12 are individual plants very far apart from one another.

13 MS. GANNON: Thank you. I will offer this witness
14 for cross examination or these witnesses.

15 HEARING OFFICER KRAMER: Before I forget, one
16 question for Ms. Bellows. You talked about mitigating by
17 finding plants on other public lands.

18 MS. BELLOWS: Correct.

19 HEARING OFFICER KRAMER: And what would you do
20 beyond finding the plants?

21 MS. BELLOWS: That would be it. That's actually
22 what is in the Ivanpah case. So you find them and you
23 document it, effectively. What happens is that a lot of
24 this information, quite honestly, isn't surveyed. So you're
25 doing some surveying work for them.

1 HEARING OFFICER KRAMER: And survey work is
2 considered to be enough to mitigate for this particular
3 species.

4 MS. BELLOWS: That's what we're requesting, yes.

5 HEARING OFFICER KRAMER: Okay. Staff will
6 probably respond to that when their turn comes. So any
7 questions from staff of the applicant's --

8 MR. ADAMS: Staff does not have any questions.

9 HEARING OFFICER KRAMER: From the intervenors,
10 Sierra Club?

11 MR. RITCHIE: Yes, Travis Ritchie with Sierra
12 Club. One point of clarification for Dr. Mock.

13 DIRECT EXAMINATION

14 ####BY MR. RITCHIE:

15 Q Dr. Mock, you just testified before that there
16 were eight individual White Margin Beard Tongues located on-
17 site, is that correct?

18 DR. MOCK: That's the number that's remaining
19 after the project's footprint has been changed.

20 MR. RITCHIE: So that's the number on the project
21 that's being considered today?

22 DR. MOCK: Yes.

23 MR. RITCHIE: And what surveys did you base that
24 conclusion on?

25 DR. MOCK: Our 2010 surveys during spring.

1 MR. RITCHIE: So there were two surveys, I
2 believe.

3 DR. MOCK: There were two rounds of surveys during
4 spring, yes.

5 MR. RITCHIE: And they were both conducted in
6 spring of 2010?

7 DR. MOCK: Correct.

8 MR. RITCHIE: Now is it your understanding,
9 Dr. Mock, that the White Margin Beard Tongue can persist in
10 a dormant state. That is, that the plant doesn't
11 necessarily germinate every season or from season to season?

12 DR. MOCK: Yes that's true, that's true for many,
13 many plants in the desert.

14 MR. RITCHIE: And is it also true that often the
15 White Margin Beard Tongue and other plants in the desert
16 will have seed banks that can similarly lie dormant for
17 several years on end?

18 DR. MOCK: Yes, that's true.

19 MR. RITCHIE: Now, is it your testimony that the
20 surveys that were conducted in spring of 2010 would have
21 identified out of those seed banks or dormant plants
22 existing on site?

23 DR. MOCK: That was not the focus of the survey.

24 MR. RITCHIE: So it's quite possible given the
25 nature of this plant, that there are White Margin Beard

1 Tongues lying dormant, and/or seed banks, that were not
2 identified by the 2010 survey?

3 DR. MOCK: That's highly likely, yes.

4 MR. RITCHIE: And I believe -- no further
5 questions, thank you.

6 HEARING OFFICER KRAMER: Other intervenors?

7 Mr. Basofin?

8 DIRECT EXAMINATION

9 #####BY MR. BASOFIN:

10 Q Good evening, Mr. Mock. Joshua Basofin with
11 Defenders of Wildlife.

12 Mr. Mock, have you performed summer and fall
13 botany surveys on the Calico site?

14 DR. MOCK: No we have not.

15 MR. BASOFIN: And are you aware of any plants that
16 occur in the Pisgah region that have the potential to occur
17 at the Calico site that may only flower or be visible in the
18 summer and fall?

19 DR. MOCK: Yes. We do have fall surveys planned,
20 as required by Condition of Approval of the CEC. And we
21 have developed a focal specie list of 13 plants that are
22 know from the vicinity of which maybe six to ten of them
23 have moderate potential for occurring on site or in the
24 immediate vicinity of the site.

25 MR. BASOFIN: But to clarify, to date you haven't

1 performed those surveys to determine if those plants occur
2 on site?

3 DR. MOCK: That was not asked of us until sometime
4 since last fall. There has been no opportunity to survey
5 until this fall.

6 MR. BASOFIN: Thank you.

7 HEARING OFFICER KRAMER: Any others among the
8 intervenors?

9 MS. HOLMES: We're having trouble hearing.

10 HEARING OFFICER KRAMER: Okay. The intervenors
11 are finished with their cross examination. Did you have
12 redirect?

13 MS. GANNON: Just one point of clarification.

14 HEARING OFFICER KRAMER: Go ahead.

15 REDIRECT EXAMINATION

16 #####BY MS. GANNON:

17 Q Dr. Mock, you have testified that the surveys may
18 not have captured all of the White Margin Beard Tongue that
19 could possibly be on the site. Is that true for this
20 species in any location?

21 DR. MOCK: Yes. The distribution of the Beard
22 Tongue is very limited in California. It's primarily the
23 Pisgah lava area. It's been described as basically
24 occurring in the major drainages associated with the Pisgah
25 Crater. Something on the order of six miles worth of

1 drainages have been looked at and have found indications of
2 occupation by the species.

3 MS. GANNON: how many years of surveys would it
4 take to have you have like a 90 percent certainty that you
5 had captured every place where it could occur?

6 DR. MOCK: I would hazard to guess it would
7 probably take 20 years because you'd probably only have five
8 good rain years to have any reliability you're going to get
9 a decent distribution of the species.

10 MS. GANNON: Was 2010 a good rain year?

11 DR. MOCK: It was moderately good, relatively. I
12 mean, compared to the previous efforts in 2007 and 2008 it
13 was much better.

14 MS. GANNON: Thank you. No further questions.

15 MS. HOLMES: Could Dr. Mock please speak a little
16 bit more closely to the microphone and a little bit louder
17 please, thank you.

18 MS. GANNON: Do you need him to repeat his answers
19 or we're -- I think we're done.

20 MS. HOLMES: It would be helpful if he repeated
21 the last answer. He kind of has a tendency to fall off at
22 the end of a sentence.

23 DR. MOCK: The answer was that the 2010 survey
24 year for spring's plants was much better than 2008 and 2007.

25 HEARING OFFICER KRAMER: Okay. Now we'll move on

1 to the staff's. I don't know if you still have a panel or
2 just one witness. Mr. Otahal is still here, I'll let you
3 know that. So the staff's panel of staff and any agency
4 representatives that are left, Mr. Adams. Or is that you,
5 Ms. Holmes?

6 MR. ADAMS: Since you've reminded me of Mr. Otahal
7 maybe we could start with him because there was the stray
8 piece of the question about the West Mojave Plan. And he
9 had started to talk about the plant issue related to West
10 Mojave.

11 DIRECT EXAMINATION

12 #####BY MR. ADAMS:

13 Q So would you like to continue that and talk about
14 the consistency or inconsistency of the project with the
15 West Mojave Plan as it applies to plants, Mr. Otahal?

16 MR. OTAHAL: I think one of the sets of testimony
17 that was presented indicated that in terms of the Beard
18 Tongue that there was an inconsistency with the West Mojave
19 Plan. The indication being that there was a maximum of 50
20 acres of impact that's provided in the West Mojave Plan for
21 this species. And then the contention was that there is
22 more than 50 acres of potential habitat for the species.

23 That was based on a error in the interpretation of
24 the West Mojave Plan. That was -- that 50 acre limit is
25 based on Alternative A in the EIS for the West Mojave Plan,

1 whereas what was adopted was actually Alternative B. In
2 Alternative B we do not have a acreage limit on potential
3 habitat impacts for Beard's Tongue. In fact, we don't have
4 any specific protection measure in terms of individuals or
5 anything like that. So we have in this particular case gone
6 above and beyond what the West Mojave Plan consistency would
7 require.

