EVIDENTIARY HEARING

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

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| In the Matter of: | ) | |
| | ) | |
| Application for Certification for the Calico Solar Project (formerly SES Solar 1) | ) | Docket No. 08-AFC-13 |
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CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

WEDNESDAY, AUGUST 25, 2010

1:00 P.M.

Reported by:
John Cota

## APPEARANCES

HEARING OFFICER

Paul Kramer

COMMITTEE MEMBERS

Anthony Eggert, Presiding Member

Jeffrey Byron, Associate Member

Lorraine White, Advisor to Commissioner Eggert

Jennifer Jennings, Public Advisor

STAFF

Caryn Holmes, Staff Counsel

Stephen Adams, Staff Counsel

Jared Babula, Staff Counsel

Christopher Meyer, CEC Project Manager

APPLICANT

Ella Foley Gannon, Esq., Bingham, McCutchen, LLP

Allan Thompson, Esq.

Felicia Bellows, Tessera Solar

APPEARANCES (Continued)

INTERVENORS

Bart Brizzee, Deputy County Counsel, San Bernardino County
Loulena Miles, Esq., Adams Broadwell Joseph & Cardozo
Joshua Basofin, Defenders of Wildlife
Laura Cunningham, Basin and Range Watch
Kevin Emmerich, Basin and Range Watch
Travis Ritchie, Sierra Club
Wayne Weierbach, Newberry Community Service District
Steven Lamb, Burlington Northern Santa Fe (BNSF)
Cynthia Burch, Burlington Northern Santa Fe (BNSF)

ALSO PRESENT

Charlotte Hunter, Bureau of Land Management
Ashleigh Blackford, U.S. Fish & Wildlife Service
Wayne Donaldson, State Historic Preservation Office
Susan Stratton, State Historic Preservation Office
Dwight Dutschke, State Historic Preservation Office

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PROCEEDINGS

PRESIDING MEMBER EGGERT: Good afternoon, everyone. My name is Anthony Eggert, and I am the presiding commissioner for this Calico evidentiary hearing for the Calico Solar Project.

To my right is -- actually, two people to my right is the associate commissioner on this case, Commissioner Byron. To his left is our hearing officer, Paul Kramer.

And this is a continuation of the evidentiary hearing from the 18th.

I would like to move into introductions starting with the CEC staff.

MR. MEYER: Christopher Meyer, energy commission and project manager. And to my right Jared Babula, staff counsel. Also have Caryn Holmes, staff counsel, and Steve Adams, staff counsel in the audience.

PRESIDING MEMBER EGGERT: All right.

Next, applicant.

MS. FOLEY GANNON: Ella Foley Gannon, counsel to the applicant. On my left is Allen Thompson, co-counsel for the applicant. And to my right is Felicia Bellows with Tessera Solar.

PRESIDING MEMBER EGGERT: And for the intervenors? Cure?

MS. MILES: Loulena Miles on behalf of CURE, and David Whitley, I believe, is on the phone. And Scott Cashen is in the building.

PRESIDING MEMBER EGGERT: All right.

Defenders of Wildlife.

MR. BASOFIN: Joshua Basofin on behalf of Defenders of Wildlife.

PRESIDING MEMBER EGGERT: Basin and Range Watch?

MS. CUNNINGHAM: Laura Cunningham and Kevin Emmerich.

PRESIDING MEMBER EGGERT: Okay. Sierra Club?

MR. RITCHIE: Travis Ritchie on behalf of Sierra Club.

PRESIDING MEMBER EGGERT: Society for the Conservation of Big Horn Sheep?

And either Bob Burr, Gary Thomas on the line?

San Bernardino County?

MR. BRIZZEE: Bart Brizzee, deputy county counsel, by phone, for San Bernardino County.

PRESIDING MEMBER EGGERT: Okay. Newberry Community Service District?

MR. WEIERBACH: Wayne Weierbach for Newberry Community Services District.

PRESIDING MEMBER EGGERT: Patrick Jackson?

Nope.

BNSF Railroad?

MR. LAMB: Thank you. Steve Lamb and Cynthia Burch for BNSF.

PRESIDING MEMBER EGGERT: Okay. Do we have any -- any folks here from other state agencies or federal agencies?

Go ahead.

DR. HUNTER: Dr. Charlotte Hunter, cultural resources, BLM.

MS. BLACKFORD: Ashleigh Blackford, U.S. Fish & Wildlife Service.

PRESIDING MEMBER EGGERT: Welcome.

MR. DONALDSON: Wayne Donaldson, State Historic Preservation Officer. And with me today is Susan Stratton and Dwight Dutschke.

PRESIDING MEMBER EGGERT: Could you spell -- sorry, could you say the names and spell the last names?

MR. DONALDSON: Yes. Susan Stratton,

And Dwight's last name is D-u-t-s-c-h-k-e. D-w-i-g-h-t.

COMMISSIONER BYRON: Thank you for being here today.

PRESIDING MEMBER EGGERT: Yeah, thank you for coming.

Any other federal or state agencies or public

officials?

Any local officials?

Okay. And then also just I would like to introduce again our public advisor, Ms. Jennifer Jennings, who is in the back of the room here for anybody who is a member of the public and wishes to make a comment during this hearing, please see Ms. Jennings, and she can help you fill out a blue card and give you information about how to participate in this hearing.

I think with that, I'd like to turn it over to Mr. Kramer, and we'll go ahead and get started.

HEARING OFFICER KRAMER: Okay. By way of housekeeping, we have -- I passed out to the parties who are here the latest version of the exhibit list. And I will in a few moments when we get going, on my laptop here, I will send it out to the rest of the proof of service list. So, Mr. Brizzee and others on the phone, you'll get an electronic copy of it that you can use.

We'll be going over this later today because as we expect this to be the last evidentiary hearing, we need to do the clean-up work of making sure that we receive all those documents we should into evidence and hear any objections that parties have to particular documents, but that will be down the road.

And I also passed out a new version of the topic

grid that we've been using, basically to just show which topics we think we're going to be covering. There's a few hints in there once in a while about specific microtopics. I have taken out all the time estimates because we did not collect new ones, and, you know, we've been over most of these issues; but if your witness is not on this list, don't worry about that. This is meant to just more be a guide as we go through the issues.

Structurally, after the last hearing I was -- thanks to Ms. Miles, I was able to -- she gave me the contact information for Dr. Christine Berry, and I was able to speak to Dr. Berry. She will be available to us, she thought, approximately 4:00 today. Ironically, she's probably at this moment participating in a meeting of a scientific panel for the Fort Irwin Tortoise Project, but she was going to call me as soon as she's out of that. And then she has the call-in information so she can participate with us from -- I think she'll be in Barstow.

So we're going to start with cultural.

Mr. Meyer, though, you thought that it might be productive to run through the list of many of the -- what I hope are many issues that the parties have reached agreement upon as of sort of a prelude to discussion of the issues that remain requiring resolution.

So who would be best to lead that off?

MR. MEYER: I nominate the applicant.

HEARING OFFICER KRAMER: Do I hear a second? Seeing no objection --

MS. FOLEY GANNON: I'll second.

HEARING OFFICER KRAMER: And let me also say that our transcript will probably not be available till Monday, and I -- I am having this meeting, the WebEx portion also recorded so that in the next day or so if we need to try to figure out what we said today, we could listen to the recording.

We won't be making it generally available to people unless they request it, but there is that option to provide a little bit of infill while the transcript is being prepared. Not probably the best option because you have to listen to an awful lot of -- you know, you can't word search a tape -- or actually, it's an electronic recording, I'm dating myself, but at least it's there, assuming the recording works properly. And we have on occasion had recordings that didn't work so well, but we have our fingers crossed and we'll see what we can do with that.

So, Ms. Gannon, to what's been agreed to.

MS. FOLEY GANNON: First off, we will be passing out -- and I think most of the parties may have gotten it, and if you haven't, let us know. We had attached to our

brief Appendix A which had a list of the conditions that -- the base condition was the supplemental staff assessment as well as the two erratas.

And then we had put in what we were -- the proposed changes to those conditions that we were suggesting. We have updated that based upon the discussions at the workshop yesterday.

There are going to be a couple of more updates to that based on making use of the time between 1:00 and 2:30 today and some discussions that happened after the workshop last night. But I think we can kind of quickly run through the issues that we think we have reached resolution on.

So in going off of -- I guess we can go off of your topic list here, with regards to the visual resources and the traffic and transportation, Mr. Lamb, do you want to come up, and we can present to the commission the discussions that we have had?

COMMISSIONER BYRON: You know, just while you're getting ready, first of all, I note that this document is still warm, right?

And second of all, Mr. Lamb, we've decided up here to change your last name. We're going with "Lion" from now on, Mr. Lamb.

MR. LAMB: Yes, sir. Seems to be the only

appropriate response.

What we had talked about is a lot of things, and what we're prepared to offer is as Exhibit 1209 a series of the conditions of certification that at least BNSF and the applicant have agreed on the terminology to, and that relates to transmission line safety, hazardous materials, biological resources, and hydrology, soil and water detention basins.

And then also the other issue was there was a request that we provide to supplement the staff's work on what the LORS were that related to rail operations, what is referred to as the general code of operating rules. And it's a large document. We'll go ahead and give one electronically, too. But we have those, and we'd ask that that be admitted as Exhibit 1210.

(Thereupon the above-referenced documents were marked by the Hearing Officer as Exhibits 1209 and 1210.)

MR. LAMB: In relation to the Trans issues, Trans 1 and 7 specifically, we have not been able to come to a resolution of those, but we are working on them. Because of the complexity of them, we just haven't had the opportunity that's necessary to vet that completely with BNSF at this stage.

MS. FOLEY GANNON: And do you have hard copies of

the conditions that we agreed to?

MR. LAMB: I do.

MS. FOLEY GANNON: And maybe you could just list off which conditions those are.

MR. LAMB: The conditions are TLSN-5, Transmission Line Safety and Nuisance. There is an addition to HAZ 7 and an addition and red line slight modification to HAZ 8, a BIO 15 addition, a BIO 6 addition --

HEARING OFFICER KRAMER: Okay. Hold on. HAZ 8, Bio 15.

MR. LAMB: We have copies of this.

HEARING OFFICER KRAMER: Oh, okay.

MR. LAMB: And Soil and Water 8 addition, and Soil and Water 7 addition.

MS. FOLEY GANNON: And I'll just add, as Mr. Lamb had indicated, we had, I think, very fruitful discussions with BNSF last evening regarding working out some language that we would be proposing related to specifically the glint/glare issue as well as the secondary access road.

We were not, as Mr. Lamb indicated, able to come to precise language partially because they also need to be able to go back and speak to their client, but we, I think, are fully anticipating that we will have language that we would be able to submit, and we anticipate we

could provide them as joint comments to the PMPD indicating if we've reached agreement on those conditions. And from our perspective, we believe we've submitted evidence to date which will support those conditions, and that we will, as again, I think we're pretty close to getting agreement, they obviously need to speak to their client, and there's a few other details that we need to work out.

Is that accurate?

MR. LAMB: Well, I will decline in commenting on whether we object or not. I think that was in the record before, particularly since Commissioner Byron has given me the name of "Lion," so I won't go over that again, but we are working on it. Let's just suffice it to say that.

And we do have a couple extra copies of the GCOR if anybody wants them. And again, we'll go ahead and post those electronically. But it's kind of large, it's 156 pages if anybody wants them. So that was it.

Thank you for your time.

COMMISSIONER BYRON: Thank you.

MS. FOLEY GANNON: Okay. Then with regard to the VIS conditions, which in our document that we just -- the warm document that we just handed out, is -- it starts on page 179, and I think that the changes that remain were a suggestion that we had put in about having it to the

extent feasible in VIS 1. Then there was a timing change requested in VIS 2. And I think that was it.

Again, I don't think that those are anything that we need to present evidence on. I think we've already presented testimony. And I think the committee has before it what it needs to be able to resolve those issues.

HEARING OFFICER KRAMER: Okay. Did we give an exhibit number yet to the slightly-warm document?

MS. FOLEY GANNON: We have not.

What exhibit number are we on now?

HEARING OFFICER KRAMER: Mr. Lamb, before we started, told me that you thought you were up to Exhibit 105?

MS. HOLMES: 1209 is what I heard.

HEARING OFFICER KRAMER: No. No. No. This would be for the applicant, this big compilation of conditions. And I stopped at 100 right now, so I'm wondering where we are. We obviously have some truing up to --

MS. FOLEY GANNON: I think we have some that we had assigned numbers to on the last hearing that are not on this list.

HEARING OFFICER KRAMER: That's quite possible. Okay. So what do you believe is the next number you would like to assign to this?

MS. FOLEY GANNON: I think we are -- we think we are at 108.

HEARING OFFICER KRAMER: Okay. Let's call this Exhibit 108.

(Thereupon the above-referenced document was marked by the Hearing Officer as Exhibit 108.)

MS. FOLEY GANNON: Okay. And then with regard to the traffic conditions, which are -- Trans conditions are -- 170. This is one of the things we discussed at the workshop in Trans 1 was replacing the requirement for an all-weather road to be a road using Soil Tech or its equivalent. And I believe that staff and BNSF had agreed with that suggested change, and I didn't hear any party object to that change.

HEARING OFFICER KRAMER: Okay. This would be a good time to ask then.

Of the changes so far, the visual changes Ms. Gannon mentioned a minute ago and this change to Trans 1, and I don't know if everybody has seen Mr. Lamb's Exhibit 1209 before, the changes to the conditions he outlined, are there any objections or any desire to discuss any of these proposal?

MR. MEYER: Just the -- the new conditions that were agreed to between the applicant and --

MS. HOLMES: Which conditions are you asking

about, Hearing Officer Kramer?

HEARING OFFICER KRAMER: Those that Mr. Lamb just provided us, the 1209.

MR. MEYER: Staff has not had a chance to review those yet.

MS. HOLMES: We're in the process of reviewing it. People upstairs are looking at them.

HEARING OFFICER KRAMER: Okay. So we'll come back to that later.

MS. HOLMES: Yeah.

HEARING OFFICER KRAMER: As to the visual and the traffic, transportation changes Ms. Gannon has pointed out in the Exhibit 108, did staff have any comments about those, or any other party?

Mr. Brizzee, you don't have much of this before you, do you?

MR. BRIZZEE: No, I don't.

HEARING OFFICER KRAMER: Does that trouble you?

MR. BRIZZEE: Not really.

HEARING OFFICER KRAMER: Okay.

MR. LAMB: Hearing Officer Kramer, just for clarity, and again, I'm not going to go over the arguments that we'd gone over in the last session, but BNSF does not agree to Trans 1 or Trans 7 as presently crafted or revised. Those are the ones that we're working on. Just

so we have a clear record on that. I'm not going to belabor that.

And also, just for clarity, because the exhibit list, I think, is not quite comprehensive, we had also submitted, I think it was yesterday, 1207 and 1208. And 1207 was simply our July 1st comment letter. And 1208 was our July 29th comment letter. And I just don't think that those have gotten in the record yet.

HEARING OFFICER KRAMER: No, we're going to -- we'll go over that at the end and make sure that we've got everything.

MR. LAMB: Thank you, sir.

HEARING OFFICER KRAMER: Any other comments on the conditions that Ms. Gannon has mentioned so far?

MR. MEYER: I just wanted to clarify on the -- to the extent feasible, the applicant knows how I feel about that term, so I -- if you could give me just a moment, but on the Trans, the tackifier change is acceptable to staff.

MS. FOLEY GANNON: You accepted that one before. Look at it again. That was one that you thought was okay, we understood. I know your general feeling about it.

HEARING OFFICER KRAMER: You're talking about -- this is for VIS 1?

MS. FOLEY GANNON: Yeah.

MR. MEYER: Okay. This one, I think, is one we

did understand because of the limitations of the technology and the heat.

Thank you.

HEARING OFFICER KRAMER: Okay. Ms. Gannon, go ahead.

MS. FOLEY GANNON: Okay. So I guess we went through the Trans. And I do concur with Mr. Lamb's representation. Trans 7 and Trans 1 are things that we're working with BNSF. Sorry. I didn't clarify that.

The other areas on this list I can -- we all agree, bio resources, we probably need to wait and talk about.

The soils and water, I believe we have reached resolution or have stated our positions and things we disagree with. But soils and water, the conditions are provided on page 149 of Exhibit 108. And we had some changes that we had suggested in Soil and Water 7, which we discussed briefly yesterday. It's on page 157.

And we suggested a change in Soils and Water 9. And those were the only changes we requested. And it's our view, I think, we have all presented our evidence on these issues.

HEARING OFFICER KRAMER: Mr. Brizzee, I see that the Soil and Water 7 changes would give the county 15 days instead of two months to review the groundwater level

monitoring and reporting plan. Is that -- were you aware of that, and does that cause the county any difficulty?

MR. BRIZZEE: No, I'm not aware of that change.

Can the applicant address why they need to go that short on it?

MS. FOLEY GANNON: This is a plan that's already been submitted.

MR. BRIZZEE: So it's being approved right now or reviewed?

MS. FOLEY GANNON: It is before you right now to be reviewed. And 30 days before planned construction is Monday.

MR. BRIZZEE: Can we defer that? Let me see if I can get a response from our expert people on that.

MS. FOLEY GANNON: Thank you.

HEARING OFFICER KRAMER: Any other objections from parties, or party?

MS. HOLMES: I'm not certain staff has taken a look at these. I was in the --

THE REPORTER: Can you go to the mic, please, Ms. Holmes?

MS. HOLMES: Along with Mr. Kramer, I was in the Ivanpah hearing yesterday and not here, so I don't know that the technical staff have had a chance to look at the proposed changes to soil and water resources. But my

suspicion is that there's -- all the evidence is in the record upon which the committee could make a decision as to which direction to go, so I think that -- I don't know if we have an opportunity to provide comments other than on the PMPD, but I don't think that we would likely need new evidence on whether the applicant's proposed changes are acceptable or not; but staff hasn't, to the best of my knowledge had a chance to review these.

HEARING OFFICER KRAMER: Well, we're certainly willing to entertain brief argument if you think something is impractical, for instance.

MS. HOLMES: Well, or just that we think it's not advisable; I mean, I just don't know, not having looked at them before.

MS. FOLEY GANNON: And just for clarity, they were reflected based on the discussions at our hearings in Barstow, the changes that we were making. So that's -- this isn't anything that was new based on the discussion yesterday. So these are the same ones that were attached to our brief that were submitted briefly, so these are just reflecting what we had already proposed.

HEARING OFFICER KRAMER: Okay. The next changes?

MS. FOLEY GANNON: I think worker's safety we are going to have.

Staff, are you going to have testimony on worker

safety?

MS. HOLMES: Thank you.

We have proposed changes to the conditions of certification as well as a response to the applicant's proposed changes. I suppose that could come in as brief testimony when the time is appropriate.

HEARING OFFICER KRAMER: Now is as good a time as any if they're ready.

MR. BABULA: All right.

We do have a limitation on cultural. My cultural resource people need to leave around 5:00, and that was supposed to be first, so I'm kind of hoping we can -- we've been putting off cultural quite a bit. We seem to always be at the end of the workshops and hearings, and I know my cultural staff and the BLM is courteous enough to be here, so I'd like to try to do cultural.

HEARING OFFICER KRAMER: Good point.

How much more do you have, Ms. Gannon?

MS. FOLEY GANNON: I think that these, of the topics that are listed on here that were indicated as being still open, I think we are through all of them except for the ones we know we have to have further testimony on, which is biology and cultural resources. And then this worker safety.

HEARING OFFICER KRAMER: Okay. Then let's

continue with our cultural resources discussion.

Mr. Babula

PRESIDING MEMBER EGGERT: And we appreciate, Mr. Babula, you looking out for your witnesses' interests, and apologize again for the fact that this has been pushed off till today.

MR. BABULA: Okay. No problem. We did have a productive discussion yesterday with the applicant and the other parties, and I think we did come to a lot of resolution on the conditions of certification.

I think what we're going to do -- let's see, everybody's been sworn in before.

Sarah hasn't. Sarah would need to be sworn in in case she's answering anything.

HEARING OFFICER KRAMER: Okay. Just her?

MR. BABULA: Correct.

Whereupon,

SARAH ALLRED

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

HEARING OFFICER KRAMER: If you could state your name and then spell it for the court reporter.

MS. ALLRED: Sarah Allred, S-a-r-a-h, A-l-l-r-e-d.

HEARING OFFICER KRAMER: Okay. Mr. Babula, go ahead.

MR. BABULA: Okay. As you may recall, last hearing we had some back and forth between us and BLM on trying to come up with more of a unified process; and there's been further discussion, so I think the way we're going to do this is BLM would like to make a statement regarding where they are with the potential PA, and then from that statement then I'll have staff kind of go forward with our direct that sort of complements that, and we will hopefully be done rather quickly.

So with that, I'd like to have the BLM representative speak to what's going on right now with the PA.

DR. HUNTER: While the BLM asserts --

MR. BABULA: Introduce yourself first.

DR. HUNTER: Oh, I'm sorry.

I'm Dr. Charlotte Hunter, BLM, lead archeologist for the State of California.

While the BLM asserts our rights to follow federal laws, rules, regulations, and policy on federal lands managed by the BLM, we have searched for a means to encompass the concerns of the energy commission's cultural staff. The State Historic Preservation Officer has proposed a method that I believe can satisfy the concerns

of both agencies.

I would like to enter the letter that we received from the State Historic Preservation Officer today. May I bring that to you?

HEARING OFFICER KRAMER: Do we have copies for the others?

DR. HUNTER: No, I just got copies. I'm sorry.

HEARING OFFICER KRAMER: Mr. Meyer will take care of that.

DR. HUNTER: Okay.

HEARING OFFICER KRAMER: And this will be a staff sponsored exhibit, I presume.

MR. BABULA: Correct. I'm not sure what number we're up to.

DR. HUNTER: What I'd like to do is just go through a short bullet list of our consultation with the SHPO.

The SHPO did concur that the sites that we found eligible were eligible. The SHPO neither concurred with nor objected to the BLM's determination that the remaining sites within the APE were not eligible. The SHPO recommended the preparation of a programmatic agreement to guide the continued consultation process.

The SHPO recommended that additional information be gathered to confirm that significant, that is, evidence

that contributes to the determination of eligible or not eligible would be subsurface archaeological information that was either present or not present and the following constraints and the means for doing so.

In considering how we might go about doing this, the SHPO considered the CARIDAP, that's C-A-R-I-D-A-P, as a Peter, that's the California Archaeological Resource Identification and Data Acquisition Program -- sparse lithic scatters, which is a guideline for providing for limited excavation or testing.

But the SHPO found that the sample and methods recommended in that guideline may not be appropriate to this project.

They reviewed the article that was provided by Dr. Whitley from CURE, which was a case study from southern Arizona, and noted that some type of mechanical means may be the most efficient and appropriate means to use when gathering this type of data.

The SHPO developed the proposed -- is recommending or proposing that the BLM and the CEC together develop a proposed monitoring plan to require systematic stripping of the top 20 centimeters of the sites if they are impacted. In other words, if ground disturbance was not going to impact a site, we would not test it.

But for those sites that are impacted, we would do ten-centimeter strips in the site that's being affected, the archaeological monitor would determine if the stripping could continue, and another ten centimeters would be removed in order for the archaeological monitor to gather enough data to determine the significance or to add to a larger body of knowledge.

Within the PA, we would stipulate that there would be two of these deliverables. One would be a construction monitoring plan and a discovery plan.

The construction monitoring plan would include a research design and a methodology for retrieving the data to test hypotheses developed in the research design. This would allow us to publish our PA, agree upon the contents of the PA, which would include the stipulation that these deliverables would be provided prior to ground disturbance so that we could meet our deadlines for having the PA signed and the ROD signed, but that it would allow us to encompass the concerns of the CEC's cultural resources group.

If significant subsurface archaeological materials are unearthed, work stoppage at the location in question and implementation of a systematic evaluation of the data would occur. Within our construction monitoring plan, we would include the necessary steps for evaluating

any subsurface data.

If the sites were found to be eligible as a result of the monitoring and the view below the surface, data recovery would be required. A monitoring plan and discovery plan is to be deliverable pursuant to the programmatic agreement. The BLM finds this very agreeable; it seems to solve our problems.

Thank you.

MR. BABULA: Thank you. Okay.

Now I'm going to have staff -- let's move forward with our direct here quickly.

MS. MILES: Can I ask one quick question?

I was wondering, Dr. Hunter, why is it important to have the PA -- so are you saying that the PA would need to be signed before the ROD is issued?

DR. HUNTER: Yes.

MS. MILES: And why is it important to have the PA signed before the ROD is issued?

DR. HUNTER: I don't know that I am prepared to answer that. That is a NEPA issue. Section 106 determination is responsibility of the cultural resources. And our agreement with the SHPO was that we would produce a programmatic agreement as part of our Section 106 consultation.

MS. MILES: Thank you.

MR. BABULA: Thank you.

I'll start with Mr. McGuirt here.

DIRECT EXAMINATION

BY MR. BABULA:

So in the last hearing we discussed -- you testified to a potential plan that we would work with BLM on. Now it looks like the plan's changed.

So first I would just like to get your assessment of the BLM's plan and how we can utilize going forward that plan in the context of CEQA in our condition of certification.

MR. McGUIRT: The option that we laid out for the committee and the hearing officer last time was seeking to effect mitigation for the project's effects on cultural resources through a tack that would take us to preservation of sites. And the proposal that the BLM has just made and that the SHPO has recommended takes us back to the track that we were on originally, which is mitigation through the recovery of significant information where that information is available. And we believe that the outlines of the procedures is, as the BLM has presented them, can be made to work and to address our concerns previously.

One of the things that would be critical of that is that the energy commission be given the opportunity to

have input into the development of this programmatic agreement. And the BLM has indicated they were willing to do that. So I think as we move forward with the development and the finalization of this PA, that we can make this work, that we're going to have mitigation to the effects of these archaeological resources through the recovery of the information that we sought previously.

MR. BABULA: Okay. Thank you.

What I want to do quickly is just kind of get a big picture, because it got kind of into the nuances here.

So what we're looking at for this site, as of now, the information we have, we have a fairly -- the case that we have a fairly good understanding of so that the number and the sites, like the number of sites out there and sort of what type of sites they are.

MR. McGUIRT: On the basis of the extensive field work that's been done to date, we have objective descriptions of the surface manifestations of the archaeological resources that are in the project area. And everyone is in agreement that those -- the descriptions of those surface remains are good and sound. So we have an idea of the resources that are there and generally what they're composed of.

We have enough information, and the BLM has made the determinations that three of these sites, three of the

119, I believe, are eligible for the National Register. And the SHPO in this letter that Dr. Hunter just presented concurs in that assessment that those approximate sites are eligible for the National Register, which this consensus determination means that under the California Register, they're automatically eligible for the California Register. That's the way it's set up.

On the balance of the 116 sites that are in the project area, that are in the present project area, we have a means to refine our understanding of whether or not the information that they may contain, the data sets that they may contain are significant or not. So we know where those 116 sites are, we know how they're expressed on the surface, and we have the means to refine our understanding of their significance going forward if we were to implement this procedure that Dr. Hunter described in the PA.

MR. BABULA: And then what about mitigation? Do we have an understanding of the potential types of mitigation that would be available to the project applicant?

MR. McGUIRT: This is in relation solely to the archaeological resources. The project effects to Route 66 is another issue. So in relation to the archaeological resources, those resources are most likely going to be

found either eligible or not for the information value that they contain, and the performance standard for the mitigation of significant effects to those resources would be to recover a representative sample of the information for which they are significant, and this would be done in the procedures under the PA.

MR. BABULA: So at this point, post-certification, the only thing we're really looking for is to appropriately assess whether a particular resource is eligible or not.

MR. McGUIRT: Yes. The purpose would be in the monitoring plan, as Dr. Hunter described it, to ensure -- to refine our understanding of the data sets that are in these sites, these 116 sites on the project area, and to have another crack basically at determining whether or not these are significant data sets and provides procedures for consultation between the energy commission staff and the BLM to discuss that. And then when they're found that the data sets are significant, then I believe we would enter into consultation with the SHPO to determine what the recovery of that data would look like and ultimately to mitigate and recover that representative sample that I spoke of.

MR. BABULA: Okay. Currently now we have a number of conditions of certification which we discussed

yesterday with the applicant and the other parties. I think based on this exhibit that we just got -- have you had a chance to review the exhibit that the applicant provided, Exhibit 108?

MR. McGUIRT: This is the revised conditions? Yes.

MR. BABULA: Are there any conditions in here that you just want us to confirm with the applicant that we have -- let me rephrase that.

Are there any issues in these conditions now that we still have with the applicant regarding the terms of these conditions?

MR. McGUIRT: Minor ones. Shall we discuss them now?

HEARING OFFICER KRAMER: Which condition -- you're looking at Exhibit 108?

MR. McGUIRT: Yes, sir.

MR. BABULA: Correct.

MR. McGUIRT: This is CUL 4.

PRESIDING MEMBER EGGERT: What's the page number?

MR. McGUIRT: That would be 120 and 121 in the exhibit they just gave us.

We had a discussion in last week's workshop during the lunch break at the hearing on the percentage sample that would be necessary were CUL 4 to be

implemented. We -- I believe we started out, the published staff assessment had 25 percent in it, and the applicant countered with 5, and we recountered with 20. And we feel strongly that were CUL 4 to be implemented, that 20 percent would be the smallest sample that we would want.

The purpose of that sample, under CUL 4 we're looking at evaluating a sample of the archaeological sites that fell within each site type. And so we want to make sure that the sample that would be evaluated would be evaluated and everything else would not, so we want to make sure that the information we get would be representative of the types of sites within each sample.

And so we feel that 5 percent is not a statistically-valid sample of the individual archaeological site types and feel that 20 percent is closer to the mark.

So basically we would be evaluating, if this condition were implemented, one out of every five sites that fell within a particular site type, and we feel that that's a reasonable number.

HEARING OFFICER KRAMER: How many site types are there?

DR. HUNTER: Nine.

MR. McGUIRT: Nine.

DR. HUNTER: Well, there -- yeah, there are nine that the CEC has requested the type. The other three would not be affected.

I would like to ask one quick question.

What we're proposing is to test every site that is impacted. Is the CEC saying that they don't want us to do that? They only want to test 20 percent of the sites?

MR. BABULA: Actually, I was going to get to that with my next question with Mike. Let me give him the next question.

So in lieu of what's happening with the programmatic agreement, would language that is currently in CUL 6 which discusses the fact that CUL 6 may overlap with the programmatic agreement, would such language be appropriate in CUL 4, which would basically look -- as you see in CUL 6, would acknowledge the PA and say whatever is the most stringent should be followed?

MR. McGUIRT: Yes. In order to dovetail the conditions that we have as published with the proposal by the BLM, what we would propose to do for CUL 4 is something similar that we did to CUL 6, which is we added language to the end of CUL 6 that basically said that we were going to go forward with the mitigation that was come up with under the PA for the mitigation of the project's effects to Route 66, unless something happened to the PA,

it wasn't to come to fruition, it was terminated or something of that effect, then we would revert back to CUL 6.

So we would propose putting language in here similarly for CUL 4 that says in relation to our concerns about the significance of these archaeological sites, we're going to do the remedy that's in the PA, and then put the caveat in there, if something should happen to the PA, it doesn't happen, it isn't executed, it's terminated, whatever, that we would revert back to CUL 4.

MS. MILES: Excuse me. Could I just interrupt for one moment?

I have to say that I strenuously object to the way this is proceeding considering the fact that we have not had a chance to review now staff's proposed conditions. And, in fact, staff mentioned that there would be a new proposal made today at the workshop yesterday, but that proposal was not explained. And we have not had any chance to review this, to submit testimony.

This is not exactly what was in the staff assessment -- I'm sorry, the supplemental staff assessment that was issued by staff regarding cultural resources.

And this is the centerpiece, this is the mitigation strategy for archaeological resources on the

project site and significant -- potentially significant cultural resources.