8 MR. ADAMS: Okay, thank you for that. Okay, next
9 just a couple of questions for the staff witnesses. Whoever
10 responds identify yourself.

11 DIRECT EXAMINATION

12 #####BY MR. ADAMS:

13 Q Could you briefly describe BIO-12, the plant
14 mitigation measure and the reasons for some of it being
15 conditioned on surveys that have yet to be completed?

16 MR. WHITE: This is Scott White. And I will try
17 to be brief but I have to admit to you it's a long and
18 complex measure and several things tie into it. But I'll
19 take them in order.

20 Dr. Mock has already described the special status
21 plants that were found on the project site. He's already
22 indicated that we don't regard impacts to Androstephium or
23 to Utah Vine Milkweed as reaching level of significance and
24 we are not recommending avoidance or other mitigation for
25 those species. If we need to clarify language in the

1 measure we'll be glad to do that.

2 The White Margin Beard Tongue is the most
3 important special status plant, or in our view the most
4 important special status plant found on the site. So the
5 first part of our recommended condition of certification,
6 BIO-12 addresses that plant.

7 We acknowledge that rare plant surveys have
8 certain limitations. You can't always find everything. But
9 it's routine in the CEQA analysis that we work with the best
10 information that we have available and we're pretty
11 comfortable with the information that we have available
12 provided by the applicant, based on primarily quite thorough
13 surveys carried out this year during the right season. So
14 we know on the site where at least most if not all of the
15 plants are.

16 And our recommended mitigation or our recommended
17 condition of certification is to avoid direct impacts to all
18 those occurrences and provide a 250 foot buffer surrounding
19 each one of those occurrences to give those plant
20 occurrences the best opportunity to persist in the long
21 term.

22 The 250 foot buffer area is based on an analysis
23 by a group called the Conservation Biology Institute. It
24 was carried out for a different rare plant elsewhere in
25 Southern California. But we've reviewed as much data as we

1 can in addressing fragmentation to rare plants and this is
2 the best and most thorough overall review of these kinds of
3 effects. So we took the 250 feet by reviewing their
4 analysis and taking our best, our best estimate of an
5 applicable distance that would work for this plant.

6 In addition to avoiding direct impacts of those
7 plants we are also recommending long-term monitoring and
8 management to track the persistence of the plants, the
9 regeneration, flowering, seed set and so forth. We are
10 recommending collecting seed as a measure to preserve
11 genetic diversity from those individuals. We are
12 recommending that the applicant develop remedial measures to
13 help replace the plants within those buffer areas if need
14 be. We are also recommending monitoring off-site impacts
15 that the project possibly could have to the east into the
16 ACEC where the bulk of these plants occur.

17 We don't feel that the project would have a
18 substantial impact to fragmentation for the species, because
19 as I said, the vast bulk of the California occurrences are
20 off-site to the east and this project site doesn't, doesn't
21 fall in the middle of that or interrupt the potential for
22 pollen or seed to move among the bulk of these off-site
23 occupied areas.

24 Moving on to the next section of BIO-12. We
25 recommend late-season botanical surveys. It turns out that

1 sort of an unexplored part of the flora of the Mojave Desert
2 has to do with plants that grow and flower late in the
3 summer, usually in response to late summer thunderstorms and
4 rain storms. In large part these haven't been investigated.

5 Botanists don't do that much field work that time of year.
6 And more and more we're discovering that there are
7 interesting plants out during the time of year when people
8 don't go very much.

9 So we are recommending that the applicant conduct
10 field surveys late in the year to find not only rare plants
11 but common plants. Those surveys are to be compliant with
12 survey protocols of the BLM and the CDF&G. And we're not
13 entirely sure what things could be found but we have a list
14 of potential species that could be found on the site.

15 The next section of BIO-12 addresses sort of a
16 what-if. If this plant is found how do we mitigate for it.

17 In general there are two approaches, one is avoidance and
18 the other is off-site compensation. We provide direction
19 for evaluating to what extent avoidance or outside
20 compensation might need to take place for species depending
21 on their conservation status.

22 And then finally the last section of BIO-12
23 addresses the plants identified by San Bernardino County as
24 protected plants. We recognize the applicant's concerns
25 with that measure, with that part of the measure. We

1 haven't really reviewed it. We're willing to talk about
2 finding ways to conserve these plants without necessarily
3 the salvage and transplanted of them. There are probably
4 other approaches to do it through the re-vegetation measures
5 that I think is a condition of BIO-10. So at this time we
6 are not prepared to change anything but we can work on that
7 in a workshop. I think that concludes my discussion.

8 MR. ADAMS: Thank you. You're right, it wasn't a
9 simple measure handled overly briefly.

10 Only other question. Have you had a chance to
11 look at the applicant's proposed changes to BIO-10, which is
12 the, one of the plant measures, re-vegetation? And if so,
13 any thoughts on their requested changes.

14 MR. WHITE: We have looked through BIO-10. We saw
15 a few changes that had to do with topsoil salvage and it
16 mostly involved insertion of the phrase "where feasible" I
17 believe. And we'd rather not make that change, we'd rather
18 keep it as it is.

19 There was a condition that had to do with loss of
20 a re-vegetation site due to fire or flood and we'd like to
21 retain that paragraph.

22 MR. ADAMS: The other plant measure, BIO-12,
23 you've already addressed in part. This was another one we
24 received yesterday, I believe, wasn't it?

25 MR. WHITE: Yes.

1 MR. ADAMS: Any other thoughts on their requests
2 to the extent you have been able to review them?

3 MR. WHITE: I think I already mentioned the Utah
4 Vine Milkweed and the Androstephium to clarify that we are
5 not expecting or we are not requesting mitigation
6 compensation for those two species. And nothing else comes
7 to my mind at this point.

8 MR. ADAMS: Thank you very much. No other
9 questions.

10 HEARING OFFICER KRAMER: Okay, cross examination
11 of staff then. The applicant?

12 MS. GANNON: I have no questions at this time. We
13 look forward to working with staff on potential revisions to
14 the conditions.

15 HEARING OFFICER KRAMER: Mr. Basofin?

16 MR. BASOFIN: Yes, thank you, I have a few
17 questions for Mr. Otahal.

18 HEARING OFFICER KRAMER: Go ahead.

19 CROSS EXAMINATION

20 #####BY MR. BASOFIN:

21 Q Good evening, Mr. Otahal. I'm wondering if we can
22 put up on the screen Defenders Exhibit 615. And it might
23 need to be enlarged because it's got some small print.
24 Yeah, it's a little bit small. That's the correct exhibit.
25 You know, I'll just go ahead and read it.

1 This is Provision 2.2.4.10.23 of the Bureau of
2 Land Management's West Mojave Amendment to the California
3 Desert Conservation Area Plan. And I was going to have you
4 read it, Mr. Otahal, but for efficiency's sake I'll read it.

5 There's a section that states -- it's entitled White Margin
6 Beard Tongue and there's a section that states: "This
7 species is a disjunct with a very limited range within
8 California, all within the West Mojave. It would be limited
9 to 50 acres of occupied and potential habitat.

10 First, Mr. Otahal, do you have a sense of how much
11 potential habitat for White Margin Beard Tongue occurs on
12 the Calico site?

13 MR. OTAHAL: No I don't. We were basing our
14 analysis on the presence of individuals and then protecting
15 a suitable habitat buffer around each of those individuals
16 in order to maintain the populations that were identified.

17 MR. BASOFIN: And is this indeed a provision in
18 the West Mojave amendment to the CDCA plan?

19 MR. OTAHAL: No it's not. This is a provision of
20 Alternative A, which was not adopted. This is from what was
21 called the preferred alternative and that would have been a
22 joint BLM management and a HCP, a Habitat Conservation Plan.
23 That was not adopted.

24 And what I would refer you to is in the West
25 Mojave Plan, which was already entered I believe. If you

1 look at Table 2-33, Chapter 2, 239. There's seven
2 alternatives that were identified in this EIS. And it was
3 alternative B that was ultimately implemented. And under
4 the White Margin Beard Tongue there is no provision for that
5 50 acre limit.

6 MR. BASOFIN: Is this 50 acre limit that's
7 included in this version of the Mojave Plan, is that stated
8 in the Staff Assessment and Draft Environmental Impact
9 Statement as a provision that would apply to this project?

10 MR. OTAHAL: I don't believe that the 50 acre was
11 mentioned in the Staff Assessment because it's not
12 applicable.

13 MR. BASOFIN: Thank you.

14 MS. MILES: Josh, we actually had a question
15 relating to that particular topic so I wonder, could I just
16 interject on that topic?

17 MR. BASOFIN: Okay.

18 MS. MILES: Scott, could you just point out the
19 page number that you were showing me. I just want to get
20 clarification on this.

21 MR. HUNTLEY: I'm sorry, were you directing the
22 question to me, Scott?

23 MS. MILES: No, no, sorry, Mr. Cashen.

24 MR. CASHEN: I know that this has been a source of
25 confusion for all of us for a long time now and we're just

1 trying to get some clarification. I'm looking at the Record
2 of Decision that was issued for the West Mojave Plan and it
3 does, in fact, say that the Record of Decision or the ROD
4 approves Alternative B. But it also says under Alternative
5 B, this alternative consists of those elements of
6 Alternative A that are applicable to and that could be
7 implemented on BLM-administered public lands.

8 And so the provision about the protection or
9 limiting to 50 acres of habitat loss to White Margin Beard
10 Tongue was in fact listed under Alternative A. But the ROD
11 appears to say that everything under Alternative A is
12 applicable if it's on BLM land. Trying to figure this out.

13 MR. OTAHAL: Okay, that's incorrect because
14 obviously it was not applicable. Because if you look at the
15 take limit -- take does not apply to plants but that is how
16 it was described in Alternative B. If you look at the table
17 that I provided it shows that that 50 acre limit is not
18 applicable.

19 MR. CASHEN: I'm sorry, I missed -- can you give
20 me that table number again.

21 MR. OTAHAL: Sure. That's table 2-33. It is on
22 page 2-238.

23 MR. BASOFIN: Can I continue with my examination?

24 MS. MILES: Um-hmm.

25 MR. BASOFIN: That would be great, thanks.

1 BY MR. BASOFIN:

2 Q Mr. Otahal, is it your testimony that the DWMA
3 Record of Decision does not state that the conservation
4 measures associated with Alternative A apply to federal
5 lands under Alternative B?

6 MR. OTAHAL: In this particular case, no.

7 MR. BASOFIN: And is there, is there any BLM
8 document that clarifies that the conservation measures
9 associated with Alternative A do not apply to Alternative B?

10 MR. OTAHAL: I refer you to this table which,
11 again, indicates what take was indicated or anticipated
12 under Alternative B. And this 50 acre limit is not in that
13 table.

14 MR. BASOFIN: And is the provision associated with
15 Beard Tongue in 2.2.4.10.23 included in the West Mojave Plan
16 as its currently printed?

17 MR. OTAHAL: Is it included?

18 MR. BASOFIN: Yes, is it included?

19 MR. OTAHAL: It is included in the EIS as part of
20 the preferred alternative. And the preferred alternative
21 was not adopted.

22 MR. BASOFIN: Thank you.

23 HEARING OFFICER KRAMER: For the sake of the
24 record. Is somebody asking that we take official notice of
25 the West Mojave Plan?

1 MS. MILES: Yes.

2 MR. BASOFIN: That would be a good thing to do,
3 thank you.

4 HEARING OFFICER KRAMER: Okay, we will do that.
5 And can somebody circulate either -- it looks pretty big so
6 I suppose it would be -- is that available via a link on the
7 Internet?

8 MR. OTAHAL: No it's not. And I don't even know
9 if we have an electronic copy either.

10 DR. MOCK: Yes it is, Chris.

11 MR. OTAHAL: Is it?

12 DR. MOCK: Yes.

13 MR. OTAHAL: Okay.

14 DR. MOCK: I was able to download it recently.

15 MR. OTAHAL: Okay.

16 MS. GANNON: And we should make sure that we are
17 in agreement about what we're taking notice of or what we're
18 submitting. It seems like there is some controversy about
19 which provisions have actually been adopted by the BLM and
20 being implemented.

21 HEARING OFFICER KRAMER: So we need the West
22 Mojave Plan. We also need the Record of Decision that is
23 referred to. And I would suggest the parties brief whether
24 this 50 acre limit is applicable. Because one way I heard
25 it was that the ROD, the ROD was adopting a combination of a

1 couple alternatives it sounds like. And one interpretation
2 would be that that overrides the implication that Mr. Otahal
3 is deriving from the table because it's a higher order
4 document.

5 MR. OTAHAL: As a point of clarity. What my
6 interpretation was, and this is from speaking to Dr. Larry
7 Lapree, who is the district biologist who actually wrote
8 this. His statement to me, last night as a matter of fact
9 because I was getting clarity on this, was that the 50 acres
10 was applying to the private land portion of the Habitat
11 Conservation Plan. And because the HCP was not adopted the
12 private provisions are not applicable.

13 HEARING OFFICER KRAMER: Now is that, is that
14 intent manifested merely in memory of the intent or in words
15 in the plan itself?

16 MR. OTAHAL: I cannot point to those words.

17 HEARING OFFICER KRAMER: Okay. Well I think it
18 would be useful for the parties to try to draw us a road
19 map. Because I could see myself otherwise spending a couple
20 days working on this little issue. And looking at my time
21 budget I don't see that happening.

22 MR. WHITE: This is Scott White. I wonder if
23 could just step in for a minute. I might be able to clarify
24 a couple of things.

25 Chris is referring -- Chris Otahal that is, is

1 referring to Table 2-232. And the specific line that
2 pertains here is near the end of the table, it's on page
3 2-242 of the EIS. And about partway down this large page of
4 the table, white margin beard tongue is cited. And under
5 the preferred alternative A, all known sites would be
6 conserved and there was a take of 50 acres. Under the
7 adopted Alternative B -- and it's not called the adoptive
8 alternative in this document because it's the EIS, it hadn't
9 been adopted yet. For conserved it says, most known sites.
10 And for take it has an abbreviation, U-N-K, which I presume
11 means unknown.

12 And I would also suggest people take a look at
13 Chapter 2 of the EIS, which is the chapter that describes
14 preferred Alternative A. And I can't remember which chapter
15 but there is another chapter that describes the
16 alternatives, and in particular you would want to focus on
17 Alternative B.

18 MR. BASOFIN: Mr. Kramer, I have maybe one but
19 maybe two additional questions for Mr. Otahal.

20 HEARING OFFICER KRAMER: Okay. Before that, did
21 we just add a couple more documents to the list of official
22 notice? And that would be the EIS, the West Mojave Plan.
23 And Chris on the telephone -- Is it Chris or -- it was
24 Scott. Was there another document you must mentioned?

25 MR. WHITE: No, everything that I just mentioned

1 is in the Final Environmental Impact Report and statement
2 for the West Mojave Plan, January 2005.

3 HEARING OFFICER KRAMER: Okay, so we have that, we
4 have the West Mojave Plan and we have the ROD that adopted
5 the West Mojave Plan. We will take official notice of all
6 of those. But it would be really helpful if somebody could
7 circulate links. Or in the case of the ROD I suppose it's
8 small enough to email the PDF.

9 MR. ADAMS: This is Steve Adams. Maybe we could
10 -- I don't know if Chris Otahal knows this. But the only
11 document we have been looking at is the EIS on the plan.
12 I'm just wondering if the plan itself is contained within
13 the EIS.