And I think if we were in a typical proceeding, this would probably be -- this would merit perhaps recirculation of the Draft EIR. I'm not asking for that, but I am asking that we would have an opportunity to review a mitigation strategy that's put in writing and submit testimony on that and also be able to ask questions after we've had a chance to review it.

MR. BABULA: Well, these were based on the -- the analysis hasn't really changed, it's the conditions have been modified and tweaked as we went through and had discussions and then worked with the BLM.

But the overall basis -- and you're free to cross-examine Mike and so forth, but I understand what you're saying, and I'll have him continue to just go through the rest of the conditions where we had a couple disagreements with the applicant and then on cross, and we can discuss some other options for briefing potentially.

HEARING OFFICER KRAMER: Yeah, I don't think there was a question on the table, but your objection to -- or your request for additional time is noted, but given all the other factors that we face, we need to go forward. And you will have the additional opportunity to comment during the PMPD comment period. But we cannot

wait another week to do this again.

MS. MILES: My understanding is that additionally there's going to need to be a programmatic agreement drafted, and I know in the Imperial project we had a opportunity to review that. Today, I mean, we were told yesterday that it was still being drafted. And so I think that's another thing that we need to have an opportunity to review, because that is actually the mitigation strategy being proposed for all resources.

MR. BABULA: Well, I think it's kind of like the Genesis Project though where we acknowledged a PA was going to be done, but we have a set of conditions of certification that the applicant in Genesis is subject to, and we'd note in one of the conditions if the PA comes out that would be followed if it conflicts, but if it's additional, whichever is more stringent would be followed. So I think a similar strategy here where you would have an understanding of the realm of the impacts of mitigation, and so the PA would probably duplicate quite a bit of what's in our conditions of certification. And then for things that are specifically in conflict, the PA would follow. If it's additional --

MS. MILES: If I'm hearing this correctly, the conditions of certification are changing as we speak because what BLM proposed just now, what Dr. Hunter put on

the table, is not directly reflective of what was in the conditions of certification or even the conditions that we've been discussing at the workshop.

MR. BABULA: Well, it actually is originally what our conditions were from -- originally we had conditions that required some form of testing, because originally the BLM didn't -- they had already determined these things weren't eligible, so they were just going to -- the three were avoided, and they were going to level the rest. Then we had a difference of professional opinion on that, and we wanted some sort of testing. Now there's been some merger in there --

MS. MILES: Right, but some sort of testing is where I'm going with that. Like the actual details, the devil in the details of that testing in the strategy is continually changing. And I just find that it's --

MR. BABULA: Well, I'm going to have Mike talk on -- I don't believe the testing is ever detailed out too much in there.

MS. MILES: Well, the percentage of the sites that are going to be tested, that depth of the testing. I mean, the detail was presented, and it's different than what was in the supplemental staff assessment.

MR. BABULA: Okay. All right. Thank you.

If you want to just continue, Mike, with the few

other ones where we had differences.

MR. McGUIRT: Okay. On CUL 5, which is page 123, we had some discussion last night about unmitigable versus unavoidable. And upon further reflection, we would just like to strike both and just have it read "for the significant effects that the project will have," and let's just end that rather silly discussion.

All right. So if I could turn it over to Kathleen to discuss CUL 6.

HEARING OFFICER KRAMER: That was CUL 5 you were just speaking of?

MR. McGUIRT: That was CUL 5 on page 123 towards the bottom in that subpart 2.

MS. FOLEY GANNON: And for the record, the applicant has no objection to striking that.

Whereupon,

KATHLEEN FORREST

was called as a witness herein, and having been previously sworn, was examined and testified as follows:

MS. FORREST: I'm Kathleen Forrest.

On CUL 6, page 126, the very last paragraph on that page talks about the documentation being submitted to a local repository. And we would just like the CPM to have review and approval over that repository and just to

insert that in that paragraph.

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

MS. FORREST: On page 127, verification 3, there's a statement, "within 15 days after the CEC architectural historian approval of the Howes report," that needs to read "CPM," just for the sake of consistency.

HEARING OFFICER KRAMER: Sorry, one more time?

MS. FORREST: It should read, rather than "CEC architectural historian," it should just read the "CPM."

HEARING OFFICER KRAMER: And where?

MS. FORREST: First line on verification 3 on page 127.

MR. BABULA: It actually says 4, but it should be 3, I think.

MS. FORREST: Yeah, it -- 4 is struck out.

And also in that same verification on the third line where it references that the final report has been provided to the SHPO, I would propose deleting the SHPO as -- my understanding is that the CRS is their repository, and the SHPO does not want stuff submitted to them, but they could correct me if I'm wrong.

DR. HUNTER: It should be to CRS?

MS. FORREST: Yes.

DR. HUNTER: Instead of --

MS. FORREST: Rather than the SHPO, it should go to the CRS, which is already included.

HEARING OFFICER KRAMER: For the record, the SHPO says that's fine.

MS. FORREST: And that's all I have for CUL 6. So I'll turn it back over to Mike.

MR. BABULA: Those are all the issues we had regarding the conditions of certification.

HEARING OFFICER KRAMER: Okay. So then you're saying that this scheme, this condition scheme fits in with this revised approach that Dr. Hunter and Mr. McGuirt were talking about.

MR. McGUIRT: That's correct, with the addition of the language that we spoke of earlier in CUL 4.

HEARING OFFICER KRAMER: And you didn't give us any precise language, so would that be modeled on that long paragraph at the top of page 127 above the verification of the CUL 6?

MR. BABULA: Yeah. I would propose that we could submit that prior to the -- in the next couple days to -- as a model based on the testimony here in the record and CUL 6, so there's a basis for it on how to modify CUL 4.

MS. FOLEY GANNON: If I may, Hearing Officer Kramer, we will try to draft language right now and get it

to you before the end of the day if we can share it with the staff and other parties and let them look at it so hopefully we can --

MR. BABULA: Or we can do that.

MS. FOLEY GANNON: It will be really warm.

HEARING OFFICER KRAMER: Is it in both of these cases. Is there any possible scenario in which the PA could result in a less strict standard than what is specified in the condition? I wasn't sure earlier, there was a hint of -- certainly if you just said the PA rules if it's -- if it comes into existence, you could have a situation where in effect the mitigation is less than what one would assume by reading our conditions.

MS. FOLEY GANNON: Well, if you go to page 127 in that paragraph, it says that the applicant shall adhere to the more stringent requirements.

HEARING OFFICER KRAMER: Okay. That's the plan for CUL 4 as well?

MS. FOLEY GANNON: Correct.

HEARING OFFICER KRAMER: Okay.

PRESIDING MEMBER EGGERT: So going back to the previous example then, if the PA said -- if this says 10 percent and the PA says -- I'm sorry, if this says 20 and the PA says 10, it would be the 20? That --

MS. FOLEY GANNON: I think you heard the PA's

going to say 100?

PRESIDING MEMBER EGGERT: Right. Right. That was as a hypothetical.

DR. HUNTER: May I --

MS. FOLEY GANNON: But whatever, it would say something different.

DR. HUNTER: May I interject something?

The PA is not going to stipulate this sort of information. What it is going to say is that it requires the monitoring plan, which will include all of the recommendations of the energy commission as to how we actually go about testing the sites. The PA will stipulate that there will be a deliverable of a monitoring plan. The monitoring plan itself will state everything that needs to be done in consultation with the SHPO and the energy commission to fulfill the needs of the energy commission for testing.

Does that make sense?

PRESIDING MEMBER EGGERT: So just -- see if I can summarize here.

So you actually mentioned, if I recorded it properly, two elements of what the BLM wants to have, which is a construction monitoring and identification plan and a data recovery plan; is that correct? Did I --

DR. HUNTER: A construction monitoring plan and a

discovery plan, a cookbook of what will happen during the ground disturbance and what the monitor needs to do and what we will agree with the applicant and the energy commission should be done. And the discovery plan would be a cookbook stating what will occur should artifacts or buried sites be encountered. And that construction monitoring plan importantly will also include a research design which will guide us in interpreting what we find subsurface.

PRESIDING MEMBER EGGERT: And the dependency of that on what the CEC is asking for in these conditions is -- maybe just explain that one more time.

DR. HUNTER: We would -- well, we're proposing that any site that is going to be affected will be tested. The CEC requested that 20 percent of each site type be tested. In some cases a site type may only include two sites; 20 percent of two sites obviously is not statistically relevant. We think that if one of those two sites were disturbed, that the automatic testing would actually be more than the energy commission has asked for.

The question was whether -- if the PA didn't get written, if the monitoring plan didn't get written, then what would happen? We would revert to CUL 4.

PRESIDING MEMBER EGGERT: And when you say "we," you mean the BLM?

DR. HUNTER: Yes.

PRESIDING MEMBER EGGERT: Okay. I think I'm -- I have no further questions.

MR. BABULA: Okay. I think Mike might be able to also add some more complication to this, or clarification.

MR. McGUIRT: Thank you.

It's unlike in CUL 6 where we have a relatively straightforward effect to one resource where we can talk about more or less stringent. In this case, we're sort of comparing apples to oranges because we're looking at one approach to deal with the historical significance of these resources, which was our approach in CUL 4, which is an entirely different shape of program than we're talking about trying accomplish the same goal but through an entirely different means.

It could work out, as Dr. Hunter just pointed out, given the circumstances of the construction, that we could actually end up with a greater amount of information on these resources to substantiate our conclusions than we would have under our CUL 4. It could also turn out to be the reverse. We can't tell which ahead of time, but we are in agreement that the approach that the BLM is proposing accomplishes our goal that we had that was behind the intent, that was behind CUL 4.

So we're comfortable, the staff's comfortable

with that at least. And what we're proposing for this additional language on CUL 4, unlike CUL 6 would not say whichever one is more stringent.

We're going to commit to -- the energy commission staff would like to commit to the proposal that the BLM is putting forward and simply say that in the event -- as Dr. Hunter just said, that in the event that the PA doesn't come to pass, that one of the plans doesn't come to pass, or somebody terminates the agreement, that only in that case we would have CUL 4 to fall back on as a failsafe.

MR. BABULA: What does the applicant think?

MS. FOLEY GANNON: I think we would like to include language in there that says it has to meet the intent, and there should be a description of that intent as a performance standard to say that the PA -- because the PA you don't have in front of you yet, it should say that the -- Dr. Hunter has explained what the intent of the PA is, I think, clearly here, and I can -- we can capture it, and we'll share that language with you, saying if the intent of the PA, the CPM can decide if the intent of the PA is met as described in the condition, and if it is, that will be implemented, and if it isn't, CUL 4 will be implemented.

MR. BABULA: Okay. That sounds good.

HEARING OFFICER KRAMER: Okay. Somebody's going to work on that?

MR. BABULA: The applicant will. And I guess when you go back to the committee meeting -- or the business meeting, that would be a good time for them to crank that out.

MS. FOLEY GANNON: We will get it -- we'll get it done by this evening.

HEARING OFFICER KRAMER: Okay. That's great.

For those of you on the telephone, you may not be -- we'll be breaking at about 5:30 for an hour for dinner. But we'll have the lines open, so you'll be hearing the continuation of the commission's -- full commission's business meeting on an unrelated project. So don't be surprised.

We'll tell you again before we break.

Anything else, Mr. Babula?

MR. BABULA: I'm done. So they're available for cross.

HEARING OFFICER KRAMER: Applicant?

MS. FOLEY GANNON: We have no cross. Thank you.

HEARING OFFICER KRAMER: Any other intervenor?

MS. MILES: I have -- did I hear someone on the phone?

HEARING OFFICER KRAMER: Is somebody on the

phone?

I guess that was a non-expected utterance.

MS. MILES: Okay.

CROSS-EXAMINATION

BY MS. MILES:

Just to clarify, you're saying that any site that is going to be affected will be tested?

And it could be directed to whomever would like to answer it, whoever feels qualified and comfortable. Go ahead.

DR. HUNTER: Yes.

MS. MILES: So when you say "affected," do you also include visual effects?

DR. HUNTER: No. What we're discussing here is an archaeological question. What I mean is ground disturbance.

MS. MILES: Okay. So that means that every site where a SunCatcher will be put into the ground there will be testing; is that correct?

DR. HUNTER: That every site that is impacted by construction in the form of ground disturbance will be tested.

MS. MILES: And will there be only mechanical excavation, or will hand excavation also occur on the sites?

DR. HUNTER: It will be mechanical.

MS. MILES: Will the surface artifacts on the sites be mapped, collected, analyzed and curated before the mechanical excavation?

DR. HUNTER: They have already been documented fully.

MS. MILES: So in addition to documentation, they will not be collected or curated or analyzed in any further manner?

DR. HUNTER: No. The surface artifacts are primarily lithic material, and they have been counted, photographed, documented in standard field methodology for surface artifacts in the desert.

MS. MILES: And did BLM collect any of the resources on the project site already?

DR. HUNTER: No, we do not collect artifacts in general, unless they are diagnostic or in danger.

MS. MILES: Based on the technical report in site SBR5600, there was a spear point that was estimated to be 11,000 years old. And I'm not sure, Dr. Charlotte, If you're familiar with that or if Jim Shearer would be better or familiar with this; but based on the background research and the statements and the technical report, it appeared that the spear point was up to 11,000 years old, perhaps 8,000 to 11,000 I believe is what it stated. And

so I was wondering if you could -- and my understanding is BLM did collect that resource; is that true?

MR. SHEARER: My name is Jim Shearer archeologist, Bureau of Land Management, Barstow field office.

And at the request of the CEC, diagnostics were collected on site, projectile points, that is correct.

DR. HUNTER: Diagnostics we do, yes.

MS. MILES: And what has been the ultimate location of where that artifact is being curated?

MR. SHEARER: At this time we're waiting for a curation agreement. Most likely place for curation will be San Bernardino County Museum.

MS. MILES: And based on its research potential, is that resource potentially eligible?

MR. SHEARER: Eligible for what?

MS. MILES: For the National Register or the California Register?

MR. SHEARER: That would be a no.

MS. MILES: Okay. Unfortunately, I had questions prepared, but most of them are not relevant because of the changes, from what I can tell; and so I'm not going to go through my questioning. But I would just like to again note that I strenuously object to proceeding in this fashion. I believe that it's a violation of CEQA.

HEARING OFFICER KRAMER: Noted.

Any other cross-examination of staff?

Ms. Gannon, do you have any witnesses?

MS. FOLEY GANNON: We would like to call Rachel Nixon.

Were you sworn in last week?

MS. NIXON: Yes, I was sworn in.

HEARING OFFICER KRAMER: Okay. Go ahead.

MS. FOLEY GANNON: And just to explain the intent of what we're doing, in consideration of the time we're spending on this, I just want to have -- Ms. Nixon was one of our -- was a lead cultural investigator on the site. I just want to have it in the record the investigation that happened. So I just want her to very quickly walk through what happened, the results of it, to give you a context for the decision that has been made between the BLM, the direction that the BLM was giving and the CEC staff position.

HEARING OFFICER KRAMER: Okay. Before we go any further in the transcript, the letter that Dr. Hunter gave us, August 25th, from Mr. Donaldson at the SHPO to Roxie Trost at the BLM will be Exhibit Number 311.

(Thereupon the above-referenced document was marked by the Hearing Officer as Exhibit 311.)

MS. MILES: Can that be made available

electronically? I would like to have my expert have a chance to review it?

HEARING OFFICER KRAMER: I think Dr. Hunter would have to help us with that, or maybe Mr. Donaldson. Could you send it to you Mr. Meyer, and he'll circulate it to the whole group?

MR. DONALDSON: Sure.

HEARING OFFICER KRAMER: He says he can.

Thank you.

Go ahead. I'm sorry.

MS. FOLEY GANNON: Okay. Thank you.

Whereupon,

RACHEL NIXON

was called as a witness herein, and having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. FOLEY GANNON:

Ms. Nixon, are you the same Rachel Nixon who gave testimony earlier in this proceedings which was marked Exhibit 75?

MS. NIXON: Yes, I am.

MS. FOLEY GANNON: And is your resume that was attached to that exhibit still accurate and correct?

MS. NIXON: Yes, it is.

MS. FOLEY GANNON: And do you have any corrections or revisions to make to your earlier testimony?

MS. NIXON: Yes, I do.

MS. FOLEY GANNON: Please go ahead.

MS. NIXON: In reference to question 4, A4, there is reference in two places of proposed avoidance areas that the applicant -- that was referenced to our earlier report. After the report was finalized and approved by BLM, the applicant has since avoided those areas. It's over 245 acres that have been avoided. So this now reference is to avoided areas.

MS. FOLEY GANNON: So it's avoided areas rather than proposed areas.

MS. NIXON: Yes.

MS. FOLEY GANNON: Okay. Any other further clarifications or corrections to make to your testimony?

MS. NIXON: That's also in Q6, same reference.

MS. FOLEY GANNON: Any other changes?

MS. NIXON: No.

MS. FOLEY GANNON: Okay. Thank you.

I think you heard the introduction to this, to your testimony, so we can -- you can give -- we won't have to do as many questions and answers -- you can sort of give a description of the investigation that occurred on

the site and that you were involved in.

MS. NIXON: Okay. I'll try to give a concise summary of that, of the events.

In August, August 4th through October 2008, URS, on behalf of the applicant, conducted survey of the Calico Solar Project about -- at that time I think it was about 8500 acres. We conducted that in 15-meter wide transects. We had approximately 20 individuals out there for three months.

Following that, we met with the BLM, BLM and CEC had subsequent meetings. We provided a draft report of our findings in November of 2008. And at that time we met with BLM and BLM's representative, consulting LSA staff to go over comments they had to the document.

We addressed those comments, provided a revised document in December. I believe we had another in April. And we are -- and at that time it was provided to the CEC, it was authorized for that copy to be provided.

At that time we, after April 6th, we reached data adequacy. We then received data responses in July --

MS. FOLEY GANNON: This is July 2009.

MS. NIXON: -- 2009.

At that point it had been determined by BLM and CEC that a 25-percent sample resurvey was necessary. We -- staff set out to do that and provide data responses

to a 25-percent sample of those responses where applicable. In other places it was 100-percent response. That response was submitted and provided in October, in April and October.

So we then went back after following meetings and conducted a 75-percent resurvey. So the resurvey involved revisiting every single site. So 100 percent of all sites as of March 2009 have been revisited from the October initial survey work.

They were resurveyed per the data requests and the template that required further data. And the level of data includes extremely detailed site descriptions and 100-percent inventory of the surface finds as well as mapping individual features and photographs, detailed photographs of the sketch maps, as well as detailed interpretation that also takes into account a geomorphological study that was part of the data requests as well, which was done by a geoarcheologist and which involved looking at trench profiles during geotechnical testing to determine the potential for subsurface deposition. And their overall results were very low to moderate; none in some cases, such as rock outcrops, but very low to moderate across the entire project area.

That data was all applied to our revised summary site description as well as the detailed inventory that

described every site based on our 100-percent resurvey that was provided and completed in March.

MS. FOLEY GANNON: So, Ms. Nixon, so we understand how this all comes about. You went out on the site and you investigate all of the site to try to identify potential archaeological sites or sites where there may be resources that have to be investigated; is that correct?

MS. NIXON: Initially resurvey the entire project area in 15-meter wide transects. We identify a site. We relocate -- we return to that location and we survey it in closing three-meter wide transects to identify that site boundary and to identify the artifacts and the features within that.

MS. FOLEY GANNON: And when you were just saying there was 25 and then 75 percent surveys, so 100 percent of the sites that were identified were subject to the level of investigation which you just described, which include doing 100-percent inventory of everything found, looking at the information that was available about the subterranean or the geoarch tests that had been done, as well as the trenching that had been done in this area; is that correct?

MS. NIXON: That is correct.

MS. FOLEY GANNON: And did I capture correctly

kind of what that -- essentially that analysis that's done on each site?

MS. NIXON: That analysis was to collect additional data and detailed information for each site, confirm the accuracy of each site, as well as to incorporate the geomorphological characteristics, the general as well as subordinate land form characteristics to better describe the site.

MS. FOLEY GANNON: And in addition to the field work that was being done, was there also research done about the resources that were potentially in the area to help you understand or to interpret the data that you were finding?

MS. NIXON: Yes. Part of the whole process of conducting a cultural resource investigation involves preliminary background research and review of all previously-recorded sites, previously-tested sites; and that is ongoing throughout the process of reporting. And so yes, we have reviewed all previous surveys that have been done within a mile, but that's just standard as part of the record search. But in addition, we have looked at documents within the greater area of the Mojave Desert.

MS. FOLEY GANNON: And when you referenced earlier LSA, who was BLM's consultant; is that correct?

MS. NIXON: LSA & Associates, correct.

MS. FOLEY GANNON: And did you -- you referenced they had worked with you on this investigation.

Can you just briefly describe the role that they played?

MS. NIXON: Right. LSA accompanied us on behalf of BLM during the 25 percent and the 75 percent resurvey efforts in order to ensure we had an established field methodology that BLM and CEC agreed to for the resurvey effort to collect this additional data. And in order to facilitate that and ensure its accuracy and compliance, an LSA BLM representative was on site with every team during the resurvey work.

MS. FOLEY GANNON: So the field work on the subsequent reporting was reviewed by LSA and BLM?

MS. NIXON: That is correct.

MS. FOLEY GANNON: And you had described earlier that there had been sites that had been identified as being appropriate for avoidance.

Can you just briefly describe how those sites were identified and what conclusion was reached?

MS. NIXON: Those sites worked during the resurvey effort and the additional data we were collecting, BLM archeologists as well as LSA archeologists were on site during the recordation and identification of sites that have a large number of features, over 500 plus

features and numerous of these lithic scatters we've been discussing, the features and cleared areas as well that appear to represent prehistoric components and/or historic.

They were data potential that is -- they have additional data potential in which these have been recommended eligible. And the sheer number alone is -- and Native American communities have expressed their concern with preservation of these resources as well.

MS. FOLEY GANNON: Again, those were the sites that you were referencing in the beginning of your testimony that are now going to be avoided?

MS. NIXON: These are to be avoided -- they have been avoided. They have been removed from the project APE.

MS. FOLEY GANNON: And then just briefly, I think you were at our hearings last week, and there was discussion about the fact that initially there was no additional subterranean investigation proposed for any of the sites.

Can you just briefly describe the basis for that?

MS. NIXON: Again, working closely with BLM and the BLM consultants on this evaluation and the second round of field work and data collection where we had come to this decision, it was extensive review of the data and

the data we had on hand and the previously-tested sites within the area, within the project area, the Mojave pipeline.

And the results of those studies as well as our objections on site and the geomorphological analysis have brought us to the conclusion that there is a very low likelihood, extremely low for subsurface potential. And these sites were not recommended eligible as a result as well as other factors.

MS. FOLEY GANNON: Thank you.

And you heard Dr. Hunter's testimony early as well as Mr. McGuirt's describing the intent of the measures that will be incorporated into the programmatic agreement.

Do those sound appropriate to you?

MS. NIXON: They do sound appropriate.

MS. FOLEY GANNON: Thank you.

She's available for cross-examination.

HEARING OFFICER KRAMER: Staff?

MR. BABULA: One moment.

CROSS-EXAMINATION

BY MR. BABULA:

Just have one question for you.

Do you concur with Mr. McGuirt's testimony that based on the information we have now we have a good

understanding of the sites and we know that mitigation menu, potential mitigation, and we know the impact of the project, and so what we're seeking to -- the missing piece that we want to clarify is the eligibility?

MS. NIXON: Under California Register.

MR. BABULA: Right.

MS. NIXON: Where we are today, I concur with what we have discussed today.

MR. BABULA: Okay. No further questions.

DR. HUNTER: I need to make a correction to what I said earlier.

I don't think I have the authority at my paygrade level to obligate the government. What I mean is that I would concur with the conditions of CUL 4 as the state archeologist. I can't obligate the government to do anything; I'm just not high enough up to do that.

So when I was asked by Mr. Eggert if the government would agree to the conditions of CUL 4, I said yes, or would we revert to CUL 4, would the government do that, I said yes. But what I should have said is that I would concur with doing that.

MR. BABULA: Thank you for that clarification. It's okay. The applicant's the one who has to do it.

PRESIDING MEMBER EGGERT: Actually, that was my question as a follow-up, was that it seems like these are

mostly written specifically directed towards applicant's activities on the site, and we're not specifically asking BLM to do anything, we're not directing them to do anything.

MR. BABULA: Right now, in fact, we can't. Our authority of limitations would be on the applicant, on a third party.

I have no further cross.

HEARING OFFICER KRAMER: Any other parties have any cross-examination?

MS. MILES: I have one question.

CROSS-EXAMINATION

BY MS. MILES:

I believe it's Rachel Nixon.

So you just said, if I heard you correctly, that eligible sites have been avoided.

MS. NIXON: That is correct.

MS. MILES: And does that include all of the -- all of the artifacts that are around the site?

MS. NIXON: That includes all contributing elements to that site that contribute to its eligibility.

MS. MILES: And are the artifacts that are found within a site important for understanding the site as a whole?

MS. NIXON: The artifacts are themselves, they're

all taken into consideration when making an evaluation recommendation.

MS. MILES: Okay. I have no more questions.

Thank you.

HEARING OFFICER KRAMER: Okay. That was Dr. Berry on the telephone telling me that she's ready, so --

MS. FOLEY GANNON: I have one redirect question if the other parties don't have cross.

HEARING OFFICER KRAMER: Any other party on cross of the applicant's witness? And that includes the folks on the telephone.

Hearing none, go ahead with your redirect.

REDIRECT EXAMINATION

BY MS. FOLEY GANNON:

Ms. Nixon, I believe you just got the question of whether you agreed that the information that was available was sufficient to identify the potential impacts associated with the project and to understand the resources; is that correct?

MS. NIXON: That is correct.

MS. FOLEY GANNON: And then there was a follow-up question of whether the only information that was missing was to be able to determine eligibility.

Do you believe that there is additional

information that's necessary to be able to determine eligibility?

MS. NIXON: I believe at this point we have enough information to make an eligibility determination, although I do believe that the additional measures proposed today could provide that clarification and certainty that we're looking for.

MS. FOLEY GANNON: So they will provide additional information, may or may not be necessary, but it will be additional information that would be useful.

MS. NIXON: That could provide certainty for those that are uncertain.

MS. FOLEY GANNON: Okay. Thank you very much.

HEARING OFFICER KRAMER: Okay. Thank you.

Do any of the other parties have any additional witness regarding cultural?

MS. MILES: CURE does have Dr. Whitley on the phone as mentioned.

HEARING OFFICER KRAMER: And how long would you estimate he will need?

MS. MILES: Not very long. I would say probably 20 minutes.

HEARING OFFICER KRAMER: Okay. Dr. Berry told me she'll be locked out of where she is by 5:00, so we'll need to switch to her by 4:30. So go ahead with

Mr. Whitley.

And does any other party have any additional witnesses on cultural?

MS. FOLEY GANNON: We don't.

HEARING OFFICER KRAMER: Okay. Go ahead, Ms. Miles, then.

Whereupon,

DAVID WHITLEY

was called as a witness herein, and having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MILES:

And I believe you were previously sworn, Dr. Whitley?

DR. WHITLEY: Yes, that is correct.

MS. MILES: And whose testimony are you sponsoring today?

DR. WHITLEY: My own, my opening testimony and Exhibit 442.

MS. MILES: Okay. And his testimony is Exhibit 441. I'd like to move to have those entered into the record.

HEARING OFFICER KRAMER: We were hoping to do all that at the end of the hearing, but does anyone plan on

objecting to either of those exhibits, 441 or 442?

MS. FOLEY GANNON: No.

MR. BABULA: No objection.

(Thereupon the above-referenced documents were received in evidence as Exhibits 441 and 442.)

MS. MILES: And, Dr. Whitley, do you have any changes to your sworn testimony?

DR. WHITLEY: Yes. The CEC's position with respect to cultural resources, as you can see, is a moving target, it's changed a number of times since the supplemental staff assessment was issued on August 9th, and it's even being negotiated now.

For that reason, I would, by necessity, like to extend my earlier written testimony and potentially have the opportunity to augment it subsequently as the CEC staff position changes.

HEARING OFFICER KRAMER: Well, we're going to be closing the record today most likely, so you and your attorney will have the opportunity to provide comments on the PMPD when that comes out. But I think today we'd like to hear not about what you can't tell us, but any responses you have at this point in time to what you've heard from the staff either today or previously.

DR. WHITLEY: I would be glad to provide that. And this does change my testimony slightly.

First, I think my position can be summarized in terms of four points.

The first one is that is I concur with the SHPO's recommendation or determination that there currently are insufficient data to determine the eligibility of over a hundred sites within the project APE.

Second, however, if I understand what has been said today, the proposal for the programmatic agreement is that over a hundred archaeological sites will be tested to -- partly to obtain final determinations of eligibility using mechanical excavation.

I'd like to point out that numerous archaeological regulations and guidelines require that testing be conducted in a minimally-destructive fashion. I think, and I'd have to check, the references off the top of my head, I believe this is specified in the Secretary of the Interior's standards and guidelines, in the BLM manuals, and even in the Office of Historic Preservation CARIDAP Programmatic Treatment Plan.

The point then is that hand excavation for testing is the professional standard, and that is the process that should be followed in this circumstance, because otherwise, frankly, you're destroying the site as you're determining whether or not there is anything present.

Third, if I understand again what is being stated and suggested here, the criterion for eligibility is going to largely depend for these over 100 sites based on whether subsurface archaeological deposits are present or are not present. I'd like to point out that there are many examples of archaeological sites that have provided very important scientific information that are themselves simply surface archaeological manifestations. A number of these occur in the immediate project area.

And I'd like to point out for the record that I have published a number of papers on surface archaeological sites in the Mojave Desert. These have been published in journals such as "Science," which is, frankly, the leading scientific journal in the world, "American Antiquity," which is the flagship journal of the Society for American Archeology, and a variety of other locations.

The reason why these sites are so significant and have, in fact, research value is because they address one of the most important topics in archaeological research, which is the peopling of the world. So the idea that whether or not a site has a subsurface component is the only real issue in terms of whether it has research value is simply false and has been false for quite some time.

Finally, I'd like to point out that the idea that

the artifacts on these sites won't be mapped, collected, and curated for future study and analysis is simply extraordinary. I've never heard of such a thing. And I recommend quite strongly that standard archaeological practice and procedures be required here. I see no reason to destroy the archaeological record simply for the sake of expediency.

Those are my four summary statements at this point.

MS. MILES: And just to follow up, did you have anything to add regarding potential for unique cultural resources within the project area of potential effect?

DR. WHITLEY: Yes. I mean, under CEQA, one of the criterion that we have to consider is whether or not an archaeological site is unique. A unique site for CEQA is one that addresses a specific important research question that happens to be of widespread public interest. I would argue, and I think it would be something that most archeologists would concur with me on this point, that the peopling of the Americas, the first occupation of the continent is one of those topics that would qualify with respect to the definition of unique resources potentially under CEQA.

We have one other archaeological site, San Bernardino 5600 that a projectile point was recovered

from that's potentially 11,000 years old. Normally we date archaeological sites based on diagnostic artifacts. That would suggest that this site is potentially 11,000 years old; and that would, in my estimation, qualify it as a unique resource under CEQA.

MS. MILES: One last question.

So you mentioned the mechanical excavation versus hand excavation. And so am I correct in stating that this proposal for mechanical excavation is the mitigation measure that may in itself pose potentially significant impacts?

DR. WHITLEY: Mechanical excavation -- all archaeological excavation, I should say, destroys the site in the site context. Archeology is destructive in that sense. For that reason, standard archaeological practice requires as carefully controlled excavations as possible. That's why we hand excavate archaeological sites using a trowel and a dust broom, a whisk broom. Mechanical excavation can be controlled to a certain degree, but the level of control is -- is, frankly, at the point of mass destruction. By the time you've found an archaeological deposit using mechanical excavation, you've effectively destroyed a significant part of it.

Normally we only use mechanical excavation to find buried archaeological sites in locations where there

is not the existing evidence -- there is not evidence that a site is already present. We wouldn't take a backhoe into a site and dig into it to see if it had a subsurface deposit. We would take a backhoe out onto an area that had no evidence of archeology and use it to strip down the soil to see if there was something deeply buried underneath. That's an important distinction, and it seems to be one that has gotten confused in this process.