14 MR. OTAHAL: Yes, that's correct, we don't have a
15 stand-alone, planned document. It is the EIS itself that
16 serves as a plan.

17 HEARING OFFICER KRAMER: Okay, then it's the
18 EIS/plan and the ROD. And we'll take official notice of
19 those.

20 Mr. Basofin, go ahead and continue.

21 MR. BASOFIN: Thank you.

22 BY MR. BASOFIN:

23 Q Mr. Otahal, do you have a copy of the SADEIS in
24 front of you?

25 MR. OTAHAL: The --

1 MR. BASOFIN: I'm guessing you probably don't
2 since I only see one stack of papers.

3 MR. OTAHAL: No.

4 MR. BASOFIN: If you had 1400 pages it would look
5 a lot bigger.

6 MR. OTAHAL: I have the biology section.

7 MR. BASOFIN: Okay. Well, I'm going to refer you
8 to the biology section.

9 MR. OTAHAL: Okay.

10 MR. BASOFIN: Okay. So if you could turn to page
11 C.2-117. And, Mr. Otahal.

12 MR. OTAHAL: Yes.

13 MR. BASOFIN: If you could read the first sentence
14 of the first full paragraph.

15 MR. OTAHAL: The one that begins "under this
16 alternative?"

17 MR. BASOFIN: Actually it's the second, the second
18 sentence on C.2-117. It begins "under the plan."

19 HEARING OFFICER KRAMER: Could you -- you're
20 referring to the original staff assessment.

21 MR. BASOFIN: Sorry, I'm referring to the original
22 staff assessment. Do you only have the Supplemental?

23 MR. OTAHAL: Yes, I had the supplemental

24 MR. BASOFIN: Okay, no problem, one second.
25 Actually if you could read the first two sentences of the

1 first full paragraph.

2 MR. OTAHAL: Okay. That begins "in addition?"

3 MR. BASOFIN: Right.

4 MR. OTAHAL: "In addition to meeting the
5 cumulative orientation on ground disturbance, projects on
6 lands covered by the plan would be required to pay a
7 mitigation fee. Under the plan, incidental take of White
8 Margin Beard Tongue is limited to 50 acres of occupied and
9 potential habitat."

10 MR. BASOFIN: And was this document created
11 jointly between the CEC and the BLM?

12 MR. OTAHAL: Yes it was.

13 MR. BASOFIN: Okay, thank you.

14 MR. OTAHAL: And apparently that is in error.

15 MR. WHITE: Pardon me, this is Scott White. I
16 haven't been able to track down what you're reading or what
17 page of which document.

18 HEARING OFFICER KRAMER: It was the original staff
19 assessment, draft EIS.

20 MR. OTAHAL: And is that in the final, in the
21 supplemental?

22 MR. BASOFIN: Are you asking me questions?

23 HEARING OFFICER KRAMER: I think you might be
24 answering my question. So did that same statement about the
25 need to adhere to the 50 acre standard appear in the

1 supplemental staff assessment? If you know, Mr. Otahal.

2 MR. OTAHAL: I am not aware of that. I was not
3 looking for that specific sentence so I cannot say if it is
4 there or not.

5 HEARING OFFICER KRAMER: Okay. Staff, do you know
6 the answer?

7 MR. ADAMS: Not to our knowledge. I don't
8 remember that it is. We will need to review that and check
9 and make sure. But it sounds like it was an error that was
10 in the draft. We hope we corrected all our orders in the
11 Supplemental Staff Assessment --

12 MR. BASOFIN: Mr. Kramer.

13 MR. ADAMS: But we will check.

14 MR. BASOFIN: I'd refer you to page C.2-121 of the
15 SSA.

16 HEARING OFFICER KRAMER: Do you see that, staff?
17 That's C.2-121 of the Supplemental Staff Assessment,
18 otherwise known as Exhibit 300

19 MR. HUNTLEY: This is Chris Huntley. Yes, we do
20 have that language in the Supplemental Staff Assessment and
21 we believe it's in error. We made a similar mistake and
22 reviewed Alternative A for that species.

23 HEARING OFFICER KRAMER: Then do you have an
24 opinion about whether the project complies with the adopted
25 Alternative B?

1 MR. HUNTLEY: This is Chris Huntley. Staff has
2 reviewed Alternative B for rare plants and a variety of
3 other species that were identified by intervenors. And we
4 believe the project is in compliance with the West Mojave
5 Plan.

6 HEARING OFFICER KRAMER: Thank you.

7 Mr. Basofin, anything else?

8 MR. BASOFIN: Yeah, I have a question for staff.

9 BY MR. BASOFIN:

10 Q Staff, did you submit any testimony or exhibits
11 that would have indicated that two versions of the Staff
12 Assessment were in error with regard to the avoidance
13 requirements of White Margin Beard Tongue?

14 MR. WHITE: I'm sorry. If I understand the
15 question right, have we submitted --

16 MR. BASOFIN: Have you submitted any --

17 MR. WHITE: Have we submitted an errata addendum
18 to indicate those errors. Is that your question?

19 MR. BASOFIN: An errata would be one type of
20 evidence or exhibit, yes. Was there any type of evidence or
21 exhibit that would have indicated that those numbers are in
22 error?

23 MR. WHITE: We haven't submitted those, no.

24 MR. BASOFIN: That's it, thanks.

25 HEARING OFFICER KRAMER: Ms. Smith, did you have

1 something?

2 MS. SMITH: No, thank you.

3 THE REPORTER: Who was that, Mr. Kramer? I have
4 no idea who that was.

5 HEARING OFFICER KRAMER: Who was that on the
6 telephone just now? Our court reporter wants to know.

7 MR. WHITE: This is Scott, Scott White.

8 HEARING OFFICER KRAMER: Okay. And you spoke just
9 a minute ago, Scott?

10 MR. WHITE: Yeah.

11 HEARING OFFICER KRAMER: Okay, thank you.

12 Any other intervenor questions for the staff
13 panel?

14 Seeing none then we'll move on to the intervenors'
15 panel. And I don't know which of the witnesses we've listed
16 intended to testify about plants. We've eliminated
17 Dr. Bleich.

18 Mr. Cashen is one of the candidates.

19 Ms. Cunningham, are you? You're not on plants,
20 okay.

21 Our friends from the Society for the Preservation
22 of Sheep have retired for the evening.

23 It's after seven. Do we have --

24 MR. BASOFIN: The last time I checked, Mr. Kramer,
25 Mr. Andre was on the phone. Mr. Andre, are you there?

1 MR. ANDRE: Yeah, I'm still here.

2 HEARING OFFICER KRAMER: Okay, thank you for
3 calling in.

4 Mr. Aardahl has left us, is that right? Oh no,
5 you're back there.

6 MR. BASOFIN: Mr. Aardahl's testimony doesn't go
7 to plants so he won't be joining the panel.

8 HEARING OFFICER KRAMER: Okay, great, okay. First
9 we need to deal then with the question of the motion to
10 exclude Mr. Andre's testimony. We tried to discuss that a
11 little bit last night but we decided that we needed to hear
12 from you, Mr. Andre, before we could rule on that.

13 First let's swear you as a witness. Can you raise
14 your right hand.

15 Whereupon,

16 JIM ANDRE

17 was called as a witness herein, and after first having been
18 duly sworn, was examined and testified as follows:

19 HEARING OFFICER KRAMER: Thank you.

20 The first question for you from the Committee and
21 then I'll let the parties ask others is, to describe your
22 role on this project to this date, including the work that
23 you did under perhaps several layers of subcontract for the
24 applicant on this case.

25 MR. ANDRE: Sure. It's actually very -- I'm

1 familiar with this role because I served this role on quite
2 a bit of projects that go on in the desert because that's my
3 expertise. I played the same role, by the way, on the
4 Ivanpah surveys. And also played the role of an intervenor
5 on the Ivanpah project.