The geomorphological study that was conducted by the applicant's archeologist was intended to determine whether there were buried sites, not whether sites themselves had subsurface deposits. And that seems to be the point of confusion here.

MS. MILES: Thank you, Dr. Whitley.

I have no further questions.

HEARING OFFICER KRAMER: Staff or the applicant?

MR. BABULA: No questions.

MS. FOLEY GANNON: I just have a couple of questions.

CROSS-EXAMINATION

BY MS. FOLEY GANNON:

Dr. Whitley, you were describing the fact that the subterranean investigation is only one part of the process that is used to evaluate the eligibility of sites; is that correct?

DR. WHITLEY: That is correct.

MS. FOLEY GANNON: And the other parts of that investigation are, just briefly?

DR. WHITLEY: Well, the surface evidence itself, the nature of the artifacts, the diversity of them, and very importantly their age. Now, we have techniques that we've developed over the 20 or 30 years that can be used to date exactly the kinds of artifacts that are present on the site within the project APE.

As I mentioned before, I and about 20 other scientists published a paper in "Science," the world's leading scientific journal, on the dating of those surface artifacts demonstrating that some of them may pertain to the peopling of the Americas. So there are many things that we look at.

But the idea that we just assume that surface sites are not eligible is at best a confusion and at worst an avenue for destroying the archaeological record.

MS. FOLEY GANNON: And so you're familiar with the reports and the investigations that were done on this site?

DR. WHITLEY: I have read the technical report, the redacted version of it. I have not had the opportunity to examine the site records or the site maps.

MS. FOLEY GANNON: So if the determinations that

were made or the considerations about the surface artifacts that were found didn't just say we're discarding this because of surface -- because it's just surface artifacts but actually involved further analysis, then you might agree that that might be appropriate?

DR. WHITLEY: No. There was no analysis. There was a count, a gross count by field crew members of the number of flakes on site. This is not a lithic analysis, this does not satisfy the data that is in these sites. And, in fact, the standard process, it's certainly true that an applicant isn't required to answer every potential scientific question that some archeologists might dream up, but we are required to collect systematically and preserve the artifacts that are present so that subsequent archeologists can ask those questions and conduct real analyses on these, these recovered remains.

I mean, let me ask you a question. Is there a table there in that technical report that summarizes the numbers of artifacts that were found on all of the sites and compares those tabulations to other studies in the area? Because I certainly haven't seen one. And that would be the first start. The most basic kind of scientific analysis. I've seen no evidence of that.

MS. FOLEY GANNON: I've only seen redacted versions of things too, and even less than you have. But

my understanding is that the data is there.

And I think I have no further questions.

Thanks.

DR. HUNTER: This is Dr. Hunter.

I'd like to ask you one question, Dr. Whitley.

Are you aware of an article entitled "Desert Pavement and Buried Archaeological Features in the Arid West, a Case Study from Southern Arizona"?

DR. WHITLEY: I was the one that entered that article into the record.

DR. HUNTER: Thank you. I quote from that article, "We can also note that mechanical surface stripping provides one and perhaps the only cost effective means of looking for such cultural remains under desert pavement," unquote.

Thank you.

DR. WHITLEY: May I clarify that quote taken out of context?

That makes exactly the point that I drew earlier, which is there's a confusion between testing for subsurface deposits on known archaeological sites versus doing testing for buried deposits in areas where no archaeological sites are known to be present. That I believe is exactly the point these authors were trying to make.

When we don't see surface remains, we have to use some cost-effective expedient technique, and mechanical stripping is absolutely the appropriate one; but where we have archaeological sites, known archaeological sites, the regulations in standard archaeological practice requires that we test these sites in as minimally destructive a fashion as possible. I think you will find that in the BLM manual as well in the Secretary of the Interior's standards and guidelines.

HEARING OFFICER KRAMER: Okay. Any more questions from any other party? Okay.

Thank you. Was it Dr. Whitley?

DR. WHITLEY: Yes, it is.

HEARING OFFICER KRAMER: Okay. Thank you.

That was, I believe, the last witness on cultural resources, although we did want to invite Mr. Donaldson from the SHPO to address us if he had any comments he wished to make.

MR. DONALDSON: I have no comments, but if there's a question, any questions --

THE REPORTER: Please go to the mic, sir.

MR. DONALDSON: This is Wayne Donaldson, State Historic Preservation Officer.

I have no comments at this time, but if there's any questions that would want to be addressed to me, I can

certainly field those.

PRESIDING MEMBER EGGERT: We greatly appreciate your participation and your input that you've provided.

MR. DONALDSON: Thank you.

HEARING OFFICER KRAMER: Thank you.

Dr. Berry, did you make it on the telephone?

DR. BERRY: Yes.

HEARING OFFICER KRAMER: Okay. Hold on. Mr. Donaldson had one thought.

MR. DONALDSON: It's not a thought, it's just a technical correction.

Anything that is determined eligible for listing on the National Register of Historic Places is automatically listed as eligible on the state register.

HEARING OFFICER KRAMER: Thank you.

Okay. Dr. Berry, is it still the case that you need to move yourself by about 5:00 or get locked in?

DR. BERRY: Yes.

HEARING OFFICER KRAMER: Okay. When I called you last week to see if you could join us, I gave you a bit of a preview about the types of issues we're talking about.

Did you wish to make any -- oh, we're going to go into biological resources now, in case that's not clear to everyone.

So do the parties need to -- Dr. Hunter, you had

a question?

DR. HUNTER: Are we finished with cultural?

HEARING OFFICER KRAMER: I believe we are finished with cultural.

Does anybody want to argue against that?

MR. BABULA: I think we're finished except for the applicant was going to propose some CUL 4 language that we would get to you before the end of the hearing.

MS. FOLEY GANNON: We're working on it.

MR. BABULA: That's the only other --

HEARING OFFICER KRAMER: Okay. So you might, if you're interested in that, Dr. Hunter, you probably need to make yourself available. And that probably will come after dinner I'm suspecting.

DR. HUNTER: Okay.

MS. FOLEY GANNON: That's correct.

HEARING OFFICER KRAMER: Okay. So now we're --

PRESIDING MEMBER EGGERT: But you could join via phone if you're inclined to make it home for dinnertime.

HEARING OFFICER KRAMER: So now we're going to move on to biological resources.

Dr. Berry, you don't have the benefit of having sat through our previous hearings, but I think it's fair to say we are at least midway through our discussion of biological resources, or at least that's a hope,

certainly, of the committee.

We have been interested in the information that the translocation and relocation efforts at Fort Irwin can provide to us in this case. And I know that CURE --

Ms. Miles, did you consider her to be somebody that you would like to sponsor as a witness or --

MS. MILES: I believe that she wanted to be not necessarily represented by any party here.

HEARING OFFICER KRAMER: Okay. So I think rather than lead off, which I could do, I'll simply ask Dr. Berry if she is wishes to make some preliminary comments, and then we will leave her open to questioning from the various parties.

So would you like to make some preliminary remarks, Dr. Berry?

DR. BERRY: Yes, I would.

I have looked at the translocation plan, and I have some comments about that.

First, I would like to say that the project does not appear to be a carefully planned science-based project that will yield valuable and usable information for recovery of the state- and federally-listed populations of the Desert Tortoise. The translocation plan seems to be hastily assembled, lacks basic and careful science, and it's not a rigorous, thoughtful plan.

Very little background information is presented and no supporting scientific or quantitative data on such important topics that are raised in the documents such as annual and perennial vegetation, soils and surficial geology.

Primarily the writers of the plan present observational data, although they also draw on a USGS habitat model. The habitat model is a good model, but it's not been validated to be accurate locally or appropriate for use at the proposed translocation sites.

The second point I'd like to make is that the writers of the translocation plan used layers of assumption unsupported by scientific evidence, and I'd like to give some examples. And these include but are not limited to such subjects as carrying capacity, phrases and topics like compromising a resident population, the potential spread of invasive alien plants such as Brassica tournefortii or the Sahara Mustard, distances that tortoises are likely to move, and likelihood of encountering a zero positive tortoise, zero positive specifically for mycoplasma agassizii.

In the plan they mention a proposed buffer of 2.5 kilometers around a diseased or zero positive animal, and that kind of buffer is not supported by current evidence.

For example, in our Fort Irwin project and in our progress report for 2009 we found that translocated tortoises move a mean distance of 2.4 kilometers with a minimum of 275 meters and a maximum of 12.6 kilometers. Thus a translocated tortoise with that kind of buffer would be likely to come in contact with an infected tortoise.

Now, another point is that the information presented in the translocation plan on health, diseases, and movements of tortoises indicate that the writers are only superficially acquainted with a very important material on health, diseases, and other topics of importance concerning the tortoise.

For example, they haven't defined the use of the term "diseased." They say they're not going to translocate a diseased tortoise. We have translocated tortoises that have shell lesions, such as lesions of cutaneous dyskeratosis. They may be referring to infectious diseases, but it's not clear in what they have written.

They don't mention mycoplasma that's caused by the pathogen mycoplasma testudinium. So it's not clear on whether they're going to test for that particular species of mycoplasma. And just 12 miles away we have clusters of tortoises with mycoplasma testudinium, and it too is

believed to be an infectious disease.

Still another critical point is their proposal to place up to 185 translocated tortoises south of I-40 in the Ord Rodman Desert Wildlife Management Area. This certainly raises a number of concerns. The westernmost site, DWMA 1, which is a long-distance translocation area, borders on private lands, is within one and a half to two miles of agricultural developments near the Fort Cady Road, and within a few miles of Newberry Springs, which is an area that we know has dog packs. It's close to unsuitable habitat.

The preparers of the plan wrote that it had, and I quote, "an inordinate number of carcasses, all within the same relative age class of roughly two to four years," which I'm assuming to mean dead two to four years, suggesting a die-off. Yet the preparers of the plan didn't talk about how many carcasses, what the ages of the tortoises were, whether they were juveniles or adults.

Why place tortoises here if there's been a die-off, and they talk of a die-off, especially when we don't know what the die-off is caused by.

In another proposed translocation area, DWMA 2 south of I-40, again they note a die-off with high numbers of carcasses. So why place tortoises here if there's been a die-off and the cause has been undetermined?

Perhaps the area is not as high quality as the observers report. No information is offered on the food supply of plants eaten by tortoises, for example. And no information is given that these receiving areas will be fenced to protect tortoises from traveling into inappropriate habitat where they would be at high risk.

I'd like to point out that both these sites are within 12 miles of a site where I've been conducting research on epidemiology of upper respiratory tract disease caused by mycoplasma agassizii and mycoplasma testudinium. This is a site with a high concentration of animals with disease, and it's very possible that the DWMA site proposed for translocation also have sick tortoises.

Now there's very little scientific evidence that translocation is a successful mitigation or minimization measure for Desert Tortoises. And that is a very important point, because we all are supposed to be focusing on how to recover this threatened species. The studies on translocations conducted to date have been short term and some have not demonstrated success if we measure success in terms of survival.

A good example is the Fort Irwin project with which I am involved, and I have a major research project on health and disease associated with this project. We have -- I started, for example, in 2008 with translocating

and being responsible for 158 tortoises in the spring. Since that time 49 percent of the tortoises have died. The deaths have continued from 2008 up through this month. And this year alone, 11.6 percent of the 68 tortoises that I had known to be alive in January have died.

This is in contrast to tortoises at the Daggett epidemiology site where the death rate during the last eight months has only been two and a half percent, and at another one of my sites zero percent. So translocation has not been a positive feature for these 158 animals.

Translocation is also not recommended by the independent science advisors who prepared the Draft Desert Renewable Energy Conservation Plan, which was published and made available this month.

And finally, the proposed plan mentioned that there will be, and describes, monitoring and annual reporting, but does not guarantee that the project will be conducted using sound scientific methods. In fact, there's no evidence that there will be. There are no hypotheses offered that will be tested, there are none that are outlined. The methods used to gather data are not given in any detail, and the description of the monitoring is very sketchy. As a reader I'm very uncertain of the data they collected and how it will be used and whether it can be put into a report or a science

document that can undergo peer review and publication.

And that concludes my remarks. And I'm open to questions.

HEARING OFFICER KRAMER: Okay. Well, since the intervenors asked you to be here, we'll start with them.

Ms. Miles?

MS. FOLEY GANNON: Can I get a point of clarification again?

So the statements that she just gave, was that testimony? Was she sworn? I mean, are we -- she's not sponsored by CURE, I understand, so I'm just trying to verify where we are with --

HEARING OFFICER KRAMER: Well, the committee asked her to come, plus she's a federal employee, a member --

MS. FOLEY GANNON: Oh, she's a federal employee. That's right.

HEARING OFFICER KRAMER: We don't swear them.

MS. FOLEY GANNON: Right. Right. Okay.

HEARING OFFICER KRAMER: So, Ms. Miles, do you want to go ahead first?

MS. MILES: Sorry. If you could give me just a moment. We prepared some questions, but she's responded to a number of them, so I just want to make sure we don't --

HEARING OFFICER KRAMER: Does someone else want to fill in the gap then?

Mr. Ritchie?

MR. RITCHIE: Sure.

This is Travis Ritchie with Sierra Club.

Dr. Berry, first, thanks for joining us, and thanks for providing your insight. I think it would be helpful for the record if we perhaps briefly went over your experience and familiarity with the Desert Tortoise.

How many years have you been involved with research related to Desert Tortoise?

DR. BERRY: I started on a project with the tortoise in 1970, 1971, at the request of what was then Division of Highways and is now Cal Trans. I began that project before I finished my doctoral dissertation.

MR. RITCHIE: And since that time have you frequently been involved in Desert Tortoise projects?

DR. BERRY: Yes. Starting in 1983 the vast minority of my time has been spent conducting research on Desert Tortoises.

MR. RITCHIE: And you mentioned the recent project and papers you were involved with on the Fort Irwin health of the Desert Tortoise.

Are there other peer-reviewed published papers that you have written and published on this topic?

DR. BERRY: Yes. Probably close to 50 peer-reviewed published papers and additional reports, agency reports, and agency documents.

MR. RITCHIE: Thank you.

And I wanted to follow up on one of the statements you made.

I believe you said that based on your experience you -- translocation is perhaps not an effective measure to mitigate impacts on Desert Tortoise; is that correct?

DR. BERRY: That's correct.

MR. RITCHIE: And is it possible, in your opinion, that translocation can actually cause more harm than good?

And perhaps I should reference that.

Specifically are there potential harms to the receptor sites that --

DR. BERRY: Yes. And I think that was one of my concerns with the proposed translocation plan, was there was inadequate discussion of how they were going to deal with such issues as carrying capacity, they tossed phrases and words around like they didn't want to compromise the resident population, but they didn't set up a protocol or a decision tree on how they would avoid compromising a resident population. They didn't discuss carrying capacity and how they were going to determine the carrying

capacity.

MR. RITCHIE: And in your experience what are some of the factors that are involved in determining carrying capacity?

DR. BERRY: Well, number one, we want a history of the land use on the site, and we would want data on the perennial vegetation and the annual plant vegetation in a number of years. We'd want to know about the surficial geology at the site because that's essential to understanding the potential for construction burrows.

We'd want to know the tortoise population that is present, and we'd want to know not only about the live tortoises but the dead tortoises and what the death rate has been for the last several years. And that can be very easily ascertained by looking at the shell skeletal remains and having some good idea of the local density of the tortoise population.

So there's much that can be learned about the local area and whether it would be suitable for adding tortoises, and if so, how many.

MR. RITCHIE: And were those types of factors looked at in the Fort Irwin project?

DR. BERRY: To some extent there's what we call the group of lessons learned from the Fort Irwin project. And we have a lot of lessons that we've learned from the

Fort Irwin project. One of those lessons is we'd like to know a lot more about the resident population.

MR. RITCHIE: And I'd also like to ask are you familiar with the Calico project site that's at the base of the Cady Mountains?

DR. BERRY: Yes.

MR. RITCHIE: And from your understanding and your experience, is the Desert Tortoise population that's currently present at that site a healthy population?

DR. BERRY: I don't have information on the health of the tortoises, and that kind of information was not presented in the translocation plan. I think that's a very important topic that needs to be addressed.

MR. RITCHIE: And far as the population densities that were identified in the surveys, does that lead you to believe that -- to make any conclusions about the value of the Calico project site to the Desert Tortoise?

DR. BERRY: Yes, it does. When the Desert Tortoise was listed in 1990 in California, we had several populations of relatively high density, but we had problems with disease and other kinds of threats. Since that time, the populations that were in high to moderate density for the most part have declined, and many of them have declined markedly for a number of reasons. So we no longer have those high density populations within the

state.

Now a site such as the Calico that have a population that at one time would have been considered low to moderate become more important because they are more remote, they're farther away from settlements and towns and the influence of the urban areas, and they offer more hope for the future for the species.

MR. ADAMS: Pardon me for the interruption.

Steve Adams with staff.

I just -- 5:00 is a hard deadline. I would ask that the time be equitably apportioned among the parties for asking questions.

HEARING OFFICER KRAMER: You think that's a hard deadline, Dr. Berry?

DR. BERRY: If you'll hold a minute, I'll ask.

There's still people here in the building, but no one's available to ask.

HEARING OFFICER KRAMER: Does it look like the doors have crash bars on them so you can force your way out?

DR. BERRY: I hope so.

HEARING OFFICER KRAMER: So could you stay a little after 5:00 if you --

DR. BERRY: I'll try to stay after 5:00.

HEARING OFFICER KRAMER: Okay. And you also --

you do have a cell phone, right?

DR. BERRY: Yes.

HEARING OFFICER KRAMER: So that could be our backstop.

Okay. Go ahead, Mr. Ritchie.

MR. RITCHIE: Doctor, I just have one more final question, and this is again on the specific Calico site.

It's been noted in the testimony and that the site is in a connectivity area between the various recovery units. Does this add anything, in your opinion, to the value of the site for the Desert Tortoise as a whole?

DR. BERRY: With the continuing declines in the population in California and our inability to stabilize any of the populations, I would say that populations such as the one in the Calico area become more and more important. I might not have said that 15, 20 years ago, but I would say it now.

MR. RITCHIE: Thank you.

I have no further questions.

HEARING OFFICER KRAMER: Ms. Miles?

MS. MILES: Yes, just a couple.

Dr. Berry, based on your decades of research, what is it you anticipate will happen to the tortoises in the project region if the project is developed?

DR. BERRY: In terms of the tortoises that are scheduled to be translocated, I would expect a high mortality rate, especially if the plan that is proposed is followed. That's based on several factors. One, the location of the sites themselves, and the proximity for DWMA 1 to the Fort Cady Road and to the Newberry area and the lack of fencing to keep the tortoises from traveling into inappropriate areas.

The second is the die-off that is mentioned in the translocation plan for the areas scheduled to place the tortoises south of I-40. We don't know the cause of the die-off. Why are we proposing to put tortoises there? And then where else could they be placed?

MS. MILES: What about indirect impacts around the project site to tortoise populations that would still, you know, surround the project area?

DR. BERRY: I would anticipate with the human traffic in the area, that it would increase the predator interest in the general area and that one might be likely to see an increase in the subsidized predator use of the area.

MS. MILES: And my last question, you mention that there were numerous tasks that would need to be completed to implement the translocation plan.

Do you foresee any problems with deferring the

development of those tasks in the plan until after project approval and perhaps even until after in many cases some tortoises have begun to be moved?

DR. BERRY: If I understand your question, are you asking about how the project could be managed if it's approved immediately and then subsequently some of these areas are found unsuitable?

MS. MILES: Yes --

DR. BERRY: Could you rephrase the question?

MS. MILES: -- that's a part of what I'm getting at.

For example, the California Department of Fish & Game representative Tanya Moore raised the issue that there's not sufficient receptor sites that have been identified and that more information would be needed. And I believe that the Bureau of Land Management representative, Chris Otohal, said that, well, things can be adaptively managed in the future after the project has been approved.

And I just wanted to know your opinion as to whether it would -- if you see any problems, if it is problematic to approve the project now on the basis of the plan that currently exists without doing additional analysis and providing more information.

DR. BERRY: Well, number one, I said that the

project wasn't carefully planned and wasn't a science-based project that would yield valuable and usable information. I don't think as written the plan is likely to be a sound, productive plan and that it's likely to have great success for the tortoises.

If the approval is given, and, of course, I'm not involved with any process such as that, then it becomes more difficult to craft solutions and places to put tortoises, especially if the sites are not previously identified and the sites aren't good sites to begin with.

MS. MILES: Thank you, Dr. Berry.

HEARING OFFICER KRAMER: Mr. Basofin?

MR. BASOFIN: Yes. Thank you.

Joshua Basofin with Defenders of Wildlife.

I just have a couple questions.

Dr. Berry, can you elaborate a little bit about the mortality rates that you've observed with the translocated Fort Irwin tortoises in the years that you've been observing?

DR. BERRY: Yeah. Okay. We started our project with the translocation in late March and early April of 2008. We had 158 tortoises. By December of the first year, nine months into the project, 43 were known to be dead or salvaged because they were dying or just freshly dead, and 15 were missing.

We started January of 2009 with 100 known live and 15 missing. At the end of 2009, a year later or 21 months into the project, 27 more tortoises had died and 20 were missing total. So at that time our known death rate was 44.7 percent.

So this year, in January we started with 68 live tortoises out of the 158, and 20 missing tortoises. Since January, eight more tortoises have died, and I have 23 total that are missing. This year alone I have a death rate of 11.76 percent of the 68 tortoises that were known to be alive in January.

So my grand total now known dead is 49 percent with 23 individuals missing.

We occasionally find these missing individuals and then we miss or lose some more. Some of these are animals where they've been apparently attacked by a predator and the transmitter's been torn off. Sometimes we find them dead. In very rare cases we find them still alive.

So we have a very high death rate on this project. And most of the deaths are due to subsidized predators, specifically coyotes and ravens. I should say all these tortoises are adults. We do have instances where ravens are now attacking, flipping over adult tortoises and killing them by pecking the cloaca and hind

leg area and then entering the tortoise that way.

The subsidized predation is, I think fueled by the proximity to Barstow, Daggett, Yermo, and the towns and settlements in the area as well as the Fort Irwin cantonment. There are so many sources of food for these predators that their populations are able to build. And I think there's a pretty good record on published record on the raven population explosion.

MR. BASOFIN: Thank you.

And what was the total mortality percentage that you've observed thus far?

DR. BERRY: As of this month the total percentage is 49 percent known dead where we've got the carcasses, and an additional 23 individuals that are missing, some of which may be dead.

MR. BASOFIN: Thank you.

That's all I have.

HEARING OFFICER KRAMER: Staff?

MR. ADAMS: Thank you.

Dr. Berry, you're familiar, I assume, with the Fish & Wildlife Service 2010 translocation of the Mojave population from project sites, planned development criteria?

DR. BERRY: I don't think I've looked at that recently, and I'm not sure I've looked at it at all.

MR. ADAMS: Okay. There's an update that just came out, I think this month, and staff has proposed a -- in its condition on translocation that the final plan be consistent with these criteria.

You don't have an opinion, I would guess, on whether that is appropriate, if you're not familiar with the document?

DR. BERRY: I'd have to read it first.

MR. ADAMS: Are there other criteria, guidelines that you do think we should reference and require that this translocation plan be made consistent with?

DR. BERRY: In terms of guidelines, no, I can't give you any other than it needs to be a good, science-based plan because we need to gather as much valuable and usable information as possible to determine if this is an appropriate mitigation or minimization measure to use into the future. And right now we don't have adequate information to assure us that it is and that under what circumstances it might be.

MR. ADAMS: Do you -- and from your testimony, I understand that one of the big concerns is the amount of information at the sites that will be receiving tortoises to make sure that they will fit in there.

I'm wondering, for someone who doesn't have the knowledge of the various studies you've talked about,

how -- what kind of time and effort goes into what you would consider appropriate level of study prior to approval of a translocation plan?

DR. BERRY: Well, number one, is the food adequate. And that requires doing surveys of the plant biomass and composition in springtime when the winter annuals are available. And if we have a dry year, we can't get very much information. But we need data for more than one year. And you can't get that data by looking at the vegetation in the fall and you can't get at that information by eyeballing it and visually saying there's a lot of good forage out there, because tortoises are very picky eaters, they don't just eat any annual plant. There's some families they don't touch at all. And they do have different food habits in different areas. So it's important to know what the composition of the plants are and if there's going to be adequate food.

And the big question for many of us is, well why add more tortoises; aren't the numbers out there what the land can withstand? The land right now, we have an influx of invasive annual plants. Bellari (sic) is one. The Arab grass schismus, which there's two species of schismus, is another.

And in research undertaken by my graduate study and myself, that's Matt Brooks and I, on annual plants in

the critical habitat of tortoises in the western, central, and southern Mojave, we found that these alien annual plants composed about 65 percent of the biomass. So these alien annual plants, some of which the tortoises don't eat unless there's nothing else available, are now taking up a large portion of the nutrients and the moisture in the environment. So we may not have the carrying capacity that we once thought, and maybe this is why we are seeing die-off.

We also need to consider climate change in the location of placing these tortoises, because if we are undergoing climate warming, are we placing tortoises where they really don't have a chance 15, 20 years from now? So if we put these animals at some of these very low elevation, and I think about the DWMA 1 site which grades to the north right into the agricultural areas without a fence, then these animals are going to be right up against some poor habitat.

MR. ADAMS: So in general in your view the way to proceed would be to identify tentatively potential sites for -- to receive the tortoises and then conduct a spring survey, but it sounds like maybe more than one year.

DR. BERRY: That's right. And then also at the same time get the information on the live and dead tortoises that are occupying the area and on their health.

MR. ADAMS: Do you have any idea how -- whether that standard is met with any or many of the translocation plans that are approved for projects?

DR. BERRY: Well, we did a lot of that for the Fort Irwin project. We did massive work on the resident population as well as the control population and on the tortoises themselves that were scheduled to be translocated.

MR. ADAMS: Any other projects you know of that have done that level of work?

DR. BERRY: No.

MR. ADAMS: And finally, you probably have heard from some of the people who have contacted you, that at last week's hearing the abstract of the study that your name is on was introduced, and I think there was discussion about the fact that you don't agree with some of the conclusions of that.

Could you just briefly catch us up on that or explain --

DR. BERRY: Oh, yes. Yes. I -- actually, I -- it's been published, it's out and available now, and the issue is that the project dealt with the year 2008 only. So the figures quoted and the impacts are related to the first year of translocation only. And 2008 as the year that was preceded by a very dry year, which exacerbated

the coyote population or the predator population, because they were very hungry.

So what is different with what I have to say is we have to be careful not to say that the effects of translocation on the tortoises here and the predation that was going on here is the same as what's going on in the year 2009 and the year 2010. I think we have more information now to separate out impacts of translocation on tortoises that are above and beyond what we reported with this study.

MR. ADAMS: Okay. And your opinion is that the predation is -- does hit the translocated tortoises more heavily disproportionately than the population overall.

DR. BERRY: I would say that it's very possible that that's what's going on, and I would say that based on the data that I provided in earlier testimony comparing the Daggett site for instance, this year, with the translocated tortoises.

Because I have 78 tortoises at the Daggett study area, and only two and a half percent died; even though many of them are sick, only two and a half percent died between January 2010 and the present. Whereas my translocated tortoises had a higher death rate, higher mortality rate. And if I look at still a third site in the Soda Mountains on the east part of Fort Irwin, I have

no deaths, zero deaths.

So I think that, though it's very preliminary in nature, I think we do have to look at each of these years separately and we have to look at all these situations very carefully. And this is one of the issues that makes translocation so problematic.

When we first started to see the deaths with the tortoises in the first year, in 2008, it appeared that the females were being disproportionately killed. Well, it turns out it was the smaller animals that were disproportionately killed. And as time has gone on, we have not seen a gender difference in the animals that I've lost to predation. So it may be the coyotes preyed first on the smaller and easier prey and then it moved on to the larger individuals.

MR. ADAMS: Okay. And I promise, last question.

From your data on your study, is predation of translocated tortoises the main -- the main risk?

DR. BERRY: Yes. Yes. I've had one rattlesnake, two vehicle kills on dirt roads, a death due to gout, the tortoise was sick with gout, and a death, at least one or two, hyperthermia, from becoming overheated. And the rest have been primarily canid deaths, but we did recently have a Golden Eagle kill.

MR. ADAMS: Okay. Thank you very much.

HEARING OFFICER KRAMER: Applicant?

Then we'll go to folks on the phone.

MS. FOLEY GANNON: Thank you.

Dr. Berry, first question, when you were starting out in your presentation this afternoon, you were talking about some problems that you'd identified with the translocation plan and they were relating to whether the plan had hypotheticals, whether there were scientific ways for testing it, whether it would result in a peer-review article. It just leads me to wonder, what is the goal, do you think, of a project-specific translocation plan?

DR. BERRY: Well, if it's for the Desert Tortoise, which is a listed species, one of the objectives should be to develop information that's going to help with the recovery of the species. On the subject of translocation, we need more information, rather than less.

MS. FOLEY GANNON: Yeah, I understand that. But are you also looking at trying to -- as you said, you may question whether it is effective in minimizing the impacts. But I would assume that the reason that a listed species is moved out of harm's way is to try to preserve that species; is that correct?

DR. BERRY: Well, there's a difference --

MS. FOLEY GANNON: The individual members is what I'm speaking to, first of all.

DR. BERRY: Yeah. Yeah. Certainly there's a difference between moving it off the road and a translocation project.

MS. FOLEY GANNON: Absolutely, and I don't think anybody would be writing a translocation plan for moving off the road. So I'm speaking here to a situation where you need a translocation plan.

So again, one of the goals would be -- a primary goal would be to identify how you're actually going to be handling and addressing the individual tortoises that are potentially affected by the activity that's going to be approved?

DR. BERRY: Well, I would think that one of your overall and overarching objectives would be to have the animals survive.

MS. FOLEY GANNON: Sure. Right. So again --

DR. BERRY: And so everything would be directed, all of the activities would be directed toward enhancing the situation for those tortoises as well as the resident tortoises.

MS. FOLEY GANNON: Right. I guess I'm just trying to break it down so I understand what you think is missing from that plan.

But the things you were speaking about of having hypotheses that could be tested, and peer-reviewed

articles that could be produced, that's not necessarily relating to the actual impacts on individual members of the species, either those that are translocated or those that are of the resident population; is that right?

DR. BERRY: That's right. That would -- the report would be an outcome. But I think that by developing hypotheses and setting up a very sound study plan and getting the plan peer-reviewed, which is required in our agency of each of the scientists, we could produce a far better and we do produce far better research and findings and have a better outcome, because we have very careful planning and it's all laid out and outlined and well presented.

MS. FOLEY GANNON: Right. And speaking of the peer review, you just spoke in response to Mr. Adams's questions about the summary of the article that was based, I guess, on the 2008 data, and you were talking about 2009 and 2010 data. And there may be other conclusions. But those conclusions have not been yet presented in a peer-reviewed article, correct?

DR. BERRY: No, they --

MS. FOLEY GANNON: Those are preliminary?

DR. BERRY: The information from 2009 is in progress reports with -- and includes statistical analyses that are presented to the agencies.

MS. FOLEY GANNON: Thank you.

And then you were raising some issues about the level of analysis that had been done on the proposed translocation sites. And it sounds like you think that there just isn't enough of an explanation in the plan that is responding to the list of issues that you identify, like the types of plants that are present in those areas and the assessment of whether those would be appropriate foraging for Desert Tortoise and that sort of information; is that correct, that information you think should be added to this draft plan before it's finalized?

DR. BERRY: If the information was actually gathered and recorded --

MS. FOLEY GANNON: Right. So if the --

DR. BERRY: -- it should be -- it should be presented. There should be quantitative and qualitative information. There's statements like the vegetation of creosote bush or Mojave Desert creosote bush. Well, there are creosote bush communities of many, many different types, and --

MS. FOLEY GANNON: Right. So if that -- but that information was gathered, it should be included in this plan, and that would help --

DR. BERRY: That would assist.

MS. FOLEY GANNON: That would assist.

DR. BERRY: And certainly the surficial geology is very important, because the age of the surfaces of the alluvial fans and the places where from which the tortoises will be taken and potentially placed should be present too. Is this a 100 or 500-year-old surface, or is it a 500,000-year-old surface, and what is it composed of? It makes a huge difference on what forage might be available and what burrowing sites might be available.

MS. FOLEY GANNON: Right. And then you were also asking about or commenting on the lack of testing that had been done on the Desert Tortoise themselves on site. As I'm sure you're aware, for the investigators to actually be able to do health assessments on the resident population, they'd actually have to be handling the tortoises generally; wouldn't that be correct?

DR. BERRY: Yes.

MS. FOLEY GANNON: And if the agency precludes handling of the tortoises during this type of surveys, is there a way that you would suggest that someone who's drafting this plan should again gather this information?

DR. BERRY: I think it would be appropriate at some phase of the project, at some decision-making phase of the project that that information be gathered and that handling be part of the program and part of the protocol. About --

MS. FOLEY GANNON: And it's --

DR. BERRY: About 50 percent of the tortoises that have upper respiratory tract disease or this infectious disease that's noted in the translocation plan and that we're all concerned about, about 50 percent of these tortoises don't show clinical signs all the time. And so a visual inspection doesn't tell one very much.

MS. FOLEY GANNON: Sure. But early on I would assume you wouldn't want tortoises being handled all the time. Right? I mean, you would want it to be limited to the appropriate time period in the translocation efforts or in the planning efforts. I mean, you understand why the service wouldn't want the tortoises to be handled on sort of a regular basis; is that right?

DR. BERRY: Well, you're saying all -- using the words "all the time" and "regular."

MS. FOLEY GANNON: Okay. Let me ask it this way: If every time a project was proposed that could potentially involve translocation of Desert Tortoise, would you think it would be appropriate for the surveys to always allow for health assessments for handling for testing of all of the tortoises that are present?

DR. BERRY: If there is a reasonable future for the project, a likelihood of a certain percentage that is going to be considered strongly? Then I think it would

1 certainly be appropriate to have a one-time handling of
2 each individual that's encountered on the site or a
3 similar protocol established.
4 MS. FOLEY GANNON: But if the agencies don't
5 allow that, then you agree or recognize that --
6 DR. BERRY: I recognize --
7 MS. FOLEY GANNON: -- the applicant couldn't do
8 that then; is that right?
9 DR. BERRY: Right.
10 MS. FOLEY GANNON: Okay.
11 DR. BERRY: But at the same time, the applicant
12 needs to recognize the deficiencies in that kind of --
13 that approach.
14 MS. FOLEY GANNON: Right. And that's why I
15 believe the plan then has provisions for the testing that
16 will be done and the range of responses to the results of
17 those tests.
18 And is that an appropriate way for dealing with
19 this data void that they can't address?
20 DR. BERRY: Yes. It is appropriate. It would
21 have been much more assuring to see a more careful
22 treatment of the health and disease portions planned.
23 There's no mention of this other infectious disease,
24 mycoplasma testudinium. No mention that lab tests would
25 be done for that mycoplasma.

The use of the term "disease," there's -- it's not clear whether animals that have shell lesions of any size or sort would be excluded from being translocated. There's much that needs to be done on the health and disease section of the plan.

MS. FOLEY GANNON: So there are improvements that need to be made to this draft section of this plan.

DR. BERRY: Yes.

MS. FOLEY GANNON: Right. Okay.

DR. BERRY: And I'm listing -- I'm listing just a few things.

MS. FOLEY GANNON: Sure. That does raise the point you are aware that this plan was being developed and has been going through multiple level of review by the service, the BLM, and CDFG; are you aware of that?

DR. BERRY: Yes.

MS. FOLEY GANNON: Would you assume that those agencies are going to be giving appropriate direction of these types of modifications that they feel need to be made to the plan?

DR. BERRY: I don't make any assumption of that nature.

MS. FOLEY GANNON: Okay. And you had referenced earlier about the -- I think the question was about the site and where it's located and the role that it place.

And it was -- you were noting that it was located between critical habitat areas but the site is not a critical habitat area; is that correct?

DR. BERRY: I didn't say anything about critical habitat in my testimony.

MS. FOLEY GANNON: Maybe it was in the question.

The question was put -- was phrased as it's located between critical habitat areas. There was a mention of critical habitat.

Is the site critical habitat?

DR. BERRY: The Calico site is not critical habitat. However, the proposed translocation recipient areas are in or adjacent to critical habitat.

MS. FOLEY GANNON: And when the service is designating critical habitat, is it that they're looking for the areas that they have determined to be essential to the survival and recovery of the species; is that correct? Isn't that what the regulations provide?

DR. BERRY: The tortoise was listed in 1990. The critical habitat was published in 1994.

MS. FOLEY GANNON: I understand that. But when they're designating critical habitat --

DR. BERRY: And we designated the critical habitat based on the areas that we thought at the time were necessary for recovery of the species.

Since that time, there have been 20 years that have passed since the listing and since work on the first recovery plan and the critical habitat was published, 20 years have passed, populations have declined markedly. In some places, especially in the western Mojave, they've crashed. So the critical habitat that was designated in some cases doesn't contain now sufficient viable population. So we're concerned about areas outside the critical habitat.

MS. FOLEY GANNON: And you've referenced some information that you think that can be helpful sort of in the long-term planning that would take multiple years to gather.

Are you aware that the Calico project is a phased project?

DR. BERRY: I read that, yes.

MS. FOLEY GANNON: And do you believe that it would be appropriate for, particularly if the initial phases involve the translocation of a very few number of tortoises, for them to continue gathering this type of information during the phasing of the project? Would that be an appropriate way of proceeding?

DR. BERRY: I think it depends on what areas are actually developed. And I don't want to be misquoted on this. I think if I turn and look at some of these figures

that are available on the different phases, if the project proceeds, there's a Phase 1 area that's below the Phase 2, the northern Phase 2, that appears to have a very low number, and the Phase 2 areas between the railroad and the freeway.

MS. FOLEY GANNON: Right. And unfortunately the plan that you have does not have the -- Phase 1 has been further subdivided into a Phase 1A and a Phase 1B. And we certainly -- we understand that you will be speaking hypothetically here because you don't have the advantage of that map. But if you became aware that Phase 1A was in an area in which two -- one tortoise was found in the earlier surveys, would that seem like if the project was going to go forward that that would be sort of an appropriate way to start and do some of this further data gathering that you've described?

DR. BERRY: That could be an appropriate move. However, I think the greater issue is whether in approving a project the whole project is going to be approved prior to gaining critical information that would be essential to making good decisions on the tortoises in the other parts of the area. There's a big difference between an impact on a couple of tortoises and 185 or over 100 tortoises.

MS. FOLEY GANNON: Sure. Yeah, we appreciate that.

I think we are getting close to the end of our time. I guess I would ask is -- Ashleigh from the service was on earlier, if we could find out if she's going to be able to be on when we come back later. It would be, I think, helpful to have the service and the BLM and CDFG, if they're available, also to speak to some of the comments we've discussed here with Dr. Berry.

HEARING OFFICER KRAMER: Ms. Blackford, are you there with us?

MS. BLACKFORD: I am still here. I am not going to be available till 10:00 tonight however.

MS. FOLEY GANNON: How about at 7:30?

MS. BLACKFORD: 7:30 I can do.

HEARING OFFICER KRAMER: Oh, okay. I thought you said I couldn't come back until 10:00.

MS. BLACKFORD: Oh no, no, no. I have other -- I'm not really allowed to work after 6:00 without asking for special time, and these late meetings are hard for us, some of us to work around. So 7:30 I can do.

HEARING OFFICER KRAMER: Well, you're not the only person who hopes to be doing something else. So if we'll actually be reconvening at about 6:30 --

MS. FOLEY GANNON: Oh, 6:30. Okay.

MS. BLACKFORD: Okay.

HEARING OFFICER KRAMER: So --

MS. BLACKFORD: Oh, yeah, right, because we're going to take a break now until --

HEARING OFFICER KRAMER: Right. Until 6:30.

MS. BLACKFORD: I will be here at 6:30.

HEARING OFFICER KRAMER: All right.

There are a couple of intervenors on the phone. Did you have any questions for Dr. Berry before she goes? Because we do plan to excuse her so she can get back to, well, her home, I hope.

MS. CUNNINGHAM: Yeah, Laura Cunningham.

HEARING OFFICER KRAMER: Go ahead, Ms. Cunningham.

MS. CUNNINGHAM: Dr. Berry, I have one question.

In the greater Barstow region, this central Mojave Desert, to recover the tortoise, would you think that areas that have relatively high tortoise density and that are reproducing well, but that they're outside of desert wildlife management areas, these areas also be preserved?

DR. BERRY: I think they can -- yes, I think they can serve an important function. I don't think there was the intention when the critical habitat was established that tortoises would be allowed to die or the areas be developed in all the other non-critical habitat areas.

MS. CUNNINGHAM: Okay. Thank you.

HEARING OFFICER KRAMER: Any other questions from the phone?

PRESIDING MEMBER EGGERT: I just want to -- Dr. Berry, this is Commissioner Eggert. I just want to thank you for joining us today. I think, you know, it's clear that your credentials are impeccable, your knowledge and experience is quite deep on this issue, and it's been quite valuable to have you participate in this hearing. And I've found the most recent Q and A to be very helpful to my knowledge of this -- of this particular issue.

So appreciate you risking getting locked in wherever you happen to be in Barstow to stay with us some extra time to answer the questions.

DR. BERRY: Well, thank you. I appreciate the opportunity to be able to comment.

PRESIDING MEMBER EGGERT: Thank you.

HEARING OFFICER KRAMER: Okay. Well, with that we will adjourn for an hour for -- Mr. Meyer?

MR. MEYER: Excuse me, Hearing Officer Kramer. I have a couple staff members that I'm trying to find out if we're done with traffic and transportation, if those staff can be excused to go home. And also I think there might be -- I'll leave it to Jared Babula to talk about cultural, to see if cultural can go.

HEARING OFFICER KRAMER: We did finish cultural,

as far as I'm concerned.

Traffic and transportation, --

MS. FOLEY GANNON: We're done.

HEARING OFFICER KRAMER: Okay. And, Mr. Lamb, you've agreed to disagree is where we're -- as far as we're going to get tonight?

MR. LAMB: That's correct, sir.

HEARING OFFICER KRAMER: Okay. I guess traffic is done as well.

MR. BABULA: I just wanted to check in with the applicant.

CUL 4, the insert we were working on that, did you guys have a chance to --

MS. FOLEY GANNON: We're working on it. And I just saw what you've done, but I've been busy for the last hour. But during the break I will get this done.

MR. BABULA: Okay.

HEARING OFFICER KRAMER: Okay. We'll go off the record then, and be back here at about 6:30.

(Thereupon a recess was taken.)

HEARING OFFICER KRAMER: Mr. Babula asked that the proposed changes to Cultural 4 -- I'll find a number for that in a minute, but why don't you go ahead and start to explain what we've got here.

MR. BABULA: This would be an insert to the CUL 4

as it exists. And I'll have Mike McGuirt come up here and just explain the theory behind this insert and what it's supposed to achieve.

MR. McGUIRT: This is an amendment to CUL 4 that we discussed earlier, and the purpose of it is to sync up this CUL 4 with the programmatic agreement that's going to be developed.

Basically what it does is it states what the intent of CUL 4 is and says that this is the same intent as going to be fulfilled by various stipulations in the programmatic agreement, and if the programmatic agreement is successful in fulfilling that intent of collecting the information that we need sufficient to substantiate our evaluations, then we're going to go with the program as it's laid out in the programmatic agreement.

In the event that the programmatic agreement doesn't materialize or materializes and is subsequently terminated so that there's no programmatic agreement in place, this would default -- this insert here would default us back to CUL 4 and say that the applicant needed to go ahead and fulfill CUL 4 under those circumstances.

HEARING OFFICER KRAMER: This literally seems to allow, because it says the programmatic agreement supersedes the requirements if the programmatic agreement had less strict requirements, then there would be a

reduction in whatever mitigation or protection is provided in our condition. Am I correct on that, or am I missing something?

MR. McGUIRT: No, sir. What this does is it says that as long as the programmatic agreement fulfills the intent of CUL 4, which is to collect a certain class of information on these sites to substantiate our evaluations of their eligibility, then we're going to go with the PA and the program that it lays out in the PA that Dr. Hunter described earlier today.

So unlike in CUL 6 where we had language in there about what's more or less stringent, this has language in it that says that the programmatic agreement will fulfill the same intent as this cultural condition, and if something happens to the programmatic agreement, then we'll default back to CUL 4. So there's no language in here about more or less stringent. It's a matter of intent.

HEARING OFFICER KRAMER: Okay. Thank you.

Applicant, comments?

MS. FOLEY GANNON: I think that the purposes, it's -- stringency here would be something that is hard to establish because is it more stringent to do a certain written protocol and a smaller level of test on a discrete number of these subcategories of things, or is it more

stringent to do testing on 100 percent of the sites, is it -- you know, there's a lot of different factors.

So I think what we were discussing is that it would be more appropriate to say what we're trying to accomplish through this measure and to make sure that that is specified; therefore, the CPM can look at what's in the PA and make sure that it meets that intent, and, therefore, you can be assured that the mitigation that you're requiring is going to satisfy the conditions.

HEARING OFFICER KRAMER: And you're in agreement with this I gather?

MS. FOLEY GANNON: Yes.

HEARING OFFICER KRAMER: Do we have comments from any other party?

MS. MILES: I think you probably know what I'm going to say, that I object to proceeding in this fashion. I believe we need to actually see the language before we can actually provide our comments on the mitigation strategy. So I think the devil is in the details; I think the mitigation strategy needs to be laid out in more detail as to how it would be implemented in a programmatic agreement.

HEARING OFFICER KRAMER: So you mean see the language of the programmatic agreement?

MS. MILES: Yes. And also --

HEARING OFFICER KRAMER: Because you've seen this language, correct?

MS. MILES: Well, I just actually got this language, and no, my expert has not seen this language. So I guess I'd just like to reserve the right to submit additional testimony if it's necessary, and that perhaps we might need to reopen the record at the PMPD hearing.

HEARING OFFICER KRAMER: Well, you can certainly comment during the PMPD period. And reopening testimony during that period would probably require a showing of a need to do it, but you're always able to attempt to offer your testimony and make your request. But we will be, it's our plan anyway, to close the record or at least until perhaps the comment period if we need to reopen it, at the end of today's hearing so we can finish up a proposed decision and get that out soon.

So any other party wish to comment on -- I don't know if I said it. This would be Exhibit 312.

(Thereupon, the above-referenced document was marked by the Hearing Officer as Exhibit 312.)

HEARING OFFICER KRAMER: So with that, is there anything else with this, Mr. Babula, or anything else to finish cultural?

MR. BABULA: No, I think that's it.

HEARING OFFICER KRAMER: Okay. So let's return

to biology then.

Let's see. We took Dr. Berry out of order.

Let's go back to the staff then. And it looks like you have some witnesses with you, Mr. Adams.

Go ahead.

MS. FOLEY GANNON: Excuse me, Hearing Officer Kramer, I think we had discussed the possibility of maybe having other agencies while they're still available on the phone respond to Dr. Berry's discussion and the comments on that.

HEARING OFFICER KRAMER: Thank you for reminding me. Yes.

Do you know if anybody in particular wishes to respond, or should I just --

MS. FOLEY GANNON: Well, we would like to hear the service's view on the criticisms that were given to the translocation plan.

HEARING OFFICER KRAMER: Okay. Ms. Blackford, are you back with us?

MS. BLACKFORD: I am, but I can probably stay till about 8:00 or 8:30, so if you want to proceed, you don't have to necessarily come to my direction first depending on how long everybody's going to be.

HEARING OFFICER KRAMER: Well, what is your preference? Would you be sticking around anyway to hear

what else is said about you?

MS. BLACKFORD: I mean, I think it's -- as long as there's an interest in having me participate, I would stay on to be able to, you know, comment on anything, but I think about 8:30, maybe shortly after, I do need to sign off though.

HEARING OFFICER KRAMER: Okay. Well, why don't you at least comment then at this point about what Dr. Berry said about the translocation program. And then we'll let any of the other agency representatives on the phone do the same, or in the room with us, such as Mr. Otohal.

So go ahead, Ms. Blackford.

MS. BLACKFORD: Well, I don't know that I have specific comments to make. If anybody has any questions to point in my direction, I think that would be an easier way to proceed, at least from my standpoint.

MS. FOLEY GANNON: Okay. I have some questions.

Dr. Berry was raising a number of criticisms about the plan that some of which were premised on the lack of detail or background information that was included in the plan.

Can you give us your thoughts on that?

MS. BLACKFORD: Well, I think one of the primary concerns or criticism is that the plan is being -- is not

focused on the recovery and targeted for the recovery of the Desert Tortoise, and the service clearly understands that. And although the goal would be to use this opportunity to aid the recovery of the species, this project does not focus on that.

We are definitely looking at translocation as a minimization measure for the impacts of this project. And what information we're able to use and to supplement our increased knowledge on translocation, we would like to gain that knowledge; but, you know, we cannot put a research requirement as part of a mitigation.

And a lot of the additional information that we are looking -- that she was looking to have supplement, elements to the translocation plan, we have not had enough time with the ARRA funding deadlines to, you know, pursue gathering that information, I think everybody's very well aware.

And so we are, as far as addressing specifically, I know some of the elements of the recipient site, as was pointed out when she was speaking that, until the biological opinion and the record of decision is made on this project, we will not be authorizing the handling of animals because the service does not feel that a recovery permit would be an appropriate tool to authorize handling of animals for a development project.

MS. FOLEY GANNON: And again, just sort of to the efforts that have been made to investigate the potential translocation sites, it's my understanding that there was, you know, a considerable amount of effort that was put forth into doing surveys and things like that, and that maybe that is not all described in a level of detail in this plan. Is that your understanding as well?

MS. BLACKFORD: There's -- I mean, part of the plan and one of the primary recipient sites in the Ord Rodman DWMA, there's still information that needs to be gathered. And that's a part of the translocation plan. The applicant pursued surveys of the other recipient sites previously in the spring, the Pisgah ACEC to the east of the site and the potential recipient site north of the project and in the control site. So there's quite a bit of acreage left to be evaluated in the Ord Rodman DWMA.

Definitely as we were moving forward working with Tessera to try to identify translocation sites, it's always been an understanding that we're looking for potential recipients, we will gather information to evaluate the appropriateness of them to handle animals, and really after you gather that information are we only able to proceed with that translocation.

So as we've been moving forward, we've been gaining information, finding out that some of the areas

have densities that will not be able to receive any additional animals, and we're still gathering information this fall on the Ord Rodman DWMA.

MS. FOLEY GANNON: But based on the draft plan, there has been a preliminary determination made about the two translocation sites that have been identified for the up to -- I guess it's 97 tortoises; is that right? So there's been further investigation of those sites?

MS. BLACKFORD: So there's been preliminary investigation of all three areas that were identified in the translocation plan. And as this draft plan is -- it's morphed into the final plan, we are making those tweaks based on the information that we have of how many animals each one will be able to contain based on disease prevalence and density of the tortoises present at the site.

MS. FOLEY GANNON: And have you and the other agencies been involved in guiding what should be included in this plan?

MS. BLACKFORD: Yes, we have.

MS. FOLEY GANNON: So do you believe that this has the appropriate type of information included in it?

MS. BLACKFORD: I think that we are making comments on the draft to get us to the point where the agencies will be satisfied.

MS. FOLEY GANNON: Okay. Thank you.

HEARING OFFICER KRAMER: Staff?

MR. ADAMS: Yes.

Ms. Blackford, would you say this is fairly typical of a relocation plan in terms of the degree of development at this stage?

MS. BLACKFORD: Yes, I would, because these are the first ones moving forward. So nothing is typical, but this is as typical as we're getting right now.

MR. ADAMS: What do you mean when you say "the first ones moving forward"?

MS. BLACKFORD: As I think we've addressed at other questioning during the hearings, you know, when we're looking for large-scale translocation plans, Fort Irwin is really the only example we have that is associated with development.

So in conjunction with this particular solar project that's moving forward, there are several others developing plans, and as you are and most of the folks are aware, the service has been drafting guidance for translocation as we move through this process. And we just finally posted up some final guidance, I believe it was last week.

MR. ADAMS: But are translocation plans prepared for projects that involved fewer tortoises, say five or

ten?

MS. BLACKFORD: Yes, but not of this magnitude. I don't know that -- the level of the detail was not required because the impacts were significantly lower.

MR. ADAMS: Is there a precedent for a multi-year vegetation study of host sites? I don't know --

MS. BLACKFORD: I'm not aware of precedence set; it's not to say that there isn't one. It is a request of the -- it is a recommendation in the translocation guidance that there is vegetation studies, but not prior to this development.

I think it's important to realize that the project development translocation plans are different from what Kristin -- Dr. Berry was describing in that ideally the Desert Tortoise Recovery Office along with the Science Advisory Committee and other entities will be looking at how to use translocation to -- as a recovery element. And when we identify those areas for which we -- in which we would like to translocate animals, we will be doing multiple-year vegetation studies and we will be looking at a variety of factors. We are at this point in time not able to make those long-term evaluations for these projects that are moving forward.

MR. ADAMS: Okay. Thank you.

I'm done with questions.

HEARING OFFICER KRAMER: Any of the intervenors? Mr. Ritchie?

MR. RITCHIE: Hi, Ms. Blackford. This is Travis Ritchie with Sierra Club.

MS. BLACKFORD: Hello.

MR. RITCHIE: You had mentioned before the issue of not being able to handle the tortoises prior to having permission from the agencies. But would you agree with Dr. Berry's comments that there were various other characteristics that could have been evaluated that would not have required handling of the tortoises?

MS. BLACKFORD: I think that a single-year study that would be -- as she mentioned with vegetation, I think it would be information that we would have; but I still do not think -- you know, as she mentioned, in a drought year everything's different than a wet year. So a single year's worth of data is interesting but not a definitive chunk of data.

MR. RITCHIE: And so it would have been -- it would be helpful in your opinion to have, you know, external time constraints aside, it would be helpful to have additional data and information on the vegetation in the receptor sites, correct?

MS. BLACKFORD: I think scientists always want more data.

MR. RITCHIE: And the same would be true for something like the soils consideration that Dr. Berry mentioned.

MS. BLACKFORD: You know, to be honest with you, I don't have a lot of background with soil and its relationship with Desert Tortoises, so I can't really speak to that and how easily that information would be obtained.

MR. RITCHIE: Okay. One moment.

So you also mention that some of the goals that Dr. Berry highlighted that might be helpful as far as, you know, long-term research issues related to projects like this may not be applicable to this project; but I believe Dr. Berry stated that, and people can correct me if I'm paraphrasing this wrong, that that type of rigorous study has additional merits in the fact that it leads to better planning and a better -- potentially better outcomes as far as the success of the survival of the tortoises.

Would you agree that conducting a scientifically-rigorous plan would have those benefits aside from just creating a plan that could be published and peer-reviewed?

MS. BLACKFORD: I think it is the intention of the service to use the information that we will be getting from the monitoring to help us gather scientifically-valid

data that, although as you mentioned not the purpose to be peer-reviewed, but will be providing the service with better knowledge of how translocations can be better utilized.

So I think looking at the draft plan right now, it might not be clear some of the rigor that we're expecting out of this plan. I think as far as some of the pre-translocation information, there is some lacking information that we would -- when we develop -- the service develops their translocation guide, that will be used for augmentation of -- (phone connection breaking up) -- population of the species will be a part of those studies.

I'm concerned that her -- that she -- that Dr. Berry doesn't see what kind of rigor we're expecting to get out of the monitoring, and I don't know how, having not had communication about the 2010 guidance that was just released, whether or not she realizes, and if that would satisfy her concerns about it being a scientifically-rigorous plan.

MR. RITCHIE: But as far as initial project design, at this point that should already be in the translocation plan, correct?

MS. BLACKFORD: Well, I think if these weren't the first ones moving forward in development, I think that

they would be. I'm not sure if you mean in the pre-translocation or in the monitoring that has been -- that is currently in the draft.

MR. RITCHIE: Well, for example, we've -- we've identified that potential, there's some issues with knowing the carrying capacity of the receptor sites, and I believe what Dr. Berry was getting at was perhaps a more rigorous initial study design would have revealed those variables before the translocation plan was approved and implemented and that would then lead to a greater potential of success of the plan.

MS. BLACKFORD: And I would agree that if we had started two years ago and we didn't have ARRA pushing us, that that information would be -- we would be looking to achieve that information.

MR. RITCHIE: Thank you.

I have no further questions.

HEARING OFFICER KRAMER: Any other intervenors in the room?

Anyone on the telephone?

MS. MILES: I do have one question.

In considering whether this project should be approved and what impacts this project is going to have on the species, do you think it's important to know what impacts it's likely to have on off-site populations, the

receptor-site populations, and do you feel like the commission will know that when they're making this decision based on what's available right now?

MS. BLACKFORD: Based on what's available right now and the fact that we only have short-term information on the impacts on receptor individuals, it's not -- it's not possible to have that information. It's through projects such as this that we hope to gain that information so that future projects will benefit from these studies.

Without having done a lot of large-scale translocations, it's -- we can't determine the effects on these receptor populations, it's just not possible. I think it would be great information to have, which is why we're looking to monitor recipients and control populations so we can have those comparisons and identify whether or not in the next -- the future projects more forward, whether translocation truly is a good minimization measure or whether we should be looking to implement different alternatives.

MS. MILES: I assume you've reviewed the staff's assessment errata regarding the translocation plan; is that correct?

MS. BLACKFORD: I probably have talked to Mr. Huntley about it. I haven't had time to review any of

the errata documents.

MS. MILES: So I'm sure that you're familiar with the number of tortoises, the expected number of mortality for tortoises for this project?

MS. BLACKFORD: Yes, I am. Uh-huh.

MS. MILES: And what was that number?

MS. BLACKFORD: I -- you know, I believe that -- I think that the energy commission is doing a different analysis than the federal. And if I recall correctly -- well, I guess it would be better for you to tell me, and I can comment.

MS. MILES: I believe it was 186, 186 tortoises and that were expected mortality, not counting eggs.

MS. BLACKFORD: I assume it was -- I don't know if it's a portion of the subadults, juvenile was on the translocation site and in the recipient site, and I believe that Fish & Game was using a percentage close to what Dr. Berry was observing in her translocation individuals.

MR. HUNTLEY: This is Chris, Ashleigh.

There's a couple different mortality rates where you get the numbers from. Translocation mortality would be expected, if it met the 50-percent criteria identified in the staff assessment, would be 118 tortoises from translocation. That would include adults and juveniles.

Overall mortality to tortoises, I believe, would be expected to be 194 tortoises and 436 eggs, and that includes the juvenile tortoises, 85 percent of the juveniles that would be expected to be left on the project site because they were not detectable by the surveyors. So there's mortality from translocation and mortality from mechanical crushing.

MS. WHITE: And just as a clarification, does that include mortality of the recipient sites?

MR. HUNTLEY: Yes, ma'am, it does, and the control site.

MS. WHITE: Thank you.

MS. MILES: So based on what you know about the number of tortoises that are likely to die as a result of the project site at the translocation sites and the reference site, do you think that this is an effective minimization measure?

MS. BLACKFORD: I think it's more effective than bulldozing all the tortoises under.

MS. MILES: Thank you.

No further questions.

HEARING OFFICER KRAMER: Mr. Basofin.

MR. BASOFIN: Thank you. I have one or two questions.

Josh Basofin with Defenders of Wildlife.

Ms. Blackford, do you consider translocation to be a mitigation measure?

MS. BLACKFORD: A minimization measure, not a mitigation measure.

MR. BASOFIN: Okay. So the service would characterize translocation as a take minimization measure; is that right?

MS. BLACKFORD: Correct.

MR. BASOFIN: And so you consider all of the tortoises on the site that are translocated to have been taken.

MS. BLACKFORD: That is correct. I know in the Endangered Species Act, "take" includes harm and harass, which by the mere design of picking up a tortoise, you have harassment.

MR. BASOFIN: Okay. Thank you.

HEARING OFFICER KRAMER: Anyone on the telephone with more questions for Ms. Blackford on what she said so far?

So, Ms. Blackford, it's your preference then to go on to other things, or are you going to stay with us for a while?

MS. BLACKFORD: I'm going to stay with you in case anybody has another question or I have something to chime in on with Mr. Huntley, like he was able to do for

me.

HEARING OFFICER KRAMER: We really thank you for that.

PRESIDING MEMBER EGGERT: This is again Commissioner Eggert here. And we really do appreciate your agreeing to stay with us this evening, and particularly for your very clear, concise, direct, and frank responses to the questions. It's very helpful.

MS. BLACKFORD: Good.

HEARING OFFICER KRAMER: Mr. Otohal, were you waiting to say something?

MR. OTAHAL: Sure. I mean, I can answer specific questions -- this is Chris Otohal, wildlife biologist, Barstow BLM.

I can answer specific questions directed towards me, but I did want to just throw out a couple of kind of general comments first of all.

While Ms. Berry does have her opinion of the translocation plan, I do want to, you know, just reiterate that there are many eyeballs that are going to be looking at this that have already participated and will also be approving this. Fish & Wildlife will be looking at it, Fish & Game will be looking at it, and we have state biologists, district biologists, and myself looking at it from BLM's standpoint. So there's many opinions that are

going into the development of this plan.

The second thing that I kind of want to reiterate, I believe Ashleigh touched on this, is that, you know, this really is not a research program. I mean, a lot of the background information that Dr. Berry is suggesting would be wonderful to have, I mean, to have that background, that would be great, but we are meeting the guidelines that are put out by the Desert Tortoise Recovery Office. And I believe that that is the bar that we should be shooting for as opposed to some kind of multi-year millions of dollars of research such as was put into Fort Irwin.

The other thing that I don't believe has been -- has been pointed out is that the carrying capacity issue, the disease issue, and most of the other major issues that have been brought up are very much density dependent. And in this translocation plan we are only talking about moving two to three animals per square mile. And again, as I have testified before, that is very different from the 20 to 30 animals that were being moved in Fort Irwin. So in some ways we're comparing apples and oranges when we're comparing Fort Irwin's past experience with the current proposal.

And also Fort Irwin is moving forward with additional translocation, and they are going with these

much lower density numbers of moving animals as opposed to the older version of the 20 to 30 animals. And that --

HEARING OFFICER KRAMER: I'm sorry, the lower density Fort Irwin's going with now, do you know what that density is?

MR. OTAHAL: I believe the new densities, the project has been changing quite a bit as it's developing, but I believe they're more in the order of about five per square mile at this point. I don't know the answers exactly without them in front of me, but they're comparable with this. Actually, we're probably a little bit lower.

HEARING OFFICER KRAMER: Any questions for Mr. Otohal?

Ms. Miles?

MR. ADAMS: I have one either for him or Ms. Blackford, either.

And that is the estimation of juvenile tortoises subject to -- the estimate in biological opinions or environmental assessments of juvenile tortoises that are estimated beyond site and subject to take without detection, is that a fairly new development in agency environmental assessment, or has that been around for a while?

MR. OTAHAL: Yeah, just as some background, I

have worked two and a half years -- well, six years with Fish & Wildlife Service, two and a half of those years was working in the Coachella Valley mostly on Desert Tortoise issues, and then I've also been now working almost three years with BLM focusing on Desert Tortoise issues. And all that time juveniles have really not entered into the picture in terms of trying to quantify that.

But based on new direction as seen in the biological opinion for the Chevron project, we have in this particular instance looked at trying to find some kind of an estimate for juvenile numbers and also for the number of eggs that may be impacted.

And right now we have -- the staff has and in my analysis we have modeled the estimator as was done in that biological opinion.

And that's a very conservative estimate, and I don't think there's a lot of validation to that at this point.

MR. ADAMS: When was the Chevron opinion?

MR. OTAHAL: That was probably a month, maybe two months ago.