6 My principal role for the project was I was asked
7 by a colleague of mine, Bill Borman, who is a subcontractor,
8 to assist helping him identify botanists that would be
9 available for the surveys. I also provided some educational
10 materials, a rare plant photo guide. Which for this
11 particular project I also went out one day with one of the
12 project heads and botanists and we did a reconnaissance of
13 reference plant populations. Not just on the site. He had
14 not seen penstemon albomarginatus so I showed that plant.
15 But also throughout the area looking at reference
16 populations that had -- for rare plant populations that had
17 a potential to occur on the site.

18 And then I also arrived in the morning one day and
19 helped with training crews on the identification of plants
20 on the site.

21 And that was it. I didn't participate in the
22 surveys.

23 I saw my role as one of being another reference
24 for information. Which I'm commonly asked to give.

25 HEARING OFFICER KRAMER: Did you receive any

1 information from the application that you would consider in
2 any way confidential?

3 MR. ANDRE: Yeah. And in fact I made it clear
4 that I was not interested on working on the project itself
5 beyond the role that I took and that I would not want to
6 sign a confidentiality agreement and I did not.

7 HEARING OFFICER KRAMER: Okay, let me turn this
8 over to the applicant to ask the questions they think they
9 need in order to inform our decision on the motion to
10 exclude your testimony.

11 MS. GANNON: So Mr. Andre, you were asked to sign
12 a confidentiality agreement and you said no, is that
13 correct?

14 MR. BASOFIN: Objection, that was not his
15 testimony.

16 MS. GANNON: I'm asking him the question to see
17 what he said. I asked him if that was correct.

18 MR. ANDRE: That's not correct.

19 MS. GANNON: Okay. But you did just reference the
20 fact that you did not sign a confidentiality agreement.
21 Were you asked to sign a confidentiality agreement?

22 MR. ANDRE: I was not.

23 MS. GANNON: Were you aware that the company that
24 you were working for had a non-disclosure agreement?

25 MR. ANDRE: I was not.

1 MS. GANNON: Are you aware that those are -- non-
2 disclosure agreements are often parts of contracts?

3 MR. ANDRE: You know, I am aware of them but I
4 have never signed more than maybe two or three out of I
5 would say many dozens of consulting that I've done,
6 consulting projects.

7 MS. GANNON: And so the testimony you gave is that
8 you would say you have not conducted any surveys on the site
9 that is consistent with the description that was included in
10 the motion submitted by Joshua Basofin, is that correct?
11 You didn't do any surveys, is that correct?

12 MR. ANDRE: Well, you know, it's a matter of
13 semantics. I mean, I was on the site and we were looking at
14 plants. And that was only for two days.

15 MS. GANNON: So you did do surveys?

16 MR. ANDRE: It's important to understand the
17 intent of why I was there. I was there as a reference to
18 basically come in, initially, and help guide orientation to
19 identification of rare plants.

20 MS. GANNON: And there were some questions raised
21 when we were discussing this last so maybe you can clarify.
22 We had time logs that show that you worked about 40 hours
23 for the project. Does that sound about right to you?

24 MR. ANDRE: Yeah. You know, it ended up being a
25 little bit more than that when you add also the preparation

1 of the rare plant photo ID guides.

2 MS. GANNON: All right, but that sounds about
3 accurate.

4 MR. ANDRE: Yes, in the ballpark, a-ha.

5 MS. GANNON: Okay. And we also had a layer which
6 was taken -- as I'm sure you're aware, they were taking GPS
7 tracking of the surveys when they were being conducted and
8 we have a log which shows where you were. And I'm sorry, I
9 don't have the date here. But it was a GPS tracking of a
10 survey. The transects that were taken in one of the plots.
11 Do you recall whether you did that type of survey on the
12 site?

13 MR. ANDRE: Yeah, I think that you're referring to
14 a day when I was working with Sean Johnson and another crew
15 leader and the idea was to bring them up to ID and so I
16 actually walked the transects with them.

17 MS. GANNON: But you would consider that not being
18 a survey effort, is that correct?

19 MR. ANDRE: Like I say, it's a matter of
20 semantics. If you want to call it that that's fine with me.

21 MS. GANNON: Okay, I have no further questions.

22 MR. BASOFIN: Mr. Andre, on the days when you were
23 walking the site, can you just clarify what the purpose was.

24 MR. ANDRE: The purpose was to -- the crew leader,
25 Sean, was interested in taking me to an area that had the

1 highest potential he thought, and I thought as well in
2 looking at maps in the morning, of having penstemon
3 albomarginatus and other rare plants. And so we went to
4 that site partly to observe potential and also to hopefully
5 find some of the plants. They had a few other unknowns
6 there that they wanted to show me and basically get my
7 opinion on the ID. So I was available to walk that entire
8 day and we did. We walked that entire portion of very high
9 potential habitat.

10 MR. BASOFIN: And at any time during that day were
11 you counting numbers of Beard Tongue plants?

12 MR. ANDRE: We encountered one that particular
13 day.

14 MR. BASOFIN: But were you conducting surveys in
15 the sense that you were walking transects and counting them?

16 MR. ANDRE: Yes.

17 MR. BASOFIN: And how long were you doing that
18 for?

19 MR. ANDRE: That was that one day.

20 MR. BASOFIN: Okay, thank you.

21 HEARING OFFICER KRAMER: Any other questions for
22 any party?

23 Hearing none, do we have any further argument
24 about the motion?

25 MS. GANNON: I think we have made our views clear.

1 HEARING OFFICER KRAMER: Okay, give us just --
2 Okay, the motion is denied and -- is it Dr. Andre?

3 MR. ANDRE: No, it's not.

4 HEARING OFFICER KRAMER: No, okay. I'm promoting
5 a lot of people lately. We're hard-pressed to find any
6 confidential information here. Somebody having gone out and
7 given generic educational information to people who were
8 going to conduct a survey of species on public land, which
9 would be information that has to be revealed to the
10 Commission and the public, we cannot find any confidential
11 information there.

12 And also it really has not been established to our
13 satisfaction what the legal authority for the Commission
14 would be to exclude evidence. There is always the private
15 remedy if you feel your contract has been violated. And of
16 course Mr. Andre has to decide whether or not to testify,
17 making his own assessment of the risk that he might be
18 violating a contract. But that's not something for us to
19 enforce as far as we can tell from the authority that's been
20 presented to us. so Mr. Andre is free to testify as he sees
21 fit.

22 MR. ANDRE: Okay. Assuming I'm not going to be in
23 risk of legal issues.

24 I should point out that in a request, you know,
25 the idea was that I had acquired information about the site,

1 in particular the penstemon. In my brief work with the
2 group there -- you know, I have been working on the
3 penstemon albomarginatus since 1994 doing demographic work
4 at the site. And my general, my testimony also outlines a
5 number of points that reflect, you know, my qualifications
6 in general and experience with rare plants, especially in
7 the California deserts. Which is 30 years of experience as
8 a botanist, professional botanist.

9 HEARING OFFICER KRAMER: Okay. I want to be --

10 MR. ANDRE: Yes.

11 HEARING OFFICER KRAMER: I'm assuming that we are
12 not going to be going over your qualifications.

13 MS. GANNON: We will stipulate to his
14 qualifications.

15 HEARING OFFICER KRAMER: Okay. Anybody else want
16 to go over his qualifications? Hearing none.

17 But I want to be clear to you, Mr. Andre, that the
18 Commission has not given you any sort of legal immunity from
19 whatever the applicant may choose to send in your direction
20 by way of a lawsuit over this confidentiality issue. You
21 need to obtain your own legal advice about that if you have
22 any concerns. All we're saying is that we are willing to
23 listen to your testimony today and we will not exclude it
24 because of this alleged conflict of interest. So that's
25 sort of a civil Miranda Warning, if you will. You're on

1 your own legally.