MR. ADAMS: So this estimation of juvenile tortoises and eggs and factoring them into estimated project impacts is all fair- -- very new, I mean, just within this summer, this is has -- the service started

doing this with the BLM.

MR. OTAHAL: Yes, it's very new. And in my opinion it's very conservative in terms of potentially overestimating the impacts. So we're looking at -- we're basing our analysis on worst-case scenario.

MR. ADAMS: Ms. Blackford, do you have anything to add to what Mr. Otohal said?

MS. BLACKFORD: Not particularly other than I concur that is something that we are now attempting to estimate in our biological opinions and have not previously.

MR. ADAMS: Thank you.

MS. MILES: I have a question for Mr. Otohal.

So correct me if I'm wrong. I think I just heard you say so this is not designed as a research program and so it shouldn't be held to the standards of a research program; is that correct?

MR. OTAHAL: That is correct.

MS. MILES: Because it seems to -- and perhaps you can explain if this is not true, but it seems to conflict with what I understood from you when we had our last hearing. And so I just checked the transcript, and it says that this will provide a very good management direction, and it says, I mean, I've already talked with the applicant and indicated that this would make a very

good research paper, this translocation is really designed more like a science project more than a monitoring program and it's very rigorous.

MR. OTAHAL: Yes. What I meant in that, and I -- you're quoting me correctly, obviously, since you have the transcript there. What I was meaning is that in terms of having a control population and looking at the resident population and looking at the translocatees is far beyond anything in other monitoring type of situations where typically you would, you know, maybe monitor the habitat that you're acquiring and find out what the population is there in terms of having these other aspects to it. Again, having control animals that you're looking at is above what I could call typical just monitoring.

MS. MILES: And how many trans- -- or is this a common number of tortoises that are being translocated in this project compared to other projects that you've looked at?

MR. OTAHAL: In terms of translocation, no, this is new ground.

MS. MILES: For BLM as well.

MR. OTAHAL: For everybody.

MS. MILES: Okay. Thank you.

MS. CUNNINGHAM: I have a question for Mr. Otohal. Laura Cunningham.

HEARING OFFICER KRAMER: Go ahead.

MS. CUNNINGHAM: Is it true that if there's one tortoise that's infected with URTD and it comes in contact with another tortoise, it can infect that tortoise? Is that true?

MR. OTAHAL: That is my understanding, is that it is transferable.

MS. CUNNINGHAM: So it wouldn't really matter about the density if there's only two to three animals per square mile moving them, if one is positive, it could infect the population.

MR. OTAHAL: We will not be moving positive animals.

MS. CUNNINGHAM: Dr. Berry said that some animals may be not showing symptoms, not actually positive but could show it later.

MR. OTAHAL: That's correct, from my understanding. So we will be doing a visual look at the animals to see if they are showing visible signs, and we will also be blood testing. And the blood testing is not 100 percent; I mean, that's just the state of the art, but that is the best that we can do.

MS. CUNNINGHAM: So some animals, according to Dr. Berry, will not be tested, they will be visually looked at, they could be missed for URTD, and the ELISA

test for URTD does not always work; so some animal could infect other animals when translocated.

Thank you.

MR. OTAHAL: No. One of the things that you said is some will not be tested, and that is incorrect; they will all be tested.

MS. CUNNINGHAM: Well, you just said that some will be visually inspected.

MR. OTAHAL: No, they will all be visually inspected and they will all be blood tested as well.

MS. CUNNINGHAM: Will all of them be blood tested before approval of the project?

MR. OTAHAL: Before they are moved, yes.

MS. CUNNINGHAM: But sometimes the test gives a false positive or false negative, so you can't always tell with the ELISA test.

MR. OTAHAL: Yes. That's what I just suggested, is that the test is not 100 percent.

MS. CUNNINGHAM: Thank you.

HEARING OFFICER KRAMER: Okay. I think that was it for miscellaneous --

MS. FOLEY GANNON: You skipped me.

HEARING OFFICER KRAMER: Go ahead.

MS. FOLEY GANNON: Mr. Otohal, you were speaking a while ago about all the eyes that would be looking at

this plan. Can you talk again about how you are envisioning this going from a draft plan to a final plan and then through implementation, just sort of briefly where we are at the process and where it's going to be going?

MR. OTAHAL: Sure.

Again, this is a draft that we have put out. And we are soliciting public comments. We do have a 30-day review period where any of the intervenors or anyone else from the public that may be interested in commenting on this will be providing comments. BLM, CEC biologists, Fish & Game, Fish & Wildlife are all in the process of reviewing this. And as new information is coming in from all of these sources, we are constantly revising and adding to the plan.

MS. FOLEY GANNON: So is it your view that the agencies decided they wanted to have a better explanation of some feature or component of the translocation sites, then that would be implemented, included in the plan, and is that the sort of thing that's been happening as part of this process?

MR. OTAHAL: Yes. And until all four of those agencies are okay with the plan, it will not be approved.

MS. FOLEY GANNON: Thank you.

And is it your view after working on this plan

that this is going to be a workable and a reasonable way to approach translocation of the tortoise from this site?

MR. OTAHAL: I would say that it is -- it's a workable plan in that we have been very conservative in our estimates in building into this. We are building in many failsafes because, again, as I testified before, this is not a blank check that the applicant is getting for moving any number of tortoises that they might come upon. So we will have an upper limit before we have to re-look at this. And it is also, again, built on implementing the program, seeing what's working, what's not working, and then adapting to that, again, that adaptive management type of approach that I spoke of in earlier testimony.

MS. FOLEY GANNON: And based on your professional judgment, do you think there is enough information for you to evaluate what you think the effect of this project is going to be on this species and how the mitigation will or will not offset those impacts?

MR. OTAHAL: Yes. I believe there is enough information at this point.

MS. FOLEY GANNON: Thank you.

HEARING OFFICER KRAMER: Okay. Did we get to you, Mr. Ritchie?

MR. RITCHIE: No, we did not.

HEARING OFFICER KRAMER: Go ahead.

MR. RITCHIE: Mr. Otohal, you mentioned that there were multiple -- I forget the phrase you used, but you said kind of checkpoints for reviewing how the translocation plan is going and that you would stop the applicant at certain points.

Where are those checkpoints identified, and how will we know when one of them has been triggered?

MR. OTAHAL: A lot of those are being developed. For example, in the consultation that we are doing with the service, for example, there are limits that are being developed. And also, I believe there are success criteria that are listed in the current plan that we would -- that we would be matching our observations against.

MR. RITCHIE: Can you direct me to those potentially, to pull up the plan?

MR. OTAHAL: Yeah --

MR. RITCHIE: I know there are measurement criteria, but --

MR. OTAHAL: Yeah, I think I did that the last time that I testified. I don't have that in front of me. I can look at it again, but it is in my previous testimony because you asked me that same question last time.

MS. FOLEY GANNON: Chris, look at 2-23 and 2-24.

MR. OTAHAL: Oh, I'm sorry, which?

MS. FOLEY GANNON: 2-23, 2-24.

MR. OTAHAL: Yes, right.

So those success criteria again in the translocation plan are on pages 2-23 and 2-24.

MR. RITCHIE: I guess I'm confused about what these are telling me. In reading these, they appear to be monitoring and reporting criteria or -- yeah, monitoring and reporting, which I agree would gather data that would be helpful in evaluating whether or not success criterion triggers had been met; but as far as specific criteria and triggers that would cause any of the agencies to say this project is not meeting these criteria and should not go forward, I simply don't see those, that is something that can be verifiable to come back and say, stop this project, it's not working.

MR. OTAHAL: Right. And I would agree that that is something that we do need to include in the final plan, that those triggers that I'm speaking of again are coming from the draft opinion which I received just a couple days ago, and so that will be incorporated into this.

MR. RITCHIE: Thank you.

And then I have one more question on a slightly different topic.

And I guess if you -- well, looking at the plan, and you maybe don't have to look at it, I believe there were about 9,000 acres in the Ord Rodman recipient areas

that were identified.

MR. OTAHAL: That was my eyeball GIS experiment, yes.

MR. RITCHIE: But of those 9,000 acres, the surveys have only been conducted on a portion of that, correct?

MR. OTAHAL: The -- yes. There's -- just to correct my recollection, there's 9,230-some-odd acres that have been identified as potential receptor areas in the Ord Rodman. I believe about half of those have been -- those acres have been actually surveyed for tortoise. The rest of that will be done in the fall.

MR. RITCHIE: And then so for those unsurveyed areas as well, again, we don't know the density of tortoise at those potential receptor sites --

MS. FOLEY GANNON: Would you like Ms. Miller to provide those numbers for you?

MR. RITCHIE: Sure.

I believe the potential was 9,833 acres.

MS. MILLER: Theresa Miller, URS biologist. The total is 9,833 acres in the DWMA. And we surveyed 3,644 acres, and there's 6 left to survey in the fall.

MR. RITCHIE: So 3698 and whatever the rest of that math is.

And then finally, Mr. Otohal, with respect to, I

believe it was DWMA 1, do you agree with Dr. Berry's conclusions that there would be potential increased risks of predation due to the proximity of DWMA 1 to the agricultural areas that are there and the disturbed habitat there?

MR. OTAHAL: I would say yes; but also do consider that the Ord Rodman DWMA is basically across the street from the project site. So my contention would be that whatever predation associated with these human-caused influences would be very similar, and that was part of the reason the Ord Rodman was chosen, so that we would not be translocating animals any further than we absolutely needed to.

MR. RITCHIE: To be clear, there's not agricultural land directly adjacent to the Calico project site, and there is directly adjacent to DWMA 1.

MR. OTAHAL: That is correct.

And one of the things that I did want to point out is one of those trigger criteria which are not currently in the draft plan is that there will be a comparison between the control animals, resident animals, and the translocate tease, and if there is a statistical difference between predation rates between those three groups, that would be a trigger for re-looking at the plan. So we are trying to take that into account. And

also taking into account that we don't have that as a known value.

MR. RITCHIE: Thank you.

I have no further questions.

MS. BLACKFORD: This is Ashleigh Blackford. I just want to pipe in.

Chris misspoke when he said "predation" rates; it's mortality rates in general, not just predation. Sorry.

MR. OTAHAL: Yeah, mortality from all causes.

HEARING OFFICER KRAMER: Okay. Anyone on the telephone hasn't asked questions of Mr. Otohal yet?

Okay. Mr. Adams, did you want to complete your panel then?

MR. ADAMS: Sure. We got word this afternoon that Tanya Moore of Fish & Game was not going to be available because she got sick. And we were making efforts to recruit Becky Jones to be on the phone.

Becky, are you there?

We ran an e-mail with Tanya's blessing an e-mail that she had sent to Mr. Hurley -- excuse me, Huntley. Thank you. It's getting late I guess.

But Ms. Moore sent Mr. Huntley an e-mail with the most recent position of Fish & Game on this, so we docketed it. I think some of you may have received it by

e-mail, but we have paper copies to pass around.

We've also docketed Chris Huntley's recently completed responses to the committee's questions. And I didn't know -- and we have paper copies of those -- I didn't know if you wanted those handled as testimony and exhibits or something less formal.

Mr. Cashen also filed responses. I don't know if anyone else has.

MS. FOLEY GANNON: We did as well.

HEARING OFFICER KRAMER: All right. Well, let me ask this: At best I've scanned some of those. Do you find anything in those to be testimony, new factual information, or are they simply basically pointers to the information in the record? Probably a combination, but what would you say?

MR. ADAMS: Well, I think Ms. Moore's e-mail certainly elaborates and is more specific about topics that she testified on two previous occasions.

HEARING OFFICER KRAMER: I was thinking more about the answers to the committee questions.

MR. ADAMS: Maybe Mr. Huntley can address that. I think a lot of it is a summary of information available from the service.

MR. HUNTLEY: That's right. Some of the information that's in my responses was obtained through

coordinating with the Desert Tortoise Recovery Office, some of it was from independent research of recovery plans information online, available online from the service and USGS, things of that nature, and West Mojave Plan. So it's kind of a compilation of material.

HEARING OFFICER KRAMER: Okay. So then some of it would be new to the record.

MR. HUNTLEY: Yes, it would.

HEARING OFFICER KRAMER: Is there any objection to the committee taking those in as testimony?

MS. FOLEY GANNON: I have no objection.

MS. MILES: I just have a question.

I'm not sure -- I didn't receive this electronically.

MS. FOLEY GANNON: I didn't either.

HEARING OFFICER KRAMER: "This" being?

MS. MILES: The staff's responses to the questions. So if we could just take a moment to look it over.

HEARING OFFICER KRAMER: Certainly.

Let's go off the record for a minute.

(Thereupon a short recess was taken.)

HEARING OFFICER KRAMER: Ms. Miles, do you have any thoughts?

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

I don't have a problem with this being entered into the record as testimony. I'd just like to know for each list of answers whose testimony it is. Staff's list of answers doesn't have -- doesn't list a person who's submitting this as testimony. I haven't seen the applicant's, so I don't know if they do. I know that CURE's is Scott Cashen. I would just ask that list whose testimony it is.

HEARING OFFICER KRAMER: Okay. That's a good question.

So for the staff, we have two items here. First will be the response to the committee questions. And that would be number 313. And, Mr. Adams, who wrote this?

MR. ADAMS: I'll let Mr. Huntley answer.

MR. HUNTLEY: Chris Huntley. I wrote this, but I utilized information that I obtained from Fish & Wildlife Service Desert Tortoise Recovery Office who helped provide information for some of those answers.

HEARING OFFICER KRAMER: Okay. People can note that.

(Thereupon the above-referenced document was marked by the Hearing Officer as Exhibit 313.)

HEARING OFFICER KRAMER: The next exhibit is the -- it's an e-mail from Chris Huntley to Rick York, but in reality the substance of it is an e-mail from

Tanya Moore to Mr. Huntley sent today, August 25th at 10:35 a.m. Subject is "Calico Information with Changes."

MS. FOLEY GANNON: And, Hearing Officer Kramer, we do have some -- I mean, there's -- I have a number of questions about some of the provisions that are included in this e-mail. And it's going to be difficult with Ms. Moore not available to answer those questions.

HEARING OFFICER KRAMER: I understand. That's Exhibit 314. I don't think I mentioned that.

(Thereupon the above-referenced document was marked by the Hearing Officer as Exhibit 314.)

MS. FOLEY GANNON: If we're accepting that as testimony, if it's point is that -- if staff is saying that they agree with what's in this e-mail and we can question staff about some of the intent of that or what they mean by this or what they would be agreeing with, then we would not object to that -- as that basis, we would not object to it; but again, I think there's some things that we would certainly want clarification on.

HEARING OFFICER KRAMER: Okay. Well, would you like to see if you could get sufficient clarification from staff and then we can revisit whether it should come?

MS. FOLEY GANNON: Sure. That makes sense.

HEARING OFFICER KRAMER: I think it will have to come in now for nothing else than to illustrate the

discussion you're about to have, but --

MS. FOLEY GANNON: Sure.

MR. ADAMS: Well, are you asking if staff is going to --

MS. FOLEY GANNON: Is this staff's --

MR. ADAMS: -- endorse all aspects?

This is not being offered as staff's position, no. Staff would probably answer some questions about it, if you have questions about it.

MS. FOLEY GANNON: Yeah, I guess then we would like to be able to talk through it and find out what staff does agree with and what they don't agree with.

MR. ADAMS: I think that's a fair topic on cross.

MS. FOLEY GANNON: Okay.

HEARING OFFICER KRAMER: Okay. So we've marked the documents. So go ahead with your questions.

MR. ADAMS: Okay. I think in addition to Mr. Huntley, Mr. White, we have Scott Flint on the phone.

Do we?

HEARING OFFICER KRAMER: Mr. Flint, are you there?

Let me check for mutes, but I don't think there are any.

MR. FLINT: I am here.

HEARING OFFICER KRAMER: Oh, good. Thank you.

Go ahead, Mr. Adams.

DIRECT EXAMINATION

BY MR. ADAMS:

Okay. I'd like to start by asking Mr. Huntley about testimony. On August 18th you indicated that staff wanted to see substantial changes in the translocation plan; is that still true?

MR. HUNTLEY: Yes, it is.

MR. ADAMS: And do you feel Bio 16 contains appropriate and sufficient standards to guide revisions to the plan and ensure those deficiencies are cleared up?

MR. HUNTLEY: Yes, it does.

MR. ADAMS: In the original staff assessment that you prepared on this project, do you recall the number of tortoises estimated to be on site?

MR. HUNTLEY: I believe using the U.S. Fish & Wildlife formula, it came out to be 176 tortoises.

MR. ADAMS: And that was a larger project configuration; is that correct?

MR. HUNTLEY: Yes, it was.

MR. ADAMS: And with the reconfiguration, what is that number?

MR. HUNTLEY: The reconfigured project footprint utilizing U.S. Fish & Wildlife formula extrapolates to be about 93 tortoises. Those are adult and subadult

tortoises.

Using the formula for juveniles, we came with a higher estimate of 96 juveniles and then 436 eggs.

So total adult, subadult, and juvenile is 189 tortoises on the project site.

MR. ADAMS: Okay. And the juveniles and eggs were not estimated in the original staff assessment because that was not practiced at the time; is that correct?

MR. HUNTLEY: That's correct.

MR. ADAMS: Will the project as currently configured result in the take both -- well, result in the take of more tortoises or fewer tortoises in the project than you originally analyzed?

MR. HUNTLEY: It would result in the take of fewer tortoises.

MR. ADAMS: Also in your previous testimony you -- your written testimony called for mitigation ratios of 3 to 1 and 1 to 1 on the project site; is that correct?

MR. HUNTLEY: Yes, it is.

MR. ADAMS: And you felt at the time that would fully mitigate consistent with state law impacts on the tortoise?

MR. HUNTLEY: Yes, we did.

MR. ADAMS: The current staff recommendation

includes a 5 to 1 mitigation ratio; is that correct?

MR. HUNTLEY: Yes, it does.

MR. ADAMS: Can you explain the reason for that change?

MR. HUNTLEY: Yes. Yes, I can.

Based on the consideration of -- and the comments from the California Department of Fish & Game on the density of the tortoises, the location of the site both in a linkage area, staff considered that the 5 to 1 mitigation ratio was warranted and currently supports that mitigation ratio.

MR. ADAMS: And was that decision influenced by Fish & Game's opinion on that subject?

MR. HUNTLEY: Yes, it was.

MR. ADAMS: Can you spend just a moment telling us the -- from a biological perspective, the reasons that 5 to 1 are indeed warranted on that part of the project?

MR. HUNTLEY: Staff considered looking at the maps, deliberating in house with our own biologists that the tortoise density is high in those locations and both the sites location in a geographic region where it acts as a linkage or it can act as a linkage between eastern and western populations or tortoises in the Mojave desert, we felt it was warranted, further reduce impacts to that species.

MR. ADAMS: The applicant has suggested the change of the area currently designated for 3 to 1 mitigation to a lower ratio, perhaps 1 to 1. And this is the area north of the tracks, but on the southern part of the project site north of the tracks.

Can you give us your thoughts on whether that would be an appropriate change?

MR. HUNTLEY: Staff would oppose that recommendation at this time. In looking at the maps, both tortoise densities and tortoise burrows on the site, it's clear that tortoises do use that area. It is distinct from the area between the BNSF Railroad and Interstate 40. It's contiguous with well-populated tortoise habitat and was within that overall linkage area. We felt it was appropriate to maintain the 3 to 1 impact ratio for that location.

MR. ADAMS: Okay. Thank you.

HEARING OFFICER KRAMER: Can I ask about that? I'm not sure I understand what you're speaking of.

MR. HUNTLEY: Hearing Officer Kramer, I believe you can see the figure there. The area north of the BNSF Railroad is an area that was originally proposed as 3 to 1 by staff and the northernmost sites, I don't think it matches exactly what the figure you're seeing there. The Fish & Game provided some additional comments on

suggesting that a 5 to 1 mitigation ratio be appropriate based on the high concentration and good range of adult and subadult tortoises on that site. Staff supports them on that.

Part of the reason we feel it would be inappropriate to have a 1 to 1 mitigation ratio for the area immediately north of the tracks is it is contiguous to that good-quality habitat, it's clearly used by tortoises. While staff recognizes that the detected tortoises was three or four with a couple on the margins, we still feel the area plays an important role in tortoise ecology.

HEARING OFFICER KRAMER: So I understood the other day that Fish & Game recommended two -- two types of property. That there was a 5 to 1 area and a 3 to 1 -- or a 1 to 1 area. Were they also recommending that some would be 3 to 1?

MS. FOLEY GANNON: They were.

HEARING OFFICER KRAMER: I just missed that?

MR. HUNTLEY: Yes.

MS. FOLEY GANNON: Yeah. The darkest area was a 5 to 1, then there's the medium colored area that was 3 to 1, and then the lightest color was 1 to 1.

HEARING OFFICER KRAMER: Okay. So is this a new exhibit?

MS. FOLEY GANNON: No. This was the exhibit that we had created earlier, which was just showing -- calling out the different qualities of habitat.

HEARING OFFICER KRAMER: Do you recall which number it is, just for the --

MR. RITCHIE: And just to be clear, this was roughly equal, right? This map isn't exactly the delineation?

MS. FOLEY GANNON: The numbers came out the same.

MR. RITCHIE: Okay.

MS. FOLEY GANNON: When we were talking through it at the last hearing, we asked them if those were the numbers; she said yes. So I'm assuming it's the same. And they haven't shown us an exhibit, so -- I'm looking to see the exhibit number, I'm sorry.

It's not an exhibit. We will introduce it as Exhibit 109.

HEARING OFFICER KRAMER: Well, let me check the number, but -- okay. Yeah.

MR. OTAHAL: Yeah, I believe that's actually from the translocation plan.

HEARING OFFICER KRAMER: Okay. Well, it would be easier to call it a new exhibit, even if it's a duplicate.

(Thereupon the above-referenced document was marked by the Hearing Officer as Exhibit 109.)

HEARING OFFICER KRAMER: And that would be Exhibit 109. It's called "Fencing Timing for Phase 1A with Desert Tortoise Sitings." Date is August 23, 2010. So I doubt if we had it the last time.

MS. FOLEY GANNON: No, you didn't. The colors are new. You're right.

HEARING OFFICER KRAMER: Okay. So go ahead.

MR. ADAMS: Well, I think this discussion justifies us talking just a little bit about when we're talking about the different mitigation ratios, what area we think they apply to. Because there may be -- this was all fairly -- we learned of Fish & Game's position at the hearing on the 18th, and, you know, it's all fairly new to all of us.

So I'd like, Mr. Huntley, if you could describe -- I think we all understand the 1 to 1 mitigation ratio would be applied south of the railroad tracks. If you could describe both in terms of the phasing lines and mitigation ratios and perhaps acreage, since we calculated that as well, what we understand to be the area where the 5 to 1 would apply.

MR. HUNTLEY: Yes. I don't have the acreage numbers, and if you could find those for me, I'd appreciate it.

Currently, the area south of the BNSF Railroad

tracks between BNSF Railroad and Interstate 40, which is identified as Phase 2, is proposed as 1 to 1 mitigation. And that was proposed in the original staff assessment, the supplemental staff assessment, and it's what staff still recommends at this point.

The area north of the BNSF Railroad, which is identified in the figure as Phase 1B, includes portion of Sections 8, 7, 12, and portions of 11, is the area which Fish & Game and staff concur that a 3 to 1 mitigation ratio is proposed.

The area that's identified as Phase 2, which is immediately north of that, includes portions of Section -- yeah, Section 6, 5, 4, and portions of Section 2. Fish & Game has identified as a 5 to 1 mitigation area, as is portions of Section 32 and the very southernmost portion of 31 where the detention basins are proposed. And that would also be at a 5 to 1 mitigation ratio, as we understand it.

That totals out to south of the BNSF Railroad of 2,140 acres at 1 to 1 mitigation ratio. The 3 to 1 mitigation ratio accounts for 1,877 acres. The 5 to 1 mitigation ratio is for 2,198 acres. In total, that is a total compensation acreage of 18,761 acres.

MS. WHITE: Just a point of clarification, your 5 to 1 ratio also includes Section 35, that

southern-eastern portion.

MR. HUNTLEY: Thank you.

HEARING OFFICER KRAMER: Do those lines in your -- in your envisioning, do they line up with the section lines or -- because in this map we have Exhibit 109, they're just bands that are not aligned at all with the sections.

MR. HUNTLEY: They do not perfectly align with the sections. They're irregular polygons that more or less run along the edges of the section lines. I could physically identify them on a map if it would be easier for me to walk up and show you.

HEARING OFFICER KRAMER: No, I don't think that's critical.

MS. FOLEY GANNON: Chris, isn't the darker areas on here consistent with the 5 to 1 areas as you understand it? I was thinking of the wrong map. But that is the 5 to 1 because that's the 1,941?

MR. HUNTLEY: The map -- the map that you provided right here -- maybe I'm missing something -- it doesn't appear to totally match the 5 to 1 area identified by Fish & Game.

MS. FOLEY GANNON: Okay.

MR. HUNTLEY: But largely so.

MS. FOLEY GANNON: Where's the deviation?

MR. HUNTLEY: Looks like there is a deviation in Section 6 where you have this phase cut off, but --

MS. FOLEY GANNON: You think it's more of Section 6 than is shown here?

MR. HUNTLEY: Well, I'm just seeing this figure for the first time, so I need to make sure I understand it.

MS. FOLEY GANNON: Okay.

MR. HUNTLEY: What I see from your figure is you have Desert Tortoise mitigation ratios at 1 to 1, and then Desert Tortoise mitigation ratios for 5 to 1.

MS. FOLEY GANNON: Right. And it doesn't have the 3 to 1 on here. But I'm just trying to say for the 5 to 1.

MR. HUNTLEY: It does not appear to accurately represent --

MS. FOLEY GANNON: Okay.

MR. HUNTLEY: Portions of Section 6 would be accurately characterized as 5 to 1 from Fish & Game.

MS. FOLEY GANNON: Okay.

MR. WHITE: The way we've calculated the acreages, which was part of the testimony a week ago too --

THE REPORTER: Identify yourself, please.

MR. WHITE: I'm sorry. Scott White.

The way we've calculated the acreages is based on phasing lines rather than the -- rather than the colored areas that you guys show as habitat quality. Or I think the -- I would think the total acreage would actually be very similar either way.

MS. BELLOWS: This one does tie to the numbers of acres that we talked about last week.

MS. FOLEY GANNON: That's what I thought, 1,971, yeah.

HEARING OFFICER KRAMER: I'm not sure the mic's picking you up.

MS. BELLOWS: The acreage at the very least is the same, okay? So I think what we've done here is an effort to match the acreage and draw something without being -- knowing exactly where having, you know, the exact data points needed to put it on to a map.

MR. HUNTLEY: I understand. I think the concern would be that when Fish & Game looked at this, they were matching it to the phases and looking at the tortoise density, so they didn't have the ability to calculate those acreages within those polygons, so they looked at that Phase 2 area and said that is the area that we want at 5 to 1 mitigation ratio. And it doesn't seem to match up quite.

HEARING OFFICER KRAMER: Well, is this a

distinction that is going to matter for the conditions or a narrative?

MR. HUNTLEY: I think ultimately we'll need to make sure the acreage is accurate. And it could alter the mit- -- pardon me. It could alter the condition of certification if the acreages don't align.

MR. RITCHIE: And just looking, I mean, I may be looking at the wrong numbers as well, but if you look at based off of the phases, if there's -- the northern detention basin's phase is 451 acres, and the Phase 2 north of the railroad is 1,747, those would add up to higher than the 1,971 acres shown by the dark red on this map.

HEARING OFFICER KRAMER: So then one of our questions was going to be is it still 5 to 1 or has it changed?

MR. HUNTLEY: Staff is recommending a 5 to 1 mitigation ratio.

HEARING OFFICER KRAMER: And 3 to 1 and 1 to 1.

MR. HUNTLEY: Yes, sir.

HEARING OFFICER KRAMER: Okay.

MR. ADAMS: We ended up with three ratios because Fish & Game's testimony was not that all the entire 3 to 1 area be changed to 5 to 1, it was a portion of it, a majority of it, but a portion of it be changed.

HEARING OFFICER KRAMER: Okay. And do we have language then for the condition that will specify the amount of mitigation lands that are required of the applicant?

MR. HUNTLEY: Well, we're working to finalize that, but in the measures we have right now, we do have acreage calculations provided.

MR. ADAMS: Well, we have not submitted that. We provided a working copy for use at the workshop tomorrow -- yesterday, excuse me. But the applicant has submitted a competing Bio 17 that differs on a number of significant points. So, you know, at this point we're going to have to work on a version for comment on the PMPD unless the committee has another request for --

HEARING OFFICER KRAMER: Okay. Well, let's finish the testimony, and then let's talk about where we are as a practical matter so we can figure out what it is we have to decide.

MR. ADAMS: Okay. I'd like to spend just a few minutes on an issue.

Again, August 18th there was -- staff made a statement that we had to check and weren't sure on treatment of a couple of roads on the project site and whether those were included in the analysis.

These involve two different roads -- well,

actually, three different roads. Two within the Burlington Northern right of way. One on the northern edge that was a temporary road.

Maybe we should just take these in turn to keep it simple.

Have you had an opportunity to -- well, first, relative to this, earlier this afternoon staff testified that we were changing a condition, I think it's Trans 1, regarding the temporary access road and agreeing that rather than having it paved with culverts, since it was only being used a few months, that it could be made all weather with a tackifier or something similar to that.

In light of that, can you tell us whether in your judgment the impacts from use of that existing road were considered as part of the project?

MR. HUNTLEY: Yes, they were considered as part of the project. And staff drove these roads to get to Phase 2 and get to the other sections. We did include it in our analysis, talking about ecological effects of roads. We also considered road mortality on species utilizing Route 66 and even the interstate. So we did consider this.

MR. ADAMS: Okay. Well, you've just answered the second question, which hadn't been asked yet, which is the right-of-way road on the southern edge of the right-of-way

to serve the westernmost portion of Phase 2. And so I think your answer as to that was clear.

What about the temporary road going to Phase 1A facilities?

MR. HUNTLEY: Again, we did consider that in our impact analysis because it's always been a route that would have to be utilized by the applicant to get from the Phase 1 area to the Phase 2 area. So it was considered in our analysis.

MR. ADAMS: The third road was the perimeter public road that was added fairly recently. And what did you find on that?

MR. HUNTLEY: That was also considered in the impact analysis for the proposed project. We considered impacts throughout the entire phase and we considered, you know, road construction and tower locations, pedestal locations, everything. So it was considered.

MR. ADAMS: Well, but that road wasn't proposed at the time you did the analysis. Can you --

MR. HUNTLEY: It wasn't proposed, but it was within the perimeter fence line and the project footprint. And we considered impacts to all the habitat within there to be virtually a full take on habitat. And we provided conditions of certification to mitigate that accordingly.

MR. ADAMS: Okay. Thank you.

And, Mr. Flint, are you available?

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

MR. ADAMS: Okay. Great. Thanks.

I wanted to ask you at first about some of the cost figures, since you're -- by the way, for everyone's memory, Mr. Flint is a staff member here at the commission. He recently -- until recently was a manager at the Department of Fish & Game. In both capacities he's been involved in the REAT discussions as explained earlier.

Mr. Flint, could you first explain the derivation of the endowment estimate that REAT has advanced of $450 an acre? I think you talked about this in earlier testimony, but if you can elaborate.

MR. FLINT: Sure. I did, Steve, and is that -- was that 1450 an acre?

MR. ADAMS: 1450 an acre. Excuse me, 1-4-5-0.

MR. FLINT: Yes, that's an estimate.

So what you see in the table that the REAT put together is a series of cost estimates that could be used to basically secure project obligations. And these estimations are based on the agencies' -- collective agencies' experience in dealing with land acquisitions in the desert. And so we were able to work together to put this table together.

They're estimates with some uncertainties, and there are some variables in the estimates depending on the configurations of land that are acquired. So those are -- those show up in the table and are footnoted.

Specifically the derivation of the 1450 figure per acre is an estimate for the -- what would be required to endow the land for management in perpetuity. And that estimate is based on past experience with managing those types of lands in the desert by the Department of Fish & Game primarily. They've also run a PAR analysis, which is a proprietary software program that accepts various input assumption, and it calculates, you know, the annual cost of managing a piece of land given those assumptions and input.

With experience and running that PAR, we came up with that as a number that would -- is an estimate to be used to secure a project so they could proceed after permitting.

And that number was -- has typically been 1350 as used by the Department of Fish & Game was adjusted for purposes of this REAT table to account for funding additional -- particularly additional monitoring and some law enforcement of the land by BLM, if they go to BLM, if the lands go to BLM, the mitigation will go to BLM because in the desert the -- one of the impacts on lands has to do

a lot with illegal trespass and creation of road. And to help protect those desert lands there's a higher level required of law enforcement and monitoring to make sure that those kinds of intrusions are caught and remedied quickly. So it's typical management with an extra estimate for being able to fund that kind of protection of the land. So specifically that's how the endowment was generated.

Again, the idea with the endowments and the way they're typically -- the way -- this is an estimate for security purposes, but at the time mitigation lands are identified, the actual per acre endowment would be adjusted running a PAR analysis with assumptions made from the actual mitigation land after it's identified.

MR. ADAMS: So the 1450 is put in up front if mitigation isn't done prior to ground disturbance, and then the difference between the 1450 and the actual cost is projected by this software once the PAR -- once specific mitigation lands have been identified by the applicant, would either be paid by the applicant if they're higher than 1450 or refunded?

MR. FLINT: That's correct.

MR. ADAMS: The applicant has suggested that this amount really should be 692 an acre, $692 an acre. Any thoughts on the adequacy of that figure?

MR. FLINT: We have done some PAR analysis for different properties out here in the desert near some of the project sites. You know, I don't know how many were done, exactly where, but we've done a few, and it's dependent on the property that's acquired. Some of those have ranged from perhaps $600 an acre as a true estimate of a particular parcel to over $5,000 in other cases. It depends on the species to be managed, the configuration of the property, and the actual activities that have to occur to manage that property. So it's highly variable, and that's why we use the estimate. And so some actual PARs on desert land have run between 600 and $5,000.

MR. ADAMS: So you considered $692 an acre in this west Mojave area at the low end of the spectrum of what you'd expect an actual PAR to establish costs at?

MR. FLINT: Yes.

MR. ADAMS: And you consider $1,450 an acre more of an average or anticipated cost for a typical parcel?

MR. FLINT: Yes.

MR. ADAMS: The other area -- oh, you mentioned REAT. And just for review, can you tell us what that stands for?

MR. FLINT: Yeah. The REAT, when I use the acronym "REAT," I'm referring to the Renewable Energy Action Team. And these are the four primary agencies that

have permit jurisdiction over these projects. It includes the Energy Commission, the Department of Fish & Game, the Bureau of Land Management, and the U.S. Fish & Wildlife Service. Those agencies compose the Renewable Energy Action Team.

And we've been working jointly together to ensure that the project mitigations are integrated amongst the different agency approvals.

MR. ADAMS: And is it consensus among that group that the state should require the long-term management fund, the $1,450 an acre even when mitigation lands may end up going to BLM?

MR. FLINT: Yes. And the discussion -- you know, the basis for that is that the mitigations are being integrated to both meet the requirements of the California Endangered Species Act and the federal Endangered Species Act, and CEQA, and also, you know, BLM's mitigation for impacts to lands under its purview under NEPA.

So in balancing all of those things, we -- regardless, whether the land goes to BLM or not, as long as a portion of the CESA mitigation, the California Endangered Species Act mitigation is taken care of on those lands, then the requirement for the management endowment, which is part of -- which is part of the standard way we look at one of the requirements under

CESA, that the applicant provide funding for implementation and management of the land which is essentially a requirement under CESA, extends to the lands regardless of who holds them because we -- because in a CESA permit either issued by Fish & Game or in this case the commission in its approval acting in place of the department must meet that CESA standard.

So the way we're coupling our mitigation, the BLM lands count for a portion of the CESA mitigation, and that obligation must be part of the mitigation package.

MR. ADAMS: Thank you.

And finally on the acquisition estimate, again for security, our staff's condition of certification has set that at $1,000 an acre. I believe that's the REAT base or default amount; is that correct?

MR. FLINT: That's correct.

MR. ADAMS: And the Bureau of Land Management has and the applicant have both produced historic -- well, I should say in the last three years sales data showing average sale cost in the desert in the order of 500 -- 500 to $600 an acre.

Was there discussion to your knowledge at REAT about comparison -- whether this amount should be set at the average sale looking back over three years or should be set at some point higher than that?

MR. FLINT: Yeah. Again, it's -- again, the land cost varies tremendously depending on where you are in the desert and where you are in relation to roads or things like that where there's access and the land is more readily developable for other -- for any activity versus something that's farther away from roads or something like that.

And then a third factor is if you have lands that are being proposed to be acquired that may be landlocked in DWMAs by other BLM -- surrounded by BLM ownership, those -- that has a tendency to push the price down. So the ranges we looked at actually through the whole desert ranged from about -- actually in some spots are as low as $300 to $1500 or more per acre for acquisition costs. And that data, we threw out the highs and lows and kind of came up with an average or median number to use, again, as a security estimate.

And then we also had discussion and applied the fact that both the -- it's very likely that those numbers will increase over the short term, the dollars required for acquisition, the price per acre due to what's going on in the desert with, first of all, siting projects where folks are looking -- you know, some folks are looking at private lands for doing that, and that's affecting the prices out there. And it is now and in the short term

will increase those prices, and both folks looking for mitigation lands or their projects that are being considered in the permit process as having the same effect.

So it's -- you know, again, with conservative and a cautious estimate to not use that backward-looking three-year number but to factor in -- to factor into there some recognition that the prices are going to be on the increase over the short term. And that was the discussion that the REAT had including, you know, including real estate experts from BLM and the Park Service and some consultation with real estate experts at Fish & Game also, plus our regional staff that work on acquisitions out in the desert quite a bit.

MR. ADAMS: Okay. Thank you.

I guess I'd like to conclude direct with a final question to Mr. Huntley and Mr. White.

You've heard a lot of testimony over three days devoted to biology from various experts on project impacts involving a number of species and a number of type of impacts. With the exception of the revisions that you've made to the Desert Tortoise take estimates and undetected tortoise estimates that we've discussed previously and the mitigation ratio, are there other changes or areas where you believe your analysis is represented in the

supplemental staff assessment may have missed the mark, or are you comfortable with that?

MR. WHITE: In general, I think -- in general -- Scott White.

In general we are comfortable with the analysis and with the conditions of certification that we've recommended. We have reviewed and discussed with the applicant several proposed changes to our conditions of certification. In a few cases I think we've completely agreed on revised language. In a few cases I think we've agreed on where to go with them. And there will be some further minor revisions, but I think they'd be minor.

We're still working out -- or we're still discussing these ratios. We don't -- we, as staff, don't recommend any changes from the testimony that we've offered today.

So in conclusion, yes, the analysis as it's been presented, the conditions of certification as they stand now with only minor revisions, we are comfortable with that.

MR. HUNTLEY: This is Chris.

I would agree with that statement.

MR. ADAMS: We -- I don't know if it would be helpful at some point to run through the bio conditions.

UNIDENTIFIED SPEAKER: I'm at home and online.

HEARING OFFICER KRAMER: Are you -- on the phone, are you speaking to us?

No. Sounds like background noise.

Okay. Well, would it be better to discuss the conditions after we've finished all the testimony?

Ms. Gannon agrees with that.

So is that the testimony then, Mr. Adams?

MR. ADAMS: That is, yes.

HEARING OFFICER KRAMER: Okay. If you could make sure that the people to your left are sustained by the contents of the bucket to your right.

Ms. Gannon, did you want to question these witnesses?

MS. FOLEY GANNON: I do. Just a moment.

PRESIDING MEMBER EGGERT: So, Mr. Kramer, is this, the contents of this bucket, your mitigation for the late evening hours of the hearing?

HEARING OFFICER KRAMER: It's so that everyone can experience a sugar high and then the crash, yes.

CROSS-EXAMINATION

BY MS. FOLEY GANNON:

All right. Mr. Huntley, first off, we can talk a little bit about the translocation plan. And what I would like to first off discuss with you is some of the content in what has now been marked as Exhibit 314, which is the

e-mail from Tanya Moore.

And in this e-mail, I guess you can maybe give a brief summary -- you received this, you have read it, you, I understand, are not adopting this as your own; is that correct?

DR. HUNTER: We are not adopting this as our own, however, staff generally concurs with the information provided in there. Staff feels that most of the issues from 1 to 7 can be addressed through beefing up the translocation plan and do not see it as an obstacle to certification.

MS. FOLEY GANNON: 1 to 7 is exactly where I wanted to go. So you're reading my mind. Because as I'm reading this -- and obviously we just got this tonight, but this is -- I see some things that are either -- maybe I'm misunderstanding them or they could -- I see them as being very problematic.

Let's say, if we're looking at these as criteria that would be used to ensure mitigation, that's the intent of these criteria?

MR. HUNTLEY: To our understanding it is.

MS. FOLEY GANNON: And that's how you would view them as well.

MR. HUNTLEY: Largely.

MS. FOLEY GANNON: Okay. The first one I

understand; and I think it's reflected in the current draft of the plan.

The second one which reads that the site cannot be located near any existing or proposed roads -- let's just stop there.

MR. HUNTLEY: Well, let me make a point on this. I contacted Tanya after I received this and asked her some of these questions, because staff looked at the same thing and said, well, what's the distance that's acceptable from the road. Some of these things I think would be hashed out in the translocation plans. I view them as guidance. And I think staff would support that question. How close to a road is it? We have to be far enough away from a road that the road's edge effects aren't going to cause a risk to the tortoise populations.

MS. FOLEY GANNON: Because, I mean, obviously almost anything is near some existing or proposed road.

MR. HUNTLEY: Staff agrees with you and believes that these are recommendations and proposed conditions that need to be fleshed out in the translocation plan. They're not being viewed as a dogmatic, you know, this must happen in this way, because there is not specificity or, you know, identification of many of these things.

So I think what we would do is, just as I said, we will use these things within the translocation plan,

have you folks identify many of these things to the best of your ability in the translocation plan, and we'd work that out through agency coordination with Fish & Game, BLM, the service, and energy commission staff.

MS. FOLEY GANNON: And I guess because it seems to me that in your conditions of certification that are relating to the translocation plan, you already have criteria that have to be met, which is relating to where the lands would be selected, and how you evaluate, you know, requiring it be equal value of habitat --

MR. HUNTLEY: We do. And I believe we've identified that this has to be done in accordance with the translocation guidelines from the Desert Tortoise Recovery Office.

MS. FOLEY GANNON: Right.

MR. HUNTLEY: And the whole point of having the coordination with Fish & Game, BLM, and the Service is that it's an opportunity to have comments and revisions to the document.

As the translocation plan stands now, staff does not consider it adequate. So we would anticipate seeing a revised plan shortly.

MS. FOLEY GANNON: So again, just, I guess, basically factor two here, or list two, is just saying you're going to be looking at the activities that are used

on the site making sure that it's not adversely affecting the quality of the habitat in such a way that --

MR. HUNTLEY: I believe that's the intent of this e-mail.

MS. FOLEY GANNON: And one thing I would note also is that it says it can't be near any future proposed project. That would mean you could never translocate a tortoise near your project site.

MR. HUNTLEY: As I said before, I think these are guidelines that we're going to be able to work through in the translocation plan.

MS. FOLEY GANNON: Okay.

The other one that I had a concern about, and just -- maybe this is something, again, it's not intended the way I'm reading this, but in number 6, when it's talking about the translocation site has to be surveyed to identify potential predators, invasive species and human disturbances and ensure that these situations are not occurring in a higher abundance than the proposed project site, I think that the current draft of the plan is getting at this, that you're looking at these factors, these predations; but again, this seems to be saying like there has to be like a numeric number established for the site, and that's obviously a very difficult thing to do.

MR. HUNTLEY: I think the intent of this is,

again, is to make sure in your translocation plan you've carefully and thoughtfully considered what kind of predation risks are on the project site. Is it close to an area with heavily subsidized predators, is it close to an area where humans are dumping trash or there's off-highway vehicles or other factors.

I know many of these things you've addressed at least topically in your translocation plan, but we'd like to see them fleshed out a little bit more. And I believe that's the intent of the department on this e-mail.

MS. FOLEY GANNON: Okay. I just wanted -- I appreciate you giving that clarification as to your understanding of it.

Going back to some of your other testimony on the translocation plan. As I understood it, you believe that the Conditions of Certification that you've written are -- as they're proposed are adequate to ensure that the translocation plan is going to mitigate or be used to minimize impacts?

MR. HUNTLEY: We do. We believe that the translocation plan, as identified in our Condition of Certification, will have to rise to the level of approval by the Service, the BLM, Fish and Game and Energy Commission staff. And that through the Condition of Certification, we'll be able to identify when that's met

that level.

MS. FOLEY GANNON: Okay. Thank you.

Turning now to the mitigation ratios. I understood that when you said you were agreed with the establishing the mitigation ratio at 5 to 1 for this highest habitat area being basic three phase 2 area, I guess as it was described, north of the railroad and with addition of 1B, right -- the detention basins in 1B. And again you've said that was because of the density of the tortoise there, the burrows and its location.

MR. HUNTLEY: Staff adopted the 5 to 1 mitigation ratios for those areas, after consideration of the number of tortoises that are on that site, the number of burrows that are in that regions, the shear scale and size of the project, its location, its geographic location, the fact that the project is obstructing to some degree a movement corridor, for all of those reasons staff felt it was appropriate to adopt the recommendations by Fish and Game, the agency -- one of the agencies that is responsible for managing these species.

MS. FOLEY GANNON: And for these high habitat areas, you feel that this is a much higher habitat value than like the area that was impacted buy Ivanpah, are you familiar with that decision, or the proposed?

MR. HUNTLEY: I've only looked at Ivanpah on a

cursory, but we're not talking about Ivanpah, we're talking about this site and this project. And staff considers the habitat on this site to warrant that kind of mitigation at this time.

MS. FOLEY GANNON: But again, it is -- as I understand, is largely based on the densities, and that's one of the major factors, is that correct?

MR. HUNTLEY: It's one of the factors, the size of the project, the habitat that's on the site, the density of the populations, its location geographically. These are all things that we considered when we decided to adopt the Fish and Game 5 to 1 mitigation ratios.

MS. FOLEY GANNON: And in looking at the gradient of this mitigation that's being proposed, I think in our earlier testimony given by Ms. Miller down in Barstow, she had described the site as having the highest value habitat in the northern section, and in fact that's also why the project was brought down further to northwest, to avoid many of these high habitat values, is that correct?

MR. HUNTLEY: I would argue that it's not just to avoid the high habitat values. It was that the proposed project, the large footprint, virtually obstructed wildlife movement tortoise movement in the region. So while that area does have a high tortoise population in the linkage area, it was done not just because of that,

but again because as the proposed project would have virtually choked off wildlife movement.

MS. FOLEY GANNON: And moving it down prevented that from happening?

MR. HUNTLEY: It minimized that.

MS. FOLEY GANNON: Okay. In the area that is currently being proposed to require 3 to 1 mitigation to fully offset, the density again of the tortoises present is an important factor?

MR. HUNTLEY: It's one of the factors. If I may point out, I believe the 3 to 1 mitigation ratio of the project area north of the tracks has always been on the table, has always been a component. I believe may have been recommended by the applicant in the AFC. This area is occupied Desert Tortoise habitat. It basically fills in many, many hundreds of acres. And it's not a magic line that's drawn. It's a large area where tortoises are undoubtedly moving up and moving down.

They're certainly concentrated in the phase 2 area. But they still occur in this area, and the lower area still plays a role in the ecology of the animal, so where we cannot discount that.

MS. FOLEY GANNON: Right. But I think what -- and you're right, the applicant did agree with 3 to 1 to this whole area. And I think it was as described

earlier in testimony by Ms. Miller and by documents that were in the AFC was looking at the total value of the area when you considered it all as one type of habitat.

Then the average of that would get to a high value, which would require more than 1 to 1 mitigation. I guess if we're breaking it down now between these areas though, and we're going to be doing this different levels of mitigation, would it appropriate to look at the amount of tortoises and burrows that are actually present in these various areas in considering what mitigation is needed?

MR. HUNTLEY: I think the number of tortoises is a factor. The number of burrows is a factor. And remember when you look at tortoises, it is a snapshot.

MS. FOLEY GANNON: Um-hmm.

MR. HUNTLEY: You know, I don't know what the total tortoise density would be when you do your pre-construction surveys in the fall. Maybe you'll pick up a few more down there. Maybe you'll pick up fewer tortoises down there. But the area the clearly habitat. It's located in an important region and staff feels it warrants 3 to 1.

MS. FOLEY GANNON: And if you knew that this area -- for comparison purposes, there was 57 tortoises that were found in the site -- I think you're aware of

that, right?

MR. HUNTLEY: Yes, I am. And I believe there was nine or five tortoises found in the original area. You've identified, I think, tree in this figure, correct?

MS. FOLEY GANNON: Well, no, there was 50 that were found in what's identified as the high value habitat area, 50 of the 57. Five in the area that was below that but north of the railroad, and two that were south of the railroad.

And again, with the burrows very similar pro portions, 31, south of the railroad, 48 north and then 269.

MR. HUNTLEY: Well, I think an important distinction in the 1 to 1 versus the 3 to 1 is the area between the BNSF Railroad and Interstate 40. Still is Desert Tortoise habitat. Staff considered that of lower quality habitat, because it does have some disturbance but primarily because it's been cutoff and it's fragmented from other populations.

The habitat north of the railroad is connected to high quality, high density tortoise habitat. In and of itself, it's still good quality tortoise habitat. It is more sandy in the southern areas than it is in the northern areas. Yes, you're finding more burrows in the northern areas, but the value of that site isn't

necessarily diminished because it has three or five tortoises depending on where you are drawing your line.

Originally when I looked at the Desert Tortoise translocation plan, I think I counted five tortoises and nine active burrows and another half a dozen or more class 2 burrows. But it's a little different with the figure you've just provided.

MS. FOLEY GANNON: But even though it doesn't give you a precise number, doesn't it give you a sense of how many tortoises -- if the burrow number is, you know, quarter of the number that's found in the other area, the number of tortoises that are found there is a tenth. I mean, doesn't that give you some sense of there is something different going on here in the high habitat versus this area?

MR. HUNTLEY: I think we recognize that. And that's why it's still 3 to 1 and not 5 to 1.

MS. FOLEY GANNON: Is 3 to 1 historically been used for what's considered high quality habitat?

MR. HUNTLEY: Habitat -- to the best of my knowledge, mitigation ratios for projects have ranged widely. And 3 to 1 I know is, in fact, being used right now for projects with low, low, tortoise density in the Western Antelope Valley. And I don't think it's inappropriate to use 3 to 1 here. You can't separate

things. This is a large project. It's thousands of acres. It's connected to occupied habitat. It's in contiguous habitat. It's next to an ACEC. It's value isn't just that it has, you know, five tortoises or 50 tortoises. It's clearly not as densely populated as the area in the north, but we still feel it warrants 3 to 1 mitigation.

MS. FOLEY GANNON: It warrants it. So anything less than that is not full mitigation?

MR. HUNTLEY: I would say that we have to have 3 to 1 to meet the full mitigation requirement. A question I would say is what's the magic number on tortoises in your opinion, that doesn't require a 3 to 1 mitigation?

MS. FOLEY GANNON: We'll be putting on our expert who hopefully can speak more based in science than I can on that point of view. But one of the things we -- and we were hoping that Fish and Game was going to be here this evening so that they could speak to this as well, but it's precisely that question that were you posing to me is when you're -- how do you decide what is full mitigation? How do you decide how many -- I mean, you're saying this is thousands of acres that are being impacted, there's thousands and thousands of acres of mitigation that's going to be proposed, whichever one of these ratios you use.

So how do you draw the line of what is enough and when you have to have more?

MR. HUNTLEY: To meet the full mitigation requirement, you have to functionally end up with a no net loss of tortoises. Ultimately, if I'm reading CESA right, you have to have a no net loss of tortoises.

So we're taking thousands of acres of occupied tortoise habitat at a range of tortoise densities, and we're going to be acquiring this habitat that we have to either increase the carrying capacity of that habitat to meet the loss of these tortoises. The translocation is a salvage. It's part of the compensation plan to minimize impacts to the tortoises. But you have to increase your carrying capacity in those other areas to basically meet that loss.

MS. FOLEY GANNON: And I guess what I still don't understand is how you then come up with it's got to be 16,000 acres or it's got to be 14,000 acres. And I'm knotted being facetious, I understand. This is very difficult things to be able to say and to figure out how you make this calculation. And in discussing this at the workshop with Fish and Game, they said, you know, that it was in their heads, and they had thought about this.

And so this obviously has huge implications for the project. And so I'm trying to understand it. And so

we can hopefully speak to it as well and see if we can figure out if this is what is really needed to fully mitigate it.

So if can you give any sense of how you actually approached that question, how do you figure out where the line is?

MR. HUNTLEY: That's a good question. Staff recognizes the challenges with this. Staff has thought about this, as far as adopting the mitigation proposed by Fish and Game. And again, I guess after we considered the number of tortoises -- we have look at how many tortoises are here.

I beg your pardon?

Scott would like to chime in I guess. Go ahead.

MR. WHITE: You could finish your thought.

(Laughter.)

MR. HUNTLEY: Well, don't bump me in the elbow in the middle of it.

(Laughter.)

MR. HUNTLEY: The bottom line is we have a large number of tortoises. We have good quality tortoise habitat. It's in a linkage area. We want that habitat to be fully mitigated. We originally, and it's in our testimony, thought that 3 to 1 mitigation in this area would be adequate for that.

Fish and Game, the resource agency responsible for managing the species felt that that was an inadequate number based on the tortoise density there. We took their consideration to heart, and we've adopted their mitigation requirements.

Staff supports it for the reasons I've already stated. It's a high number of tortoises. It's an important area and ultimate three acquisition to the mitigation lands have to be enhanced to the point where they can replace the lost tortoises in this project.

MR. WHITE: I just wanted to add that the fully mitigated standard under CESA is a tough standard. And if there's going to be a habitat loss, and the take of tortoises, the reason that there has to be a CESA permit issued is because there's going to be a take. There's going to be a loss. To reach the point where you have fully mitigated that loss, means you have to do something above and beyond protecting existing habitat.

And so the consideration that comes into this is that for fairly poor quality habitat to protect and set aside and perhaps improve some other habitat, is not a particularly demanding tasks to find.

The better quality habitat that's going to be lost, the greater the demand for finding and improving habitat to match it and to eventually get to the point

where you say we've actually fully mitigated that initial loss.

So for exceptionally good habitat, the point is there's not much you can do to make that habitat better. So if we're going to take, you know, 640 acres or some, you know, given number, the mitigation ratio has to be higher to ensure that the set aside, the protection and the future improvements of that are enough to truly reach that full mitigation standard.

MS. FOLEY GANNON: And we completely understand that. And so we -- you know applicant had never objected to 3 to 1 when were you looking at the whole area north of the -- that we have provided testimony that says we recognize the difference in the quality of the habitat. That's the appropriate way to meet that standard. But when you're dividing up into this now saying, wow, the northern part is very high quality habitat, and I think we're asking -- let me ask you the question directly.

Do you think 2 to 1 for the area north of the railroad, south of the high quality habitat could reach full mitigation, if you have the 5 to 1 for the higher habitat and 1 to 1 below? I mean this is based upon again the density of the tortoises, the density of the burrows, the differences, you know, that those numbers are much more similar to the lower quality habitat.

I mean, do you think that that could --

PRESIDING MEMBER EGGERT: Let me ask, is this your final question Ms. Gannon?

MS. FOLEY GANNON: This is my final question, on this subject.

PRESIDING MEMBER EGGERT: Okay.

MS. FOLEY GANNON: Yeah.

MR. WHITE: We really don't think so. We're -- you know, staff's conclusion is 3 to 1 is the best ratio for that habitat. And I think Chris has explained that pretty well already.

PRESIDING MEMBER EGGERT: And I think -- I just wanted to -- I think we've heard pretty clearly the opinion of the staff, and I think you'll have the opportunity to put on your witness on this topic.

MS. FOLEY GANNON: Mr. Flint, are you still on the line, I hope?

MR. FLINT: Yes, I'm here.

MS. FOLEY GANNON: Thank you. A couple of questions about the numbers that are being used for the basis of the security.

First off, and you explained that the way you were looking at the price per acre in establishing the security amounts, I heard you say, you know, you recognized that the applicant had presented some

information, that the BLM had had some information and that number was around 500 an acre on average, is that right?

MR. FLINT: No. What I was saying was without regard to any specific location, we were looking at ranges in different areas through desert. And, you know, just as the spread of the whole thing, they range from $300 to about $1,500 an acre. So again, these were -- we came up with these estimates to apply widely to projects with the idea that we could have some certainty in the number here for applicants and for the resource agencies for security purposes, so that we could -- once the projects were permitted, a security would allow them to move quickly on to construction.

MS. FOLEY GANNON: Okay. Amy Fesnock from the BLM gave some statements, not testimony, earlier in these proceedings, in which she said that looking at the specific properties that had been acquired in this county and in San Bernardino county, the numbers were average 480 per acre on average, and that within DWMAs it was 520 per acre. Have you seen those numbers before?

STAFF COUNSEL ADAMS: Excuse me, I'm not sure that was testimony.

MS. FOLEY GANNON: It was. It was on page -- yeah August 5, 140.

STAFF COUNSEL ADAMS: I thought that was in a workshop.

MS. FOLEY GANNON: No. She also said it at a workshop, but she said it during the hearings, as well.

So, I don't know, were you aware of those numbers that the BLM had provided?

MR. FLINT: Yeah, we discussed a wide range of numbers, and I -- you know, I don't recall specifically Amy talking about those particular numbers at the hearing, but we've talked about the wide range of numbers.

MS. FOLEY GANNON: Okay, but it was 480 to 520.

MR. FLINT: I mean, yeah, I've heard those numbers. I've heard those numbers related to historic purchases.

MS. FOLEY GANNON: In '08, '09 and '10 is what she said in her testimony.

MR. FLINT: Um-hmm.

MS. FOLEY GANNON: Okay. And yet, you feel that in order to make sure that the acreage is going to be secured, that number needs to be doubled to about a thousand, is that correct?

MR. FLINT: Well, I guess I'm saying that well that works, the REAT agencies, you know, looked at all those numbers and discussed that that works best for a number we're comfortable with for security. And, you

know, just like the PAR analysis happens at the time you identify the land and it's adjusted, you know, the actual purchase price of the land does vary, but this is the number that we think is most appropriate for a security estimate, given our analysis.

MS. FOLEY GANNON: And I'm not sure if you've seen the conditions that the applicant has proposed, but we did also propose for true-ups to be used since the project is being phased. We are proposing phased mitigation. Are you aware of that for the security payments?

MR. FLINT: Yes.

MS. FOLEY GANNON: And I don't know if -- is Mr. Flint the right staff person to ask about the response to that phased mitigation proposal?

STAFF COUNSEL ADAMS: No, he's not involved as much in the specifics of this project.

MS. FOLEY GANNON: Who is the --

STAFF COUNSEL ADAMS: Over this way.

MS. FOLEY GANNON: How about that. Okay, I will ask whichever one of you wants to answer this question. I think you're aware of the phased proposal. Does staff have any objections to the proposed phasing?

MR. WHITE: Staff doesn't object to the proposed phasing.

MS. FOLEY GANNON: Okay, thank you. So with regard to the notion of truing-up the numbers as the phases go on. Is there an objection to that?

MR. WHITE: Not in so many words. Staff's recommendation is to follow the recommendations of the REAT group, which is doing its best to refine the cost estimates for the per acre cost estimates and the other estimates that go into that cost calculation. And staff's recommendation is to stick with the recommendations of the REAT group at the time that a given phase would go forward, I suppose when the security would be posted or the NFWF deposit would be made.

MS. FOLEY GANNON: Okay and just one more question, Mr. Flint, about the long term management funding number. The 1450, you said that was based on the average of 1350 and then just adding some extra funding hundred dollars extra.

The 1350, was that taking into account specific management requirements for Desert Tortoise or any particular species or was this just an average for all management areas, irregardless of what the mitigation was for?

MR. FLINT: It was based on mitigation that occurs in our -- in Fish and Game region 6 that inland desert region for CESA projects and that primarily are all

Desert Tortoise mitigation, either some or all of those projects are Desert Tortoise mitigation. So the number would accurately reflect Desert Tortoise management considerations.

MS. FOLEY GANNON: And just briefly, what are the major management activities that need to be carried out that have a mitigation line for the Desert Tortoise, if can you speak to that?

MR. FLINT: Sure, again it depends on the condition of the property and the quality of the habitat, but it, you know, usually consistently may require fencing and protection. It may require some habitat manipulations, particularly to control invasives. It may require some periodic other types of habitat manipulations. If a fire or something were to occur, it would encompass cleaning up any trash or illegal dumping that might happen on the property. And it would encompass some ongoing assessment of health of the population to that site. Those are typical things and other activities could be more intense or require more work, depending on the quality of the habitat, as it is when it's first acquired.

MS. FOLEY GANNON: Okay. Thanks very much. I have no more questions.

HEARING OFFICER KRAMER: Well, let me just ask

you your proposal to phase, you mentioned a minute ago, could you remind me which condition that's currently contained in.

MS. FOLEY GANNON: It's set up most clearly in Bio 17. It's also referenced in a couple of the others. I think it's Bio 12 and 13.

HEARING OFFICER KRAMER: And the exhibit 108?

MS. FOLEY GANNON: Yeah. Bio 17 is on page -- starts on page 77.

HEARING OFFICER KRAMER: Thank you. Questions from the intervenors of staff witnesses?

Mr. Ritchie?

CROSS-EXAMINATION

BY MR. RITCHIE:

Since we're on the topic, I'll go to this right now. I guess we just reference Exhibit 108 as containing the phasing information. To be clear Exhibit 108, which is titled Calico conditions as revised by the applicant, now Bio 17 that has not been approved and agreed to by staff, as written, in this exhibit correct?

MR. HUNTLEY: No, it hasn't.

MR. RITCHIE: And so in discussing the issue of phasing the compensation, is there -- have those been put down in writing and submitted by staff at this point?

MR. HUNTLEY: No, they haven't. We're still

developing those.

MR. RITCHIE: Okay, thank you. I just wanted to be clear we were.

And then going back to the Email, Exhibit 314, from Ms. Moore. Mr. Huntley, I'm correct that you stated before that you believe this is the criteria that would be required to reach full mitigation for Desert Tortoise; is that correct?

MR. HUNTLEY: This would be one of the components that would be required to meet full mitigation, yes.

MR. RITCHIE: And a necessary component?

MR. HUNTLEY: Yes.

MR. RITCHIE: And do you believe that this component would be required to be implemented before the translocation plan began moving tortoises?

MR. HUNTLEY: Yes, wee need to incorporate many of these factors and clarify many of these factors in the translocation plan.

MR. RITCHIE: And so that clarification and then the implementation of the factors based on that clarification would have to happen before October of this year in order to be able to move a tortoise?

MR. HUNTLEY: Ideally.

MR. RITCHIE: And a few clarification questions on the phasing issue again. When we talk about phasing

the payments, I believe, as I read -- and again, I understand this is still underdevelopment. But as I read applicant's proposal, the security for the payment would be due prior to the initiation of each phase; is that correct?

MR. HUNTLEY: I don't think that's been fully determined right now. I know there's some discussion about whether a full payment is required. Although, staff, I don't believe, is opposed to having the adequate mitigation funds placed up front that correlates to the amount of land that's being impacted.

MR. RITCHIE: Would you concerned about a condition that allowed 12 months for the land to actually be identified and acquired after the initial construction of each phase?

MR. HUNTLEY: No, because there's time required by the applicant to go out and survey these sites and inspect these things and do botanical surveys or tortoise surveys and other surveys that, you know, verify and provide the Energy Commission, the BLM, Fish and Game and the Service with the knowledge that the site adequately meets the mitigation requirement.