2 MR. ANDRE: Okay. Should I seek legal advice,
3 Josh? (Laughter.)

4 MR. BASOFIN: Thank you for that admonition,
5 Mr. Kramer, we appreciate it. Can I begin my examination?

6 HEARING OFFICER KRAMER: So to be clear, we ended
7 up with -- where did Mr. Cashen go? Is he on the panel?

8 MS. MILES: I think he may have stepped out to use
9 the restroom.

10 HEARING OFFICER KRAMER: Okay.

11 MS. MILES: But yes, he was going to be available
12 for cross and maybe had a little bit to add on direct.

13 HEARING OFFICER KRAMER: Okay. Well, he'll
14 probably be back in time before Mr. Basofin finishes with
15 Mr. Andre, so go ahead.

16 MR. BASOFIN: Actually, I'd like to request if we
17 could take a five minute break.

18 HEARING OFFICER KRAMER: Okay. Everyone is good
19 with that? So we'll come back at 9:10.

20 (Off the record.)

21 HEARING OFFICER KRAMER: Sacramento, are you still
22 with us?

23 MR. MEYER: I was going t leave you hanging for a
24 second, Paul, but yes, we are. (Laughter)

25 HEARING OFFICER KRAMER: Thank you.

1 And Mr. Andre, you're on the phone?

2 MR. ANDRE: Yeah, I am.

3 HEARING OFFICER KRAMER: Okay. Mr. Basofin, go
4 ahead and question Mr. Andre first.

5 MR. BASOFIN: Thank you. Joshua Basofin with
6 Defenders of Wildlife.

7 DIRECT EXAMINATION

8 #####BY MR. BASOFIN:

9 Q Mr. Andre, I'd just like to first throw in my two
10 cents since everyone else has and really thank you for being
11 here with us tonight. We have sort of run you through the
12 ringer. I know it's not easy to be on the phone at 9:30 at
13 night. You're certainly not in it for the money so thank
14 you for being here. Your expertise is really greatly
15 appreciated. You've certainly peaked some interest here.

16 Mr. Andre, did you submit testimony in this
17 proceeding?

18 MR. ANDRE: Yes I did.

19 MR. BASOFIN: And do you have a true and correct
20 copy of your testimony?

21 MR. ANDRE: Yes I do.

22 MR. BASOFIN: And are the opinions in your
23 testimony your own?

24 MR. ANDRE: Yes.

25 MR. BASOFIN: Thank you. I won't ask you to

1 summarize your qualifications since that has been
2 stipulated.

3 HEARING OFFICER KRAMER: Could you give us the
4 exhibit number though for the cross referencers among us.

5 MR. BASOFIN: Certainly. I believe it's -- it's
6 Exhibit 600.

7 Mr. Andre, a part of your testimony relates to
8 penstemon albomarginatus, the White Margin Beard Tongue.
9 Could you give us a brief description of the species
10 including its life history, where it occurs and a little bit
11 about what it looks like.

12 MR. ANDRE: Sure. Well, it's tap root perennial.
13 It's distributed from the California population -- well,
14 there's actually four population areas known globally. One
15 of those is up near -- well, northwestern Clark County and
16 also in the Stateline area of Nevada. Another population
17 over in Western Nevada, Mojave County, Western Arizona of
18 Mojave County. And then the smallest population occurrence
19 is at Pisgah at the lava flow and sort of arcing around the
20 north end of the lava flow.

21 It's biogeographically quite unique in having this
22 sort of distribution where you have very widely distributed,
23 disjunct occurrences. We don't know a lot about the
24 population genetics between these occurrences and whether or
25 not there is anything genetically unique about them from

1 each other. That work is ongoing and actually accelerating
2 right now by Dr. Andrea Wolfe who is collecting DNA material
3 this year.

4 It's a poster child of California rare plants.
5 Not only just in the desert but in California. It's been
6 identified as -- of the 360 or so CNPS listed species, rare
7 plant species in the California desert, as perhaps one of
8 ten that appear to be meeting criteria right now in terms of
9 its threat, the potential threats and distribution and
10 rarity as meeting criteria for state or federal listing.
11 And in fact there is an ongoing effort to propose it for
12 federal listing. So it's of conservation concern in all
13 states and throughout its range globally.

14 MR. BASOFIN: Thank you.

15 MR. ANDRE: Again, it's a very showy plant. It's
16 unique among penstemons. Penstemons as you know is a big
17 group of plants known horticulturally, quite showy. There
18 are many species in California, most are montagne or are
19 from wetter climates. This is a very unique penstemon in
20 the desert in that it occurs at low elevations in a very hot
21 desert environment.

22 MR. BASOFIN: Thank you. Can you just briefly
23 describe the importance of the project site and the Pisgah
24 region for the species.

25 MR. ANDRE: The project site lies on what we know

1 of to be basically the western portion of the known
2 distribution in California. As Scott White pointed out, the
3 largest concentration of plants occurs, abuts the project
4 site along the transmission line there just to the east and
5 occupies basically that square mile of sand ramp, sandy
6 bajada, just north of the railroads, up and towards the base
7 of the mountains there. That is probably where, you know,
8 there's an estimate of approximately 2,000 to 4,000 plants
9 in the population. It varies widely. I've done demographic
10 work on the plant for 16 years and those numbers vary wildly
11 from year to year. The best estimate is that the project
12 site itself probably contains less than 10 percent of the
13 entire population in terms of plant numbers. That's my
14 estimate.

15 MR. BASOFIN: And that population of 2,000 to
16 4,000 plants in the region. How many other occurrences of
17 the plant besides that are there in California?

18 MR. ANDRE: There's no -- none that are confirmed.
19 There was a collection, a voucher made from the Cadiz Dunes
20 area roughly by Marcus C. Jones, many, many, many decades
21 ago. There were no maps, USGS maps at the time. His
22 reference was just very broad. And we don't know that it
23 was ever actually collected from there. Although the
24 habitat there at the Cadiz Dunes is certainly reasonable
25 habitat for it to occur.

1 MR. BASOFIN: Thank you.

2 MR. ANDRE: It's limited to just that one
3 location.

4 MR. BASOFIN: Okay, thanks. And can you describe
5 the type of habitat that the species occupies.

6 MR. ANDRE: Well, it varies between the three
7 states that it occurs in. But one thing in common is that
8 it's sandy, somewhat stabilized and somewhat vegetated sandy
9 soil. The California tends, the plants in the California
10 population tend to occur on relatively unstable sands were
11 you find it, compared to the Nevada populations, which
12 thrive quite well on moderately sandy, stabilized creosote
13 bush scrub.

14 MR. BASOFIN: And you're familiar with the Beard
15 Tongue habitat in the Pisgah region and the occurrences
16 there, is that correct?

17 MR. ANDRE: Yeah, I estimated I've spent at last
18 200 days walking the site.

19 MR. BASOFIN: Thank you. In your professional
20 opinion is there more than 50 ares of potential habitat for
21 the Beard Tongue on the Calico site?

22 MR. ANDRE: Yeah, I would -- I have not done that
23 analysis. I would estimate easily over 1,000 acres.

24 MR. BASOFIN: Thanks. Now in terms of the seed
25 bank for the penstemon. And I'm sorry, I apologize, I'm

1 using penstemon and Beard Tongue interchangeably.

2 MR. ANDRE: Beard Tongue is not a favorite word
3 among botanists.

4 MR. BASOFIN: okay, so maybe I'll use penstemon.
5 Can you talk a little bit about the seed bank for the Beard
6 Tongue and what it looks like and how it occurs in relation
7 to the plant itself.

8 MR. ANDRE: Yeah. This is very important. I took
9 an interest in this plant because of my prior interest in
10 biennials and short-lived perennials in the mustard family.

11 And when I arrived at the desert I really looked at similar
12 types of life histories among desert plants an this one
13 really fit the bill.