MR. RITCHIE: And are there contingencies for if adequate land cannot be identified?

MR. HUNTLEY: I believe there is.

MR. RITCHIE: And that's as written in the --

MR. HUNTLEY: The condition has not been fully vetted by staff yet.

MR. RITCHIE: Okay, and then one final question and I'll be done. And to be clear, so the dollar amount numbers and in Bio 17 Exhibit 108 those are still in flux.

MR. HUNTLEY: I believe they are.

MR. RITCHIE: No further questions. Thank you.

HEARING OFFICER KRAMER: Other --

MR. HUNTLEY: Have I misspoke?

STAFF COUNSEL ADAMS: No, but we could elaborate, since we don't have a draft of the condition that -- where we are now is agreeing to a higher average acre -- excuse me, an average parcel size, which affects the per parcel cost estimates with acquisition. And at the workshop yesterday, we passed out a discussion draft only. It did not have all the details nailed down that reflected a 320 acre average parcel size for this area, based in large part on BLM information. And that compares with a presumed 40-acre mitigation parcel size in the current official SSA condition. We have not agreed to the other changes in costs that we've been discussing tonight.

HEARING OFFICER KRAMER: Questions from other intervenors?

MS. MILES: No questions.

HEARING OFFICER KRAMER: Okay. Anyone on the phone?

Okay.

STAFF COUNSEL ADAMS: I'd like to ask a couple of additional questions. I'll be brief.

HEARING OFFICER KRAMER: Go ahead. Redirect.

REDIRECT EXAMINATION

BY MR. ADAMS:

Mr. White, could you read to us from the transcript of Amy Fesnock's testimony that was mentioned a few minutes ago, and did she give additional information after she talked about the average purchase price of $500 an acre?

MR. WHITE: She did. It's on the following page of the transcript. And I think you'll recall from the hearing that the numbers that were roughly around vicinity of $500 per acre had to do with land sales for lands in wilderness areas where land costs or land values are relatively low due to the absence of roads or the legal built tea build a road.

But on the following page, she says, "A lot of the basis of these costs are from wilderness areas. And as such, we believe them to be lower than what an average acre would cost outside of the wilderness and therefore easier to develop."

In the following paragraph she cites per acre costs of $930 per acre in San Bernardino county, $900. I see a 960 in here, 985 towards the bottom of the paragraph.

STAFF COUNSEL ADAMS: Thank you.

And for Mr. Huntley, there's been talk about mitigation and what is mitigation as opposed to minimization? Do you consider -- when you've answered questions about whether tortoise relocation is mitigation, are you saying that it is -- what are you saying?

MR. HUNTLEY: I'll saying it's one of the components of the overall strategy to reduce, avoid and compensate for impacts of Desert Tortoise. By itself, it's a minimization measure truly. The primary mitigation the land compensation. One of the other mitigations the raven, you know, management things of that nature.

STAFF COUNSEL ADAMS: So you're not equating the use of the term "mitigation" with "compensation" for a project impact?

MR. HUNTLEY: I believe how I identified it in our staff analysis was the CEQA basis for mitigation, which is reduce, avoid, compensate. So maybe I'm not understanding your question.

STAFF COUNSEL ADAMS: No, I think you are. That's the answer I was expecting. And we are not -- is

staff relying on success of the translocation activity to compensate for the project impacts on Desert Tortoise?

MR. HUNTLEY: No, it's to minimize mortality to tortoises on the project site.

STAFF COUNSEL ADAMS: Okay, thank you.

HEARING OFFICER KRAMER: Okay. Now witnesses from the applicant.

MS. FOLEY GANNON: The applicant calls Teresa Miller. Ms. Miller was -- were you sworn last week?

MS. MILLER: I was sworn in Barstow.

MS. FOLEY GANNON: Sworn in Barstow. Still good?

HEARING OFFICER KRAMER: Yeah, this week.

(Laughter.)

MS. FOLEY GANNON: One more week, then you'll have to be sworn again.

(Laughter.)

Whereupon,

TERESA MILLER

was called as a witness herein, and

having been previously sworn, was examined and

testified as follows:

DIRECT EXAMINATION

BY MS. FOLEY GANNON:

Ms. Miller -- turning first to the translocation plan. I think you were here earlier when we heard some

critiques about Dr. Berry of the translocation plan. Can you speak to those overall critiques? Specifically she was -- as I understood it, she was critical of some of the lack of information about the studies that had been done on translocation sites, criteria that was going to be used, that sort of detail. Can you speak to those criticisms?

MS. MILLER: Yes. So she spoke to a lot of the detail that was not included in the translocation plan. And that was details that are either the blood testing or the health assessments, and issues that Fish and Wildlife Service and BLM has spoken about as far as these -- this information is for blood testing we can't do it until we have the Record of Decision, and the permit.

And for the health assessments, we did visual assessments on all of the tortoise that we saw or that we were able to look at. And the surveyors that were doing the -- these visual assessments were highly qualified tortoise surveyors that have been doing either tracking of tortoise on Fort Irwin or other projects within the area.

So they actually had a lot of experience doing those general visual observations of health assessments. Some of the tortoise we couldn't do health assessment on, because they were either face in in the burrows or -- thank you. Is that better a little better, yes much

better, thank you.

So yeah so as far as this kind of data, that's information that is either going to be available upon further -- upon the translocation process and before we move any tortoise.

MS. FOLEY GANNON: How about the type of data that you utilized to identify the appropriate sites or to evaluate the appropriate translocation sites?

MS. MILLER: I think we've talked about that a couple times. And it's -- the habitat that we looked at based on either the USGS models or the vegetation that's on site, or the slopes.

MS. FOLEY GANNON: Right. And I don't want -- you described in Barstow how you did all of that analysis. But Dr. Berry was saying that, you know, she would expect seeing in this plan a lot more detail about, you know, what was the exact vegetation that you were looking at and how did you decide that that vegetation would be appropriate for foraging for the Desert Tortoise, who would be moved there, that sort of thing? Is that something you took into consideration?

MS. MILLER: Definitely, we took that into consideration. There's also -- the translocation plan is also an appendix to the Biological Assessment, and the Supplemental Biological Assessment. So a lot of that

information exists in the Biological Assessment. And the translocation plan was a -- you know, was more of a on the ground kind of definition of how we would do the work. So all of that information was assessed. It just wasn't included in the plan, mostly for conciseness.

MS. FOLEY GANNON: So you were trying to structure this as a plan that you would actually be giving to the people who would be going out and doing the translocations and the information there?

MS. MILLER: Yes.

MS. FOLEY GANNON: Okay, that is helpful.

Then there was a lot of discussions about whether you've done things to look at investigating again the populations and the numbers of the tortoises and the translocation areas. And we don't have to rehash all that ground, but is that something that you've been taking into consideration when were you drafting this plan?

MS. MILLER: Absolutely.

MS. FOLEY GANNON: And in working this plan, I know we heard earlier from Mr. Otahal and some other representatives. You've been working with the agencies?

MS. MILLER: Yes, I have.

MS. FOLEY GANNON: And you were getting direction from the agencies about what needs to be in this plan?

MS. MILLER: Yes.

MS. FOLEY GANNON: Okay, thank you.

Turning now to the mitigation ratios. I won't tread this ground too much again. But there has been, and I think you described when you spoke with us back earlier this month in Barstow about the sort of gradation in the habitat that the found at the site. Can you again describe the difference between the habitat that's in the north, what we're calling the southern portion above the railroad and then below the railroad, and sort of the differences in the value of the habitat in your view?

MS. MILLER: Yes. So the area in the -- the just north of the railroad tracks, it is -- it awe supports a lower number of tortoise, a lower number of burrows. It's been disturbed. In the cultural resources technical report that's been docketed, there was grazing in the 1960s, so the habitat actually still shows some evidence of that kind of disturbance.

And there's -- it's just much different level of quality between these two -- between the area immediately to the railroad next to the railroad and in the northern higher quality habitat.

MS. FOLEY GANNON: And so the difference is in the north is -- obviously, we've talked today about the densities and the number of burrows that are -- are there other differences in terms of the vegetation or the slopes

or is there other differences?

MS. MILLER: Yes. So the differences are the alluvial -- the habitat in the highest quality area is -- has is washers and the deeper cut channel. And habitat that would allow more tortoise use and residents of that area, the habitat in the lower elevation has we might call it is more of a fan alluvial fan type of habitat.

And there's more obviously, if this higher quality we sell more forage available for tortoise in the higher quality habitat. In the north and there's also more -- it's a higher -- a denser habitat as far as creosote scrub and other types of scrub, that allows you a shelter outside of the burrows.

MS. FOLEY GANNON: Oh would you, in your professional view, would you view the area north of the railroad but in the lower portion of that closer in value to the northern high habitat value or closer in value to the area south of the railroad? I know it's kind a gradient but if you're comparing them, which way would you think is closer.

MS. MILLER: I would say, I mean, if we're looking at comparing it for the mitigation levels and a 5 to 1 versus a 3 to 1 or a 1 to 1 ratio, a 5 to 1 ratio up in the northern is pretty high in that habitat is even the

density of that habitat's similar to moderate quality habitat in the planning units -- in the recovery units. That's from looking at the recovery plan and information like that.

And if you're going to look outside to one ratio for that northern, northern high quality part, then you know, the quality of the habitat in the lower elevation and the area south of the railroad tracks is definitely more similar to one another, where you would want to look at a more equivalent type of mitigation ratio for those areas.

I don't know if that answers it.

MS. FOLEY GANNON: That's helpful. So when you were looking at it, you were looking at the features and the densities and the burrows and then you were comparing it to some other sort of higher quality habitat or high quality habitat in the area; is that correct?

MS. MILLER: That's correct.

In looking at it in a larger landscape sense of the overall, the region, and densities of tortoise that are in other areas of the desert -- of the Mojave region.

MS. FOLEY GANNON: Okay. Thank you. No further questions. She's available for cross.

HEARING OFFICER KRAMER: Staff?

STAFF COUNSEL ADAMS: No questions.

HEARING OFFICER KRAMER: Any intervenor?

Mr. Ritchie?

CROSS-EXAMINATION

BY MR. RITCHIE:

Ms. Miller, to start with, I think, I believe since we went over this with Dr. Berry earlier, it would be fair to do so with you. Could you please go over your background and credentials with respect to Desert Tortoise?

MS. MILLER: Yes I've been working with Desert Tortoise, either doing surveys or analysis or general tortoise work for the last 10 years.

MR. RITCHIE: And your education before that?

MS. MILLER: It was a biology -- Bachelor's in Biology. And I've -- I think that's it for now.

MR. RITCHIE: And so the first Desert Tortoise project you worked on was 10 years ago you said?

MS. MILLER: Yes.

MR. RITCHIE: Do you recall the project by any chance?

HEARING OFFICER KRAMER: Can I ask where this is going, because I think we're past the point of the witness as qualifying to testify as an expert.

MR. RITCHIE: We never actually did run over that or stipulate to that.

MS. FOLEY GANNON: Well, we offered her for testimony and we had her CV attached to her testimony, which was give on August 5th in Barstow and there was no questions that were raised about her ability to offer the testimony, either written or orally.

HEARING OFFICER KRAMER: This is rather late in the process for that.

MR. RITCHIE: I won't go into much more detail on this. I would -- not as a qualification as an expert but potentially with one more question.

Have you ever had -- you mentioned last time August 18th, I believe, that you would anticipate being the lead biologist overseeing the actual implementation of the translocation plan correct?

MS. MILLER: Correct.

MR. RITCHIE: And have you ever taken that role before?

MS. MILLER: No, I haven't.

MR. RITCHIE: Okay. Thank you.

So now talked again in discussing Dr. Berry's own discussions about the assessments of the receptor areas. And you stated that you did visual assessments, but not necessarily the quantitative data that she was talking about on the receptor sites. But now to be clear, that's only on the 3,000 acres in the Ord-Rodman receptor sites

that were actually surveyed, correct?

MS. MILLER: Also in the ACEC receptor area.

MR. RITCHIE: The Pisgah ACEC?

MS. MILLER: Pisgah ACEC.

MR. RITCHIE: Which, I believe, can only contain two tortoise now is the estimate?

MS. MILLER: That's correct.

MR. RITCHIE: And so for the 6,000 acres that haven't been surveyed yet, there have been no visual assessments, even cursory, assessments as to the suitability of that habitat?

MS. MILLER: Actually, we have done cursory assessments of it. We haven't walked through the habitat, but we've done windshield and other type of habitat assessment of the area.

MR. RITCHIE: Now, do you agree with Dr. Berry's assessment that, and I believe Ms. Blackford concurred with this, that additional data on the type of soil, the type of vegetation, would be beneficial for improving the success ratio or the success probability of the translocation plan?

MS. MILLER: Yes, I do.

MR. RITCHIE: And do you know when the site was originally identified, the Calico site?

MS. MILLER: Several years ago, I believe, 2005.

MR. RITCHIE: I had 2004, but that's close.

MS. MILLER: 2004.

MR. RITCHIE: But then in the surveys you conduct on the -- in identifying the Ord-Rodman site, those were this year 2010, correct?

MS. MILLER: Correct.

MR. RITCHIE: And now you also discussed with respect to the mitigation compensation, we were comparing -- I guess we kind of have defined 3 different blocks of land, the 5 to 1, the 3 to 1 and the 1 to 1, and you said that the 3 to 1 ratio north of the railroad track was most similar to the 1 to 1 ratio that was south of the railroad track. Is that an accurate statement of your testimony?

MS. MILLER: As far as closeness to the type of habitat densities of tortoise burrows, it's much more similar if you're going the put awe 1 to 1 ratio and look at that kind of level that it fits the densities and that type of thing much better.

MR. RICHARDSON: So the basis of saying they're more similar is based only on the density of tortoise that are present in those two sites?

MS. MILLER: No, that's -- the basis is the density, the quality of the habitat and the similarities of the -- the general similarities of those areas.

MR. RITCHIE: So now in speaking as far as the quality of the habitat, is it beneficial for a piece of habitat to be contiguous with and unobstructed with a larger piece of occupied habitat?

MS. MILLER: Yes.

MR. RITCHIE: But the railroad presents at least a partial block to the pieces of habitat between the 1 to 1 and the 3 to 1 ratio, correct?

MS. MILLER: That's correct.

MR. RITCHIE: So an issue, based on that criteria, it would actually be better in the 3 to 1 area that it is contiguous with the northern regions that are more high quality habitat?

MS. MILLER: That's correct.

MR. RITCHIE: And the same would be true with connectivity issues as far as the tortoise being able to forage up to higher habitat and move into the good quality habitat, whereas in the southern habitat, they'd be obstructed from doing that?

MS. MILLER: That's correct.

MR. RITCHIE: But based off that difference, you still believe that the 3 to 1 area is more like the one to one area?

MS. MILLER: I think there's definitely the value to the connectivity to that area. But I think that, you

know, I'm just speaking about the ratios too of like the jump from the 3 to 1 to the 5 to 1 and the 1 to 1 is -- it seems a little bit arbitrary to jump from those two numbers. So I'm trying to show that the habitat between the northern -- you know, between those two areas is pretty similar. And so if you're going to kind of look at those numbers and put a number to it, I would say that you would look at it as a more of those two as closer, the part just north of the railroad and the part south of the railroad as far as that goes.

MR. RITCHIE: And then, I had just one more question about the DWMA 1 locations in Ord-Rodman habitat. Do you agree with Dr. Berry's assessment that the proximity of that location near disturbed agricultural land creates an increased risk for predation?

MS. MILLER: I think that the DWMA is located directly loss, you know, very close to the existing site. And I think it's comparable -- it' very comparable what we've been seeing on the project site. So I don't agree that.

MR. RITCHIE: So you don't agree that the site being adjacent to agricultural land could create an increased risk of predation?

MS. MILLER: I guess it can create a greater risk of predation, but I just want to point out that it's -- we

picked the sites because they were directly across from the project, and they're similar to the project habitat.

MR. RITCHIE: But isn't it also true that the project habitat is not directly adjacent to the disturbed agricultural land?

MS. MILLER: It's not directly adjacent.

MR. RITCHIE: And with respect to the DWMA 2, that's also directly adjacent to the transmission line running through, correct?

MS. MILLER: Yes, that's correct.

MR. RITCHIE: And would you expect potential edge effects or other negative effects that could be caused by it being located directly adjacent to an area of disturbance, like a transmission line?

MS. MILLER: Possibly. But if you look project site and the density of the project site next to the transmission line, that's high density right next to that and it doesn't show a defect from that existing transmission line.

MR. RITCHIE: Okay, but with respect to the Ord-Rodman site, edge effects by being located near disturbances such as a transmission line or a road, have been known to occur?

MS. MILLER: With respect to -- yes, it can be known to occur.

MR. RITCHIE: And I believe that's actually one of the criteria that Ms. Moore had listed in her testimony. She didn't specifically say a transmission line, but she stated that the sites cannot be located near existing proposed roads, human populations, and disturbances, I believe.

MS. MILLER: That's what was in there, but we just clarified with the CEC staff that it will be -- we'll figure that out and work with the agencies in that sense, as far as those are not hard and fast lines, as far as -- to determine the translocation areas.

MR. RITCHIE: Isn't it also true that the U.S. Fish and Wildlife Service guidance that was released suggested that receptor areas should not be located near human disturbances, roads, right of ways, and other such things?

MS. MILLER: I think that it says that you should determine the location and minimize the adjacent -- the closest to those areas but I don't think it says that it cannot be located adjacent.

MR. RITCHIE: But it suggests that it's potentially not a good thing if not a factor that would eliminate the site.

MS. MILLER: Possibly.

MR. RITCHIE: So possibly so -- are you saying

then --

MS. MILLER: I don't have that right in front of me. I can look at the text for you as far as their guidance, but I understand that we've been working with the Fish and Wildlife agency and using their guidance and their -- that recent guidance and we have chosen those DWMAs and those locations based on knowing that their next to a transmission line and knowing that they're next to grazing. So I think that there is exceptions and there is obviously allowance for that area, as long as the habitat is of high enough quality to be equal or better than the project site.

MR. RITCHIE: But all other things being equal, if the same piece of receptor habitat was available and it wasn't located next to a transmission line, would that be better?

MS. MILLER: Most likely, yes.

MR. RITCHIE: Thank you. I have no further questions.

HEARING OFFICER KRAMER: Other intervenors?

No, okay. Do we have any intervenors left on the telephone? Mr. Brizzee are you still there?

MR. BRIZZEE: Still here, thank you.

HEARING OFFICER KRAMER: Okay, we were just checking on.

Anyone else?

MS. CUNNINGHAM: I'm still here.

HEARING OFFICER KRAMER: Ms. Cunningham, was that you?

MS. CUNNINGHAM: Yes. Basin and Range Watch still here?

MR. WEIERBACH: Newberry is still here.

HEARING OFFICER KRAMER: I'm sorry who?

MR. WEIERBACH: Newberry Community Services District is still here.

HEARING OFFICER KRAMER: Oh, okay. I think you joined us a midway at some point right?

Did you have any questions, Ms. Cunningham?

MS. CUNNINGHAM: No, thank you.

HEARING OFFICER KRAMER: Okay, thank you. I guess that was interference.

MS. BLACKFORD: Can I interrupt. This is Ashleigh Blackford with the Service again. I'm going to need to sign off now. I don't know of anybody I can -- if anybody has any final questions for me, I could wait for those, but --

HEARING OFFICER KRAMER: No.

MS. BLACKFORD: I'm happy to go. Maybe you're line on that. So thank you for being so gracious to ask again. Good night.

MS. BLACKFORD: Good night all. Thanks for everything. By.

HEARING OFFICER KRAMER: Okay, well then that would then bring us to. Staff you had your shot. Okay. So that brick us to the intervenors witnesses then. I'm guessing that Mr. Cashen here. He's probably going the testify.

MS. MILES: Yes, that's correct.

HEARING OFFICER KRAMER: Okay. Mr. Otahal, would you give him your mic. And here Cashen is previously sworn.

MS. MILES: Yes, he is. And we submitted additional testimony for Mr. Cashen on the staff's errata to the Supplemental Staff Assessment, the second errata, I believe. This is Exhibits 454 through 460, as well as we submitted a response and circulated it to the Committee's questions. And I would like to enter that as Exhibit 461.

HEARING OFFICER KRAMER: Okay, get started and I'll get working finding that. When abouts was that sent, so I can find it in my Emails.

MS. MILES: I believe the exhibits were September this morning around 10:45ish, and the response to Committee questions probably 11:30 or noon.

HEARING OFFICER KRAMER: Yeah, I see a 10:45 exactly.

MS. MILES: Oh.

HEARING OFFICER KRAMER: And it looks like 10:49, that might be the rest of the exhibits, and 11:16 for the response. Okay, so go ahead and I will -- I'll be back to you with a number for the response. I think it should be 461, but I'll get back to you.

MS. MILES: That was my guess, yes, Exhibit 461.

Whereupon,

SCOTT CASHEN

was called as a witness herein, and

having been previously sworn, was examined and

testified as follows:

DIRECT EXAMINATION

BY MS. MILES:

Mr. Cashen, would you like to start off by providing any responses you have to testimony or comments from agencies that you've heard today?

MR. CASHEN: Yes, I would. The first thing is is that there seems to be an attempt to imply that the issues that Dr. Berry raised relate primarily to a research program or a detailed scientific study.

And I went back through my notes of what Dr. Berry testified about this evening, and I find that that most of them are actually very relevant to this project. And I'm going to just mention a few.

Dr. Berry mentioned that there was no support for using the 2.5 kilometer buffer around diseased animals, and she gave some hard information to support that conclusion.

Dr. Berry talked about how the translocation plan did not provide any discussion of the types of diseases that would be tested and what the plan was even referring to, when it talked about diseases and those are things that are really important to specify in a translocation plan.

Dr. Berry talked about how DWMA area number 1 was not appropriate in her view, because it bordered private land and it was near an agricultural center. And that there was a dog pack in the Newberry Springs area.

She also talked about both the translocation plan indicating that both DWMA 1 and DWMA 2 had -- the applicant had reported detecting an inordinate amount of carcasses. And she raised the question why would you place Desert Tortoises here?

She also -- Dr. Berry also talked about the problems associated with approving the project and the translocation plan as the way it is now. And that if that were to occur, it would be much more difficult to craft solutions to the problems that we reasonably expect will occur.

And Dr. Berry also mentioned the need to consider climate change and the effect that climate change would have on a translocation site and tortoises that are moved to a translocation site.

So those are just a few of the things that I have in my notes that are relevant to the applicant's translocation plan. And so I would -- I do not want the Committee to perceive what Dr. Berry was presenting as something that would only apply to a research program.

Ashleigh Blackford made a few comments. And there's -- I have a few concerns related to those.

Her first comment was that the translocation plan was not focused on recovery of the species. And that may be true. But I would also think that the plan is also designed not to perpetuate the further decline of the species. It's clearly not intended to try and recover the species, but certainly we need to be concerned about what affects it will have on existing population and how it may hinder the recovery of the species.

Ms. Blackford also talked about their being a lot of additional information that we would like to have or that the Service would like to have, and that Dr. Berry articulated in her comments, but there was not enough time, given the ARRA funding in this case. And I do not find that to be a justifiable reason for overlooking all

the things that are required to try and minimize mortality to a listed species.

As Ms. Miller just testified, the applicant has known about this site since 2004 and has known, I would assume, since 2004, that it is going to have to move tortoises off the site if the project is approved. And here we are six years later, the last day of testimony on biology, at least I think we all hope it is the last day, and the applicant is proposing to move tortoises in October of this year, about five weeks from now, and yet has not been able to collect any data in six years. And we now we have five weeks left.

Mr. Adams had a series of questions or at least a question, I should say, about the precedent of some of the things that Dr. Berry had mentioned. For example, Mr. Adams talked about whether -- or asked a question about whether there was a precedent for a multi-year vegetation study. And my impression of that question was to maybe suggest that a multi-year study would be excessive.

In the response to that question, the response was that the applicant would be required to revert back to the translocation guidance that has been issued by the Fish and Wildlife Service. And I would just like to point out that I think there is a precedent. And I think that precedent is Fort Irwin, which we have heard is the most

recent and maybe only example of a large scale perhaps location program.

And the Fort Irwin translocation program involved an extensive amount of work. There's hundreds of pages of things documented what they did to try and prepare for moving tortoises and to try and minimize the mortality that would occur. And then layers of backups in case things did not occur the way they anticipated.

And just as an example in relation to the vegetation study that was referenced in Mr. Adams' question, Fort Irwin had an entire modeling exercise with about 16 or 17 variables. And this model was developed and tested by several experts in the field of ecology and statistics. And then once the model was tested they went out and field verified the results of what the model had predicted.

And that was used to select the translocation sites. And so I think it points to the fact that we are not in a situation where we are forced to simply throw our hands in the air and say, "Oh, well. Too bad. We wish we could, but we can't", because they could have. They could have done something.

As a matter of fact, this model is available from the Redlands Institute. It's already developed. It already exists. All you have to do is plug in the

variables for your site and boom. And yet there was no attempt to do that.

Ms. Blackford concluded by stating, in response to a question, that we can only base our information on what is available right now. And it's not possible to identify the effects on a receptor population. And I guess I would perhaps agree with that situation, because we never really know what's going to happen, but in science we can develop an inference. And that inference can be pretty reliable based on the information that is used to develop it.

And in this case, I think the information that we have is that we don't have any information. We don't have any quantitative data. We don't have an attempt to try and reliably predict what's going to happen to the host population. And so using that information, I think we can make an inference on what's going to happen.

Mr. Otahal provided additional testimony tonight. And one of the things that he said and that has been discussed by many parties tonight, is that this is a draft plan. And Mr. Otahal expressed that many eyeballs would be looking at this.

Again, the applicant is planning on moving tortoises in approximately five weeks. This is not the time to be passing a draft around to various eyeballs to

get input. I would also say that I contacted the Desert Tortoise Recovery Office and it does not appear that they have been engaged in this process at all.

Dr. Berry who I would consider probably the most knowledgeable person on Desert Tortoises in the world was not contacted to review this plan. And so the question I would have is who is going to be looking at this? When is it going to happen? And are these reliable sources of information that we can assume will improve these plan -- improve this plan?

Mr. Otahal also -- I'm going to skip that one. Mr. Otahal talked about -- made a comparison of this project's translocation plan with that of Fort Irwin, and stated that in the Fort Irwin project, they moved tortoises on a much higher density and that was the primary cause or -- or at least, in my opinion, he suggested that that was one of the primary causes of many of the problems that occurred.

And again, I might agree with that statement. But I might also add that this is a complex situation. If you have too low of density, you're risking the fact -- or you're risking demographic events. If you put one male tortoise out in the middle of nowhere and there's no females anywhere within miles, what's going to happen? He's not going to be able to mate. It's over. So you

have to look at that end of the scale as well.

In this case, we know that the applicant has proposed translocating tortoises in two areas that have experienced large scale die-offs. And so this is a very real situation. If the density is too low, there's no social interaction. There's no mating. And so in a sense, those tortoises are going to pass on, and that's it. They have no value to maintaining the population.

Mr. Otahal talked about blood testing being the best that we can do. And that's not really true. There's a lot of things involved in blood testing that can improve it. As a matter of fact the recommendation now is to have at least two complete series of blood tests taken at different times of the year, because we know that the results of these blood tests are not perfect, and as a matter of fact they're far from perfect.

There's things like the blood to lymph ratio that can be considered, and that can be manipulated to get various results depending on what you're interested in analyzing.

There's also a western blot test that can be used in conjunction with blood testing, and a nasal lavage test -- or -- yeah nasal lavage that can be taken an cultures developed to get additional information that is not available through blood tests. And so the best that

we can do is actually using all of these things together to try and get a very accurate health profile of these tortoises.

Mr. Otahal talked about there being fail-safes being built into the translocation plan. And that's -- I don't see it. It's not -- that's not correct. There's no back-up plan. The original plan wasn't even sufficient, as articulated by Dr. Berry. The original plan doesn't even have enough space for the tortoises that were estimated to have to be moved. Not the mention a back-up plan if you go out there and you find that there's pockets of disease.

Ms. Miller talked about -- answered questions if response that were designed to try and counter some of the criticisms that Dr. Berry made. And I'll conclude with just a couple comments on those.

And those are -- the first thing that she said was that they conducted a visual health assessment of all the Desert Tortoises that they were able to look at. And it needs to be clear that that was very few tortoises. I went through the data sheets and I forget the exact number, but it was a very low percentage of the tortoises that they detected actually had anything written on the data sheet under the health category. Most of them were left blank or it said unknown. Those that did have

something filled out consisted of two or three words.

She also stated that the information had been collected. It just hadn't been put in the plan. It's not on the data sheets. It's not in the plan. I don't know where it would be. It's not in the Biological Assessment. And the data sheets don't even have a category for many of these variables that she's suggesting they collected information on. It's not adding up.

We just concluded with a discussion about habitat quality. And I've talked about this in my written testimony, and I talked about it last week. And I'll just say again that there was no data collect -- no quantitative data collected and these depictions of low, medium, and high, this is completely arbitrary. This is not based in science. This is not linked to any research to any literature, to nothing. This is completely arbitrary. And even Ms. Foley Gannon had said I know it's hard. This is a gradient.

Well, how did you decide this then? Where did you decide to draw a line? If there was no established this is what makes it a 1, this is what makes it a 2, this is what makes it a 3, it's completely arbitrary.

The question from Mr. Ritchie about whether the applicant conducted any surveys of the proportion of the DWMA 2 that had not been surveyed yet, and Ms. Miller said

they had done windshield surveys. That's not adequate.

And in fact, I just went on Google Earth and downloaded some topographic maps and examined them very quickly. There are very few roads in there. So if there was a windshield survey, it wasn't very good. And that's all I'll say on that.

MS. MILES: Thank you.

I wanted you to talk about whether you believe the plan to move Desert Tortoise to the Ord-Rodman Desert Wildlife Management Area is feasible?

MR. CASHEN: It does not appear to be feasible to me. When we met last week, there were questions raised about whether the proposed translocation areas had enough space to accommodate the tortoises that would be moved. And Mr. Otahal said that they could simply be expanded, that these were just, you know, a portion of the DWMA that could be expanded if they needed to be and that this was a form of adaptive management.

And I'd like the direct you to a few of the figures in the translocation plan. And the first would be Figure 4.

HEARING OFFICER KRAMER: Was that the first of the first of series of identically numbered figures?

MR. CASHEN: It's the one titled land use and ownership of relevant recipient control areas. And it's

got yellow and purple and a couple other colors.

HEARING OFFICER KRAMER: Okay, we've got it.

MR. CASHEN: And as you can see on this map, the two proposed translocation areas are shown in this magenta color. And the first thing I'd like you to notice is that there's a lot of private land surrounding them. So they could not be expanded into that private land, which is the purple.

The other part that's not private land is primarily wilderness area. So this is all the area to the south, and for DWMA number 2 it's largely to the west, that is outlined in blue.

MS. MILES: And which one is DWMA number 2?

MR. CASHEN: Sorry, DWMA number 1 is the one to the west that I thought looked a little bit like Oklahoma, and DWMA number 2 is the larger bigger one to the east.

So what's not surrounded by private land is surrounded by wilderness area. And Mr. Otahal last week stated that the BLM's policy is to not allow translocations to wilderness areas. There's not much left and so I don't see how these areas could simply be expanded if they needed to be, which I have established they are needed to be.

The third thing I would like to point out on this is -- it's already been somewhat addressed by Mr. Ritchie

and that's simply that DWMA number 2 is located adjacent to a major transmission line and there's a road associated with that transmission line.

So if you turn to the next figure, Figure number 5, on this figure I just simply wanted to point out that these purple areas are mountains. It shows the relief. And according to the Fish and Wildlife Service guidance that staff has indicated the applicant must comply with, there should not be a natural barrier between the project site and the translocation site.

These mountains ranges would constitute a natural barrier, and so the DWMA translocation areas cannot simply be expanded south of this mountain range.

And then if you turn to the next figure, Figure 6, this is the one that I thought was really interesting, because when I read the translocation plan, it really suggests that these two proposed translocation areas have been identified and assessed and surveyed.

But if you look at this map, you can see that most of DWMA 2 has not been surveyed at all. And yet, the applicant's criteria for establishing -- or the prime criteria for establishing high quality habitat was a high density of tortoises and tortoise signs.

So somehow it was able to assign this area that was not surveyed high quality habitat, but yet the main

criteria that they use to assign high quality habitat was never assessed, was never conducted.

The second thing that I would -- somewhat apparent on this map -- of all the maps, it's probably the best one -- is that you can see north of DWMA 1 is the agricultural land and this is what Dr. Berry was referring to. This is a problem. Agricultural lands are known to support inflated predator populations.

This translocation area is immediately adjacent to pretty extensive agricultural land.

MS. MILES: And are you identifying to the dark circles?

MR. CASHEN: Yes, that's probably the best -- those are irrigated fields. And if you look at an actual aerial image such as something available through Google Earth you can see that there's actually quite a bit more agriculture in this area. Those circles will make it clear.

I guess the other thing that I would add in relation to this question about whether it's feasible for the applicant to move tortoises to these proposed translocation areas, relates to the discussion we've had tonight about the applicant having to comply with the U.S. Fish and Wildlife Service's translocation guidance.

The applicant and the BLM have not done the tasks

and analysis necessary to meet the guidance. And staff's Condition of Certification does not provide assurance that the criterion standards established by the guidance will be met.

And to justify my conclusion I'm going to, as quickly as possible, walk you through some of the eye lights of guidance. The first is that the recipient sites should be at least equal in size to the project site. And if you recall from those maps, they've surveyed a combined total of 3,664 acres. So that's a just a little bit more than half of the project site. And of that 3,664 acres, we have two just junked areas. And so neither is even close to being equal size as the project site.

The second criteria is that the Desert Tortoise habitat be equivalent in type and quality to the project site. And I just talked about that. There's been no attempt to even evaluate habitat. And the evaluation that's been made has been completely arbitrary.

The third is that the translocation site not be -- a designated right of way or other encumbrance. And again, DWMA number 2 is right next to a major transmission line and a major transmission line road. Staff did not assess this impact. And yet, we know that this transmission line needs to be upgraded to support the project. So this is an impact that we know is going to

occur and yet we're planning on moving tortoises there. That needs to be assessed. And that impact needs to be discussed.

The fourth criteria is that the recipient sites should be at least 15 kilometers away from major unfenced roads or highways. And that that distance from roads can be reduced if the proposed action includes provisions to install Desert Tortoise exclusion fencing as a minimization measure.

Well, the majority of both of these proposed translocation sites are within 15 kilometers of Interstate 40 and old Route 66, which are major roads. And yet, there's no condition to require any fencing of either of these roads or to minimize the mortality that would occur when tortoises try and return to their home range after being translocated.

The U.S. Fish and Wildlife Service's guidance also talks about the criteria for control sites. And the criteria are that the potential control sites should be a equivalent in habitat type and quality Desert Tortoise population size and structure and disease status as the recipient sites.

The control site that's been proposed by the applicant does not meet these criteria. It can't even considered close to meeting these criteria. This is what

the translocation plan says. "The control sites shows varying levels of grazing with some areas nearly denuded of vegetation. The bulk of the disturbed areas appeared to have been historically good Desert Tortoise habitat at some point in the past, but have since been denuded of vegetation. These areas are slowly returning to a natural state and could easily support more Desert Tortoise than they currently do, if the habitat quality was improved."

Not even close. And Ms. Miller talked about the grazing that occurred on the project site in the sixties and there were still signs of that impact.

The translocation plan lacks any information to suggest that the control site has a Desert Tortoise population that is equal in size and structure. As a matter of fact, it suggests that it doesn't. And the translocation plan lacks the information necessary to evaluate whether the control site has similar disease status.

Criteria number 7 of the guidance is Desert Tortoises should not be moved prior to concurrence by Fish and Wildlife Service with the health assessments and disposition plans. There is no Condition of Certification to assure that this condition would be met.

Criteria number 8 -- or sorry, item number 8 of the guidance. "Clearance surveys, appropriate health

assessments and subsequent translocation should be conducted during the active season, which the Service has defined as generally between April 1st and May 31st or September 1st and October 15th." There is no Condition of Certification that this condition would be met.

Item number 8 also says, "Any Desert Tortoise encountered during clearance of the power plant site or the perimeter should be given a health assessment prior to being moved to the translocation site or quarantine facility regardless of the distance the Desert Tortoise is expected to be translocated." There is no Condition of Certification to assure that this condition would be met.

Under the same item the guidance says, "If the Desert Tortoise is being moved a I quarantine facility, it will not be fitted with a transmitter until it leaves the quarantine facility." There is no Condition of Certification that assures this condition would be met. And the translocation plans prepared by the applicant proposes to affix a transmitter upon entering the pen. And that's stated explicitly on pages 2-9 and 2-13 of the translocation plan.

Also, under item 8, "After an individual has been certified to conduct health assessments and draw blood and has processed Desert Tortoises for particular project a veterinarian should verify the findings submitted by the

individual to ensure proper placement of the Desert Tortoises." There is no Condition of Certification to ensure that this condition would be met.

Almost done.

Item number 9 of the guidance, "Concurrence with results of complete health assessments and disposition plans and translocation of Desert Tortoise following results of disease testing," from the Fish and Wildlife Service. No Condition of Certification to assure this condition is met.

And finally, under item 10, "Explicit triggers for implementation of adaptive management will be project specific and developed through coordination with Fish and Wildlife Service and State and Wildlife agencies as appropriate." There is no Condition of Certification to assure this would be met. And we've talked about it tonight. It is not in the translocation plan.

Mr. Otahal said that these are developed -- these will be developed -- these are things that need to be in the plan now. These are things -- all of these things make this plan something that cannot be assessed. We have -- we cannot -- we cannot assure that the Service's guidance is going to be met. It makes this infeasible, in my opinion, and unlikely to be effective if these items are deferred any longer.

HEARING OFFICER KRAMER: And you were just reading from the standards from the Desert Tortoise Protection Council or what?

MR. CASHEN: Oh, sorry. This is the -- let me give you the exact title. This was referred to in staff's Errata number 2 in Condition of Certification number 16. It was also referred to in staff's brief. It's a document titled, "*Translocation of Desert Tortoises, Mojave Population from Project Sites, Plan Development Guidance*. U.S. Fish and Wildlife Service, August 2010.

HEARING OFFICER KRAMER: So if it's referred to in condition Bio 16, does that mean that that is -- is it referred to in a way to make it applicable to the relocation plan that the applicant has to produce? Or let me ask that another perhaps to Mr. Otahal, is this plan that he has cited something that you will be applying in your review of the applicant's proposed plan?

MR. OTAHAL: Yes. This guidance is applicable to the plan and Fish and Wildlife Service would not approve of the plan if it does not eventually meet these guidance as we continue to develop this. And it would be inconsistent and I would probably be less than likely to approve such a document as well.

HEARING OFFICER KRAMER: Okay, and I could have answered that question if I'd just read the first

sentence, "The project owner shall develop a final Desert Tortoise translocation plan in conformance with standards and guidelines described in..." that document that Mr. Cashen just referred to.

Well, okay enough said, I think.

MR. WHITE: I would just add that the draft plan is currently available for public review and comment as part of the Bureau of Land Management's EIS and public comments are welcome. And the BLM will consider them.

HEARING OFFICER KRAMER: That's the draft relocation plan for this project you're referring to?

MR. WHITE: That's correct.

HEARING OFFICER KRAMER: Okay. Was that it, Ms. Miles?

MS. MILES: No, that was not it. And I just wanted Mr. Cashen to have a moment the respond to that, because I believe he was trying to make a point that some of these conditions could not be met, that were in the guidance that the Conditions of Certification has said that the Desert Tortoise translocation plan will be in conformance with this guidance. And I think he was trying to make the point that in some cases, it's not possible, based on what applicant has proposed.

HEARING OFFICER KRAMER: We'll accept that point without further iteration of it -- that we understand

that's a point he's trying to make. Although I heard words mostly to the effect that there's not a specific condition saying X, Y, and Z. And that's why I went along the line I was asking.

We do need to keep on a pace here. There is actually a bag of chocolate that's probably about three times what's still left in the bucket at least. But when we run out of that, we are -- we're really in trouble.

(Laughter.)

HEARING OFFICER KRAMER: So can we keep moving.

MR. CASHEN: Yeah, I guess --

HEARING OFFICER KRAMER: So go ahead, Ms. Miles.

MR. CASHEN: There's -- let me complete her thought. And that is --

(Laughter.)

MS. MILES: Thank you. I bet you can do it better than me. So go ahead.

MR. CASHEN: There's actually a few points I'd like to make. One is that it's not feasible to meet this guidance. And the reason that I kept going back to there not being a condition, was because so much of what we've talked about tonight has been justified with the statement, but staff's Condition of Certification Bio 16 accounts for that. And my point is it does not account for that.

The other point was this is not just one little thing. I mean, you all heard me rambling on and on and on and probably wish I'd stop. There's a lot that doesn't meet most of these criteria. So it's not just one little thing that we can turn our ahead against.

Identifying translocation sites, evaluating health, evaluating carrying capacity, evaluating vegetation resources, all the things that Dr. Berry mentioned, these are things that we need to know now. We need to take these seriously. These are not discretionary decisions that can be left up to the applicant at some later date after the project is approved. This is the close of the record here.

We need to be able to rigorously develop mitigation and evaluate the impacts associated with what the applicant is proposing. And we're already starting to see compromises and hasty decisions being made in an attempt to get this project through.

And what hasty decisions are made, there's a real risk of jeopardizing the viability of off site populations, which could be disastrous. And this is not just my opinion, this is articulated in the Fish and Wildlife Service guidelines, which say, "More than one potential recipient site must be identified during the planning to ensure that disease status, Desert Tortoise

densities, or other factors do not prevent the use of the potential sites".

It's also supported by the scientific literature. There was a recent paper presented by Germano and Bishop in the Journal of Conservation Biology. And it reported that the causes of declines, such as the die-offs that were reported by the applicant, must be addressed prior to translocation. And that all necessary precautions need to be taken to avoid spread of disease.

And if release habitat is not high quality, then chances of a positive outcome are low even when all other factors are taken into consideration. And translocation projects should never be undertaken without a thorough consideration of the ecological implications they will have on the source population, the individuals being released, and the ecosystem to which animals are being introduced.

There was also a paper prepared by Berry and others in the Chelonian Conservation and Biology, and they examined the effects of researchers on Desert Tortoise death.

And among other things, one of the things that I found really interesting about this publication was that the researchers reported cues that can be used to identify signs of stress or illness in Desert Tortoises. And they

recommended that scientists and resource agencies develop a protocol for observing the early warning signs, such that appropriate actions can be taken.

So these are things that by planning, we can minimize the mortality associated with a translocation project.

HEARING OFFICER KRAMER: And every so briefly, what does planning involve, more time studying before any action is taken?

MR. CASHEN: That's part of it. The other part of it is having a well developed plan. And one of the things that I noticed in the Fort Irwin documents was a series of decision trees. When you leave a decision up to somebody on the spot, you're really risking what could happen. And when you have specific guidelines that say if A happens, then you do B; and if B happens then you do C, that makes things a lot better. So that would be the other part of it.

HEARING OFFICER KRAMER: Ms. Miles, while our rules of evidence here are looser, I think, certainly than the court, the concept of cumulative evidence is starting to come into my head, that Mr. Cashen is repeating his points and adding just adding additional references. But let me poll the Committee. I think it's pretty clear that we understand his position, and I'm not sure we need to

add additional citations or reiterations of it. But if there's something else you have to offer, please go ahead.

MS. MILES: One moment.

Okay, so I just have one last question. And my question relates to what could go wrong as a result of not doing the proper planning up front, so that we can get a better picture of why we think that planning all of this work to develop a very rigorous plans needs to occur before the project is approved, and so I just wanted to ask that last question of Mr. Cashen?

MR. CASHEN: Yeah, there's several main things. The first is that based on thousands of studies on wildlife population dynamics, when carrying capacity is exceeded, we generally observe compensatory mortality or the population crashes.

Translocations have been implicated in unintentional spread of disease. And this is isn't just theoretical, this is real. Chytrid Fungus, which has devastated many of California's native amphibian populations, has been tracked back to failed translocation projects.

We know that Desert Tortoises carry many diseases. And spread of disease is one of the primary threats to the population.

It could also shift predator prey dynamics to the

point of no return. And briefly to explain how that works, when you add additional prey animals to an area, the predators are more successful. They have more food, and so they can reproduce, and there's a higher survivorship of their offspring. And those offspring have a higher survivorship and they reproduce.

And the population balloons to the point that they decimate the prey population to such a low level, that it can no longer recover.

And the final thing is genetic contamination, and reducing an organism's ability to respond to climate change. These are all -- this is beyond what's happening to the 189 tortoises on the project site. This is what could happen when we move animals to the Ord-Rodman DWMAs without doing our homework.

MS. MILES: Thank you, Mr. Cashen. I have no further questions.

HEARING OFFICER KRAMER: Questions for Mr. Cashen from the applicant?

MS. FOLEY GANNON: No questions.

HEARING OFFICER KRAMER: Staff?

STAFF COUNSEL ADAMS: No questions.

HEARING OFFICER KRAMER: Any other party, including those on the phone?

Okay, does any other party have any testimony

they wish to produce this evening on biology?

(Laughter.)

PRESIDING MEMBER EGGERT: I want to take a very brief moment and thank those that did provide responses to the Committee. And I want to make sure that I've got the responses from the staff, from the applicant, and from Mr. Cashen. I appreciate all the footnotes and references, Mr. Cashen.

Was there any others that have provided that? I just wanted to make sure I didn't miss any.

HEARING OFFICER KRAMER: I note the applicant's was attached to their brief at the end.

MS. FOLEY GANNON: That's correct.

HEARING OFFICER KRAMER: Do you feel the need to give it exhibit status?

MS. FOLEY GANNON: Yeah.

HEARING OFFICER KRAMER: Okay so --

(Laughter.)

HEARING OFFICER KRAMER: Okay so, what I'll do then is separate that eventually from your brief.

MS. FOLEY GANNON: I can send a different electronic version of it, if you want or we can separate it, either way?

HEARING OFFICER KRAMER: Actually, that would save me one little bit of work, and that's fine with me.

MS. FOLEY GANNON: We would be so happy to do that for you.

HEARING OFFICER KRAMER: So now we're up to 110?

MS. FOLEY GANNON: We should be at --

HEARING OFFICER KRAMER: I think the last one was the map that was -- that's still projected on the screen.

MS. FOLEY GANNON: Yes, that's right.

HEARING OFFICER KRAMER: So 110 will be --

MS. FOLEY GANNON: So 110 will be our --

HEARING OFFICER KRAMER: -- applicant's answers to committee questions.

MS. FOLEY GANNON: Um-hmm.

(Thereupon the above-referenced document was marked by the Hearing Officer as Exhibit 110.)

HEARING OFFICER KRAMER: Okay. I didn't hear anybody else offer any testimony, so that would just leave us with the discussion of where we are on the exchange of ideas for amendment to the biological conditions. And can we have that discussion with reference to Exhibit 108?

MS. FOLEY GANNON: I'm sorry what was can question?

HEARING OFFICER KRAMER: Oh, talking about the different proposed changes to the biological conditions. I guess that's not so much posed to you, since you

produced 108, but --

MS. FOLEY GANNON: I'm comfortable with that.

STAFF COUNSEL ADAMS: 108 is today's version?

MS. FOLEY GANNON: Yeah, today's version of your --

HEARING OFFICER KRAMER: Yes, formerly warm.

STAFF COUNSEL ADAMS: Yeah, we can -- we're happy to go through it in reference to that, to identify areas of agreement and disagreement.

HEARING OFFICER KRAMER: Yeah I, think we're going to -- the Committee is going to end up with enough to decide, so anything we can at least know about your agreement regarding would be helpful. We can't guarantee we'll always agree with all of you, but it's somewhat persuasive.

MR. RITCHIE: So Mr. Kramer, just to be clear, we're using this just kind of as a reference. The actual numbers in here we all agree with not agreed upon at this point, at least with respect to Bio 17?

HEARING OFFICER KRAMER: Well, we'll see when we get to it.

MR. RITCHIE: Well, my concern is, I mean, we've been referencing these numbers. They build on each other. You know, this times three or times five and then multiplying by a dollar amount, comes up with some

conclusions of what the numbers are in here. And I would be concerned of just keeping up with the math of all of these numbers if, you know, the baseline numbers aren't agreed to.

HEARING OFFICER KRAMER: Well, I guess we really need to call them out. I recognize that a decision is going to come out, and I would be shocked if we get every condition perfectly correct. So you will no doubt be commenting that there are some -- the subtle or less than subtle changes that need to be made down the road.

But let's try to call out everything we can spot today that -- and try to come to a common understanding of which you believe is proper or understand your disagreement.

MS. FOLEY GANNON: So we're just going to start with Bio 1?

HEARING OFFICER KRAMER: Sure.

MS. FOLEY GANNON: And we agreed with staff's proposed Bio 1.

HEARING OFFICER KRAMER: And is that what's reflected here?

MS. FOLEY GANNON: That's what's reflected here.

HEARING OFFICER KRAMER: Okay.

MS. FOLEY GANNON: Again, when there's no changes in here, this is Supplemental Staff Assessment as modified

by the erratas. So the baseline is staff's version.

STAFF COUNSEL ADAMS: You've taken the most recent staff submittal for every -- each condition.

MS. FOLEY GANNON: For each condition.

STAFF COUNSEL ADAMS: And the red lined reflects back to that.

MS. FOLEY GANNON: Correct.

STAFF COUNSEL ADAMS: So it's either the Supplemental Staff Assessment, whenever that was --

MS. FOLEY GANNON: Right.

STAFF COUNSEL ADAMS: -- or the second errata.

MS. FOLEY GANNON: That's correct.

STAFF COUNSEL ADAMS: Well, I don't know how this works for intervenors, but just in an attempt to accelerate the process, I -- my notes indicate that 1 through 6 are unchanged from staff's Bio 1 through 6 in the Supplemental Staff Assessment. And if that's the case --

MS. FOLEY GANNON: I think we go up to 7, don't we?

MR. WHITE: If I'm not mistaken, wasn't there a comment earlier today that the applicant and BNSF had discussed a couple of bio measures, Bio 6 and Bio 15, if I remember right.

MS. FOLEY GANNON: Bio 6.

MR. WHITE: And are those edits reflected in --

MS. FOLEY GANNON: This is -- that is not reflected in this version.

MR. WHITE: Do we need to talk about those?

MS. FOLEY GANNON: But there is -- we have those that were submitted today. So question talk about that in 6, yes. So that would be the first one to talk about is six.

MR. HUNTLEY: Does the WEEP training include inclusion much language for BNSF safety training?

MS. FOLEY GANNON: That's right.

HEARING OFFICER KRAMER: Mr. Lamb, you might as well come up to the mic, so we can get you.

So then you're speaking to Exhibit 1209 as this --

MR. LAMB: That would be correct, sir.

It is the two-page, it's on the second page.

HEARING OFFICER KRAMER: Okay, and --

MS. FOLEY GANNON: The two bios are, yeah.

HEARING OFFICER KRAMER: And it's a little bit cryptic because it just describes two additions, but not exactly where they would go. So maybe you'll need --

MS. FOLEY GANNON: We have added them in on our computer. We have not printed them yet. So we could send them to the parties, if they wanted to see what Bio 6

looks like when it has this incorporated in.

HEARING OFFICER KRAMER: Okay, but just for discussion, if you can just tell us which paragraph it's going to follow, that will help. So we're on Bio 6, and changes in Exhibit 1209 and that's to add a single paragraph somewhere in Bio 6.

It looks amenable to being another numbered requirement.

MS. FOLEY GANNON: Yeah, it is. And we put it in -- Oops, it just moved, sorry.

We were just there. We added a new number 5, that included his language.

MR. LAMB: And I think for clarity's sake, I think you changed Calico Solar to project owner for conformity.

MS. FOLEY GANNON: Yeah. So exactly what we inserted was, "Require all property owners contractors and employees to participate in BNSF environmental sensitive training programs prior to commencing work at the project site."

And then the old 5 becomes 6 and so on.

MR. WHITE: And staff is fine with that.

HEARING OFFICER KRAMER: Any objections to that?

Okay, next change.

There is something in Bio 7.

STAFF COUNSEL ADAMS: There is Bio 7, there's a small change of -- from 60 days prior to start of construction to 30 for, was it aerial photographs? And I think staff was okay with that change.

HEARING OFFICER KRAMER: Did any other parties have a comment?

Okay. Where's the next one?

STAFF COUNSEL ADAMS: From staff's perspective, I think next condition that has changes is number 12 the plant mitigation.

MS. FOLEY GANNON: Yes, I think that's right.

STAFF COUNSEL ADAMS: And staff has concerns about several aspects of this. And among the things it does is significantly change the endowment costs. It also nests the security. By nesting the security, it means that additional security isn't required for plant mitigation compared to over and above the Desert Tortoise mitigation. And while I think we agreed yesterday to explore that issue with internally and with REAT we haven't had an opportunity to do that yet.

HEARING OFFICER KRAMER: When you say nests, do you mean it combines, it gives credit for two requirements to the same money?

STAFF COUNSEL ADAMS: Yeah, it may not --

MS. FOLEY GANNON: What it's proposed in saying

that the 14,000 plus acres of land that have to be acquired under Bio 17, it's reasonable to assume that that is going to also acquire this -- it's actually very anyone mall plant off-site mitigation. And that there shouldn't have to be extra funding provided, because there is enough of a basis to say that the 14,000 acres of land will mitigate this as well. So there shouldn't have to be additional security is what our proposal is.

HEARING OFFICER KRAMER: And you're also using the land for two different purposes correct?

MS. FOLEY GANNON: Well everyone's agreed that that's fine.

HEARING OFFICER KRAMER: Oh, okay.

STAFF COUNSEL ADAMS: Whether the mitigation itself can nest would depend on whether the land found and acquired for tortoise habitat includes the required plant community.

MS. FOLEY GANNON: And what we propose is a back up saying that it's the reasonable assumption up front that this security for providing for the acquisition of, you know, ultimately over 14,000 acres of land is sufficient to ensure that that impacts women be mitigated.

If it turns out that the land that is acquired does not have the plant species on it, then the security that's equivalent to the amount that's knead today acquire

the plants will be kept in -- will be held.

So if it turns out that the land doesn't have it, the money will be kept as security. But we're just saying, it shouldn't be required up front because it's not necessary to provide reasonable certainty, right on top of the 58 million.

HEARING OFFICER KRAMER: And, Mr. Adams, what could go -- what could go wrong with not requiring what the concurrently requires or one of your witnesses?

STAFF COUNSEL ADAMS: Well, there's not a presumption -- there's a belief that many of the non-tortoise mitigation requirements that require compensation land can be met within the acquisitions for Desert Tortoise, but there is not a guarantee of that.

So staff's thinking has been that it would be appropriate to secure the full amount of mitigation that would be required, so for Phase 1A -- well, maybe 1B is a better example. There would be a certain number of acres of tortoise habitat required and a certain number of acres of specific plant habitat potentially required. And those would be separately secured, so that if they did not find the kind of plant habitat that was also Desert Tortoise habitat, that they would be covered.

HEARING OFFICER KRAMER: So Ms. Gannon, are you asking that it be assumed that the habitat is going to

cover both requirements until proven otherwise? And, at that point, an addition a security would be provided?

MS. FOLEY GANNON: Absolutely. And I think that in thinking about the reasonableness of this to be able to meet this requirement, it's important for the committee take into consideration we've been talk tonight about a number of the conservative estimates that are based in these numbers to make sure that everything is adequately covered. And we think then to add on top of that another conservative estimates -- all of these conservative estimates -- and we're hoping that you will reconsider some of them, but all of them together we think is really just gets the security number out of this world and really unreasonably related to the mitigation that's required to offset the impacts associated with this project.

So we think it's an reasonable assumption, particularly given just the number of acres of mitigation that has to be secured under the conditions, even as we're proposing them.

MR. RITCHIE: Mr. Kramer, we would be concerned with the proposal as the applicant's putting forward for a couple of reasons. One, as staff indicated, there's no guarantee that the lands would be able to be nested. And as we discussed earlier, it could take up to 12 months to identify these lands and figure out even if they're

available, let alone whether they're adequate for both purposes.

And then the applicant is also proposing phasing, which further kind a draws out that risk. You know, if this project goes in, and there's insufficient security, you know, that land is disturbed, it's destroyed, it takes 12 months to identify the new lands, if this project goes bust, there's no indication that they would -- that there would be sufficient security to find all these lands. And so we're just concerned that this is kicking the can down the road too far, too many times.

HEARING OFFICER KRAMER: Okay, so there are other changes proposed in this section, which I don't believe relate to nesting. So is nesting really the only issue that staff has?

MR. WHITE: No. There's several small wording changes -- or seemingly small wording changes, that there's -- I suppose it would be fair to say there's a little bit more nuance and detail that needs to kind of go into each one of those. Staff, I think, understands the applicant's intent in suggesting those wording changes and by and large by agree with the intent but not necessary the wording itself. So we would expect to be able to provide an alternate version, I guess within a day or two. But just now, we still want to work on this a little bit

farther.

HEARING OFFICER KRAMER: Okay, so the nesting requirement is really the top of page 49; is that correct?

MS. FOLEY GANNON: That's correct.

HEARING OFFICER KRAMER: Okay, I'm just trying to pick this apart and understand it. Okay, so staff would like to file additional argument I suppose it is or -- yeah it's in the nature of argument or suggestion, at some point prior to early tomorrow morning, which is seeming to be the --

(Laughter.)

HEARING OFFICER KRAMER: Or following early tomorrow morning. And then I suppose the applicant would want to perhaps respond to what staff files --

MS. FOLEY GANNON: I think we would be comfortable with you having the ability to look at what we've submitted and look at what they've submitted and make a choice, put it in a preliminary decision and we could comment on that.

HEARING OFFICER KRAMER: Okay, so we need to set a deadline for that sort of thing. And it has to be very soon. So Mr. Adams is the end of the day tomorrow workable for that?

STAFF COUNSEL ADAMS: I think if this is the only condition we're talking about, yes. But there are a

couple of conditions with considerably more issues in our view and may -- so -- yeah we can certainly shoot for something -- well can we -- are you two working?

HEARING OFFICER KRAMER: Well, let me put it this way. There will be a point in time where can you send in whatever you want, but it just won't be possible for it to be considered. And I would suggest that Friday morning is the latest for that.

STAFF COUNSEL ADAMS: Okay.

HEARING OFFICER KRAMER: And, I mean, you know, the mid-morning, not right before lunch.

Okay so agree to disagree on all of bio -- boy these are long.

MS. FOLEY GANNON: Bio 12.

HEARING OFFICER KRAMER: Bio 12.

So what is the next condition question talk about?

MS. FOLEY GANNON: Bio 13, starts on page 57.

So and just for an explanation for the changes in 13, most of this is more procedural and it's the same as what we are suggesting in 17. We talked about this with staff at a couple of workshops. I think they were thinking about it. We can hear what their response is.

Within Bio 13, we're agreeing with the mitigation acreage numbers. We're agreeing with the way that is set

up, but we were trying to make a little more streamlined and then a little bit less -- have it be not overly prescriptive but having the criteria included.

So when we were trying to work on our comments, we found the structure to be a little bit hard to work with, so we ended up coming up with a new structure, which we have proposed.

HEARING OFFICER KRAMER: So the first sentence refers to revised estimates.

MS. FOLEY GANNON: Acreage numbers not the compensation numbers.

HEARING OFFICER KRAMER: Okay, the first sentence still talks about revised estimates. Is it revision process done then in this new formulation?

In other words, have you settled on the 207.5 acres of habitat.

STAFF COUNSEL ADAMS: That's an issue we can talk about. I think staff is comfortable, at least tentatively, if we have buyer's remorse, we may comment on this in the PMPD. Just talking at the table tonight about it, we're probably comfortable with dropping the requirement for further delineation.

MS. FOLEY GANNON: We thought it was 207, so I mean that's what we thought now, but we appreciate what your saying.

HEARING OFFICER KRAMER: So should --

STAFF COUNSEL ADAMS: Well, you're proposing to drop the requirement for future delineation, right?

MS. FOLEY GANNON: Correct.

HEARING OFFICER KRAMER: So is it appropriate to refer to them as revised estimates in the first -- very first sentence or -- to my ears that implies that there may be a further revision process.

MR. WHITE: That is referring to the language that's struck below table 17.

MS. FOLEY GANNON: Right.

MR. WHITE: So that word revised could come out of the first sentence too.

MS. FOLEY GANNON: Where is that word revised?

MR. CASHEN: And I'm going to object to these changes. Staff did a two-day field evaluation early this year, determined that the applicant had not accurately identified or delineated habitat for Mojave Fringe-toed Lizard. This is an organism that is on the decline. It's of great concern to the agency. And staff's condition required that there be a reliable estimate of the amount of habitat on the project site. And making this change would eliminate that and revert back to a two-day field assessment that did not even cover a large amount of the project site.

MR. HUNTLEY: Staff understands your concern. We provided the initial text for a similar reason. We did the two days in the field. Then we did an aerial GIS exercise, mapping washes and things like that. We felt the number could go up or down a little bit, and that's why we put it in to have the applicant, you know, verify where -- what the acreage is. We're willing to stand on our 207 acres at this point in time.

HEARING OFFICER KRAMER: Okay, we will decide it on the basis that staff and applicant agree with that additional modification, and CURE does not.

MR. RITCHIE: And to be clear, the agreement was on the acreage. Again, the numbers for the value of the land we're not agreeing.

MS. FOLEY GANNON: We will get to that, but we are agreeing on the acreages right now.

HEARING OFFICER KRAMER: Okay, are the numbers in this condition -- it looks to me like they were crossed out.

MS. FOLEY GANNON: Oh they come in later --

HEARING OFFICER KRAMER: Oh, no.

MS. FOLEY GANNON: -- because we rearranged it.

STAFF COUNSEL ADAMS: Well, still on page 57, I notice there's a cross out of 18 months and a substitution of 24. I think at our understanding at the workshop

yesterday was that if staff's agreement to phase not only the security, which was the applicant's original request --

MS. FOLEY GANNON: Yep.

STAFF COUNSEL ADAMS: -- but for us to also phase mitigation from combined phase 1A and 1B, and separate that from phase 2, that they were happy with the 18 months. So I don't think any change is reflected in these conditions with a change to 24 months from ground disturbance to providing mitigation land should be made, is that right?

MS. FOLEY GANNON: That's correct. You're right. We didn't catch that. Sorry.

HEARING OFFICER KRAMER: And so we still have numbers on page 62 and 3. And let me ask, is this self executing, so that when new numbers are come in, that it will automatically be adjusted?

MS. FOLEY GANNON: It is when it's an Excel table, but in this it's a Word version.

HEARING OFFICER KRAMER: No. No, I mean when it operates as a condition.

MS. FOLEY GANNON: Right.

HEARING OFFICER KRAMER: So the numbers -- these numbers are examples, but does the condition contemplate that they could change before the condition is used?

MS. FOLEY GANNON: As we have drafted it, these are the placeholder numbers, and there is this provision for truing-up the numbers, which could be based on agreement with the REAT agencies or some other forum.

If there is nothing that changes, then this would be the number that would be the basis for security. If we are actually acquiring the lands ourself, then obviously the cost will be what it is.

HEARING OFFICER KRAMER: So does that answer your concerns, Mr. Ritchie?

MR. RITCHIE: Well, I don't think so, because I think when we say nothing is changing, my last impression of staff's opinion was a 5 to 1 mitigation ratio that we're comparing things to, and dollar amounts that are not reflected in this version of the document. For instance --

HEARING OFFICER KRAMER: Well, this is the lizard not the tortoise.

MR. RITCHIE: Right