14 So what I did was I started some demographic
15 monitoring at the Pisgah population. It first took me about
16 two years to really identify some concentrations of plants.

17 It really does not occur in high concentrations anywhere
18 within its population there at Pisgah. And when I talk
19 about that I talk about the entire area of its distribution
20 there in California.

21 And when I establish some what I call cohorts.
22 Basically monitoring plants over years. What I found and
23 what I found was very unique about this site is there's a
24 very high degree of localized extinction. Where a cohort
25 might survive for a few years and go extinct and then, you

1 know, maybe several hundred meters away another one pop up.

2 And that would then become a part of my study and I'd
3 follow that cohort.

4 So what you have, you know, you have a plant
5 that's very dependant on its seed bank and its reproductive
6 biology on the site. And what you see on the surface is
7 only a subset of what is actually part of its genetic
8 makeup. Again, others, Pat Mock said it well, it's typical
9 of the desert strategy. Where plants exist as seed banks
10 and that includes their distribution. And so what you see
11 above group is a very small portion of what the makeup of
12 the distribution of the plant is. And I should point out
13 that 2009 the plant was more common than 2010 in the site.
14 I know that from having done a lot of work that year and
15 actually rewalking those same areas in 2010.

16 MR. BASOFIN: And how long, what's the range of
17 time that the penstemon seed bank might persist in the soil
18 before sprouting?

19 MR. ANDRE: We don't know that. Again, there was
20 an estimate of 20 years. Desert plants, some annuals have
21 been known to survive for 70, 80 years and remain viable in
22 the soil. I think 20 years is a fair estimate.

23 MR. BASOFIN: Okay.

24 MR. ANDRE: But it's just an estimate, you know.
25 It could be five, it could be 50, we don't know.

1 MR. BASOFIN: But is it likely to be more than one
2 or two?

3 MR. ANDRE: Yeah, I think there's a very high
4 probability of that.

5 MR. BASOFIN: And Mr. Andre, if you were
6 developing a survey methodology for observing penstemon
7 would you include in that methodology something to account
8 for the seed bank?

9 MR. ANDRE: Because of the status of this plant
10 and the significance, the conservation concern. This is a
11 potential extinction scenario upon the species. I would
12 certainly do that but I would go far beyond that and conduct
13 a full population and viability analysis, which includes
14 genetic work, reproductive biology, looking at pollinators.
15 Certainly demographics that include seed bank analysis.

16 MR. BASOFIN: Thank you. I think I have just one
17 or two more questions. In your testimony you had indicated
18 that you believe there was a shortcoming in the surveys in
19 that surveys were not performed in the summer and fall, is
20 that right?

21 MR. ANDRE: Yeah.

22 MR. BASOFIN: You had described or listed some
23 species that have the potential to occur on the site that
24 would primarily flower in the fall, is that right?

25 MR. ANDRE: Yes I did.

1 MR. BASOFIN: Can you discuss those species a
2 little bit.

3 MR. ANDRE: Yeah, sure. For example, I mean, the
4 list, I forget how many were on the list. Some have what I
5 would view as a lower probability than others. Some have a
6 very high probability. I observed *camisizi perii*, which is
7 a rare plant known to sand dunes, it appears on the Kelso
8 Dunes about 30 miles away. But I have observed that in the
9 sand ramps just south of Broadway dry lake. I think there
10 is a very high probability of finding that.

11 But the others, *camisizi abramsiana*, et cetera, et
12 cetera, that Scott White touched on. Very few botanists go
13 out in late August or early September when it's still in the
14 hundreds to look for these things. I'm actually one of
15 those who do. I've probably vouchered more summer annuals
16 than any other botanist.

17 I have not surveyed this site but I suspect that
18 not only will they find a few plants that have special
19 status, assuming there's sufficient rain, which is
20 necessary. But that -- the other thing that's very
21 interesting in my experience working doing botanical surveys
22 in the fall and late summer is often some very significant
23 finds are made, including new species and new species to
24 California that would warrant protection.

25 MR. BASOFIN: Thank you. And just one last

1 question. In terms of these species you've enumerated that
2 primarily flower in he summer and fall. Would you expect to
3 find them in nearby locations and similar types of habitat?

4 MR. ANDRE: Do we know of them nearby or would we
5 expect to find them nearby?

6 MR. BASOFIN: Either one. Do you know of them or
7 would you expect to find them?

8 MR. ANDRE: I don't really have any particular
9 opinion on that, other than that, you know, they wold be
10 found where they are. So maybe very isolated. The sand
11 ramps around Pisgah are somewhat unique but there's
12 certainly no shortage of sand ramps in that area. So it's
13 more of a surprise that, for instance, the penstemon
14 albomarginatus doesn't occur elsewhere.

15 MR. BASOFIN: Okay, thank you. That's all I have
16 for this witness. I'll make him available for cross.

17 HEARING OFFICER KRAMER: Okay. Before we do that
18 we'll allow CURE to ask any direct questions they wish of
19 Mr. Cashen.

20 DIRECT EXAMINATION

21 #####BY MS. MILES:

22 Q Mr. Cashen, do you have any changes to your
23 testimony relating to plants?

24 MR. CASHEN: No.

25 MS. MILES: Was there anything that you wanted to

1 add after listening to the witnesses today? Anything that
2 you wanted to respond to?

3 MR. CASHEN: Yes. I would like to say that I
4 believe the staff and the applicant both do not have
5 adequate justification to conclude that there would be less
6 than significant project impacts to the androstephium
7 species, the small-flowered androstephium. The Supplemental
8 Staff Assessment does note that 85 percent of the known
9 occurrences are threatened by planned development or Fort
10 Irwin expansion. And I think even that does not necessarily
11 reflect the degree of threat to this species.

12 I'm looking at the California Natural Diversity
13 Database records. As of July 2010, of the -- there are 12
14 occurrences that are not listed as threatened, which does
15 not necessarily mean that they aren't threatened. Of those
16 12 occurrences the comment for seven of them is that the
17 only source of this information is a 1996 US Army Corps of
18 Engineers report. Very general site, needs field work.

19 So that to me is pretty dubious about whether that
20 population exists or not. And then of the remaining one is
21 listed as need more information, one is listed as two plants
22 observed in 1983, and then there's a couple other sort of
23 similar type comments. So those are the plants that it
24 appears we may be relying on to conclude less-than
25 significant impact to the species.

1 maybe about the number of transects that should be used for
2 certain survey efforts?

3 MR. ANDRE: No.

4 MS. GANNON: You did not comment on the number of
5 transects that should be used?

6 MR. ANDRE: No.

7 MS. GANNON: Okay. You'd be surprised if the
8 applicants felt that they changed the numbers of transects
9 based upon the advice that they received from you?

10 MR. BASOFIN: You know, at this point, Mr. Kramer,
11 I am going to object, I think this has been asked and
12 answered.

13 HEARING OFFICER KRAMER: Overruled.

14 MR. BASOFIN: Multiple times.

15 HEARING OFFICER KRAMER: Next time around maybe
16 but overruled this time.

17 MS. GANNON: This is the last time I'm asking.

18 Can you answer that question? Would you be
19 surprised if the applicant's consultant, URS, reported that
20 they changed the number of transects used for some of the
21 survey efforts based upon comments received or advice -- if
22 you don't want to call it advice, comments received from
23 you.

24 MR. ANDRE: I would not be surprised if they used
25 information I provided to basically set up a sampling

1 design.

2 MS. GANNON: Thank you. One further question.
3 You stated, I believe, that you hadn't done any calculation
4 about the potential White Beard's Tongue habitat on the site
5 but you just threw out the number 1,000 acres, is that
6 correct?

7 MR. ANDRE: Yeah.

8 MS. GANNON: But that was not based upon any
9 calculations that you have actually completed.

10 MR. ANDRE: No, and I made that clear. I mean, I
11 think that needs to be done.

12 MS. GANNON: Excellent. Thank you. I have no
13 further questions.

14 HEARING OFFICER KRAMER: Staff, any questions?

15 MR. ADAMS: No questions.

16 HEARING OFFICER KRAMER: Any of the other
17 intervenors?

18 Well, I guess that wraps it up for Biology for the
19 time being. We have the carry-over issues of the changes to
20 the conditions, the potential questions that are generated
21 by the newly received information on the desert tortoise
22 translocation.

23 I noticed after we dismissed the sheep-related
24 panel that I think there was a question in the Committee's
25 mind. I believe it was Dr. Bleich that suggested that the

1 provision of one of the conditions that suggested that it
2 would require of the construction workers, if they saw a
3 sheep that they were to stop what they were doing. And he
4 suggested that that might be more disruptive to the sheep
5 than their continuing to conduct their activities.

6 Let me ask if staff and the applicant and the
7 other parties have any comments about that at this point in
8 time. We can put that off until later. I'm presuming we
9 don't need to ask Dr. Bleich back since his opinion was
10 pretty clear. But do we have any comments about the
11 efficacy of removing that requirement?

12 MS. GANNON: Dr. Mock can speak to it.
13 Essentially the applicant's position is we don't disagree
14 with his conclusions. We don't have a strong opinion one
15 way or the other but we certainly wouldn't object to
16 removing the condition. Dr. Mock, do you want to add
17 anything?

18 DR. MOCK: I generally agree with Vern. The
19 species is highly adaptable. If they come near the site and
20 things are going the way they normally go they adapt to it
21 and take note and it becomes part of their environment.
22 It's only the nuance of the people reacting to the sheep
23 that might actually scare the sheep.

24 HEARING OFFICER KRAMER: Any other intervenor have
25 any comments on that?

1 MR. HUNTLEY: This is staff. We would like to
2 consider the recommendations of Dr. Bleich and think about
3 this a little bit more internally before we make a judgment
4 on that.

5 HEARING OFFICER KRAMER: Okay, that's fair. Who
6 was that?

7 MR. HUNTLEY: This is Chris Huntley.

8 HEARING OFFICER KRAMER: Thank you.

9 Ms. Smith, did you have something?

10 MS. SMITH: I think we'd like to talk about this
11 and think about this a little further as well. I don't -- I
12 guess the way I interpreted Mr. Bleich's testimony was not
13 that the condition should be removed but that this was a
14 highly invasive operation going out there and they were very
15 subject to different changes in their environment. So I
16 feel like this has sort of been flipped on its head and we'd
17 like to perhaps give this a little more consideration and
18 reserve the right to comment on removing the only measure to
19 date to actually protect the species.

20 HEARING OFFICER KRAMER: Well that's certainly
21 fair. I just want to make sure the question is on the
22 stable. So we'll revisit that -- It's a pretty minor
23 question, we could revisit that on the 18th I think. It
24 shouldn't take a lot of time.

25 MS. MILES: And I can also ask if Dr. Bleich has

1 any clarification regarding that condition that he would
2 want to add to the record.

3 HEARING OFFICER KRAMER: Okay, thank you.

4 That appears to exhaust our business for today
5 with regard to Biology, and that was the only, that was the
6 only event on the schedule for today.

7 Do the parties have anything they want to bring up
8 before we close for the evening?

9 Okay. First we want to thank everyone for getting
10 us in under -- wow, almost 4 hours under our 16 hours,
11 that's pretty good. And ask, are there any witness
12 availability issues for tomorrow that we need to -- we could
13 discuss now to perhaps reorient the day if necessary?

14 The topics I have, just to summarize: We were
15 planning on going with soil and water first. Although I
16 seem to vaguely recall there was going to be something to
17 start.

18 MS. GANNON: We have an 11 o'clock call from
19 Spain.

20 HEARING OFFICER KRAMER: Right. And that's on
21 here for --

22 MS. GANNON: That's part of the water.

23 HEARING OFFICER KRAMER: Right. So soil and water
24 was first, then worker safety/fire protection, which is
25 mostly about the county's issues, I believe. And

1 transmission line safety and nuisance for just a few minutes
2 to talk about the risk of induced current effects on
3 railroad workers. We did alternatives already.

4 MS. HOLMES: Hearing Officer Kramer, this is Caryn
5 Holmes. We have a series of I think it's five or six
6 revised conditions of certification in light of what we have
7 heard so far. We'd also include a revised certification for
8 transmission line safety and nuisance. We're hoping to
9 distribute those tomorrow morning. Those are for the
10 parties to look at and discuss. We are not proposing that
11 they be marked as exhibits yet. We'll have a condition of
12 certification relating to reliability, air quality,
13 transmission system engineering, noise and transmission line
14 safety and nuisance.

15 I will say that we still have one unanswered
16 question about air quality so I hope by tomorrow morning to
17 have more information about that. Another issue that's come
18 up that we weren't aware of is that information that the
19 applicant has been able to provide us so far about the new
20 proposed split hydrogen system, we haven't been able to get
21 a map that has the information that we need. So we are
22 still discussing that internally and I hope to have an
23 update on that tomorrow by the time we start worker safety
24 and fire protection and hazardous materials management.

25 MS. GANNON: Ms. Holmes, did you see the exhibit

1 which was docketed this afternoon?

2 MS. HOLMES: If that's the map that was sent
3 around earlier today, yes we did and it's not sufficient.
4 It doesn't have the information we'd -- it doesn't have all
5 of the information we'd requested. So we're still talking
6 about that. I just wanted to raise that s an issue because
7 Hearing Officer Kramer seemed to think that there wasn't
8 much to talk about with respect to hazardous materials
9 management. There may not be but I can't be certain of that
10 at this point.

11 MS. GANNON: Can you tell us or can you send a
12 list of what you believe is missing from what was docketed
13 at four o'clock this afternoon, around that time.

14 MS. HOLMES: Yep.

15 MS. GANNON: Appreciate it.

16 HEARING OFFICER KRAMER: Okay. And then tomorrow
17 we will also need to discuss the exhibits. Just the
18 housekeeping details. I think I'm missing a few electronic
19 copies for instance. So I'll try to be ready to discuss all
20 that with the parties. Is there anything else we should put
21 on our overnight list of things to dream about?

22 MS. GANNON: That's my list.

23 HEARING OFFICER KRAMER: Okay, Commissioner
24 Eggert.

25 PRESIDING MEMBER EGGERT: Thank you, Hearing

1 Officer Kramer. I do want to just echo your comments and
2 thank all the parties for coming on the under in the
3 over/under bet. What was the marker?

4 (Several people spoke at once.)

5 So I'll speak very slowly. No.

6 It's clear that the site does have a significant
7 amount of biological activity and I think today's testimony
8 and evidence brought, as well as all the good cross and the
9 discussion, has helped illuminate sort of what we currently
10 know and don't know. And of course that will all be very
11 important as we consider the decision.

12 I also want to specifically thank Mr. Otahal. We
13 very much appreciate the participation from our sister
14 federal agencies. I don't expect -- do you get overtime?
15 You do? Okay, good. I feel a little bit less bad then.

16 (Laughter.)

17 No, it is extremely helpful, as well as Ms.
18 Fesnock's earlier contributions. So this is definitely a
19 partnership with the feds on this project in particular.
20 It's essential that we stay up to speed together.

21 All right, we will see you tomorrow and look
22 forward to the third and final day for at least this portion
23 of the evidentiary hearing.

24 (Whereupon, at 9:48 p.m. the

25 Evidentiary Hearing was adjourned.)

CERTIFICATE OF REPORTER

I, TROY RAY, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Evidentiary Hearing; that it was thereafter transcribed into typewriting.

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

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of July, 2010.

TROY RAY, CER**369

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

MARY CLARK, CERT

August 11, 2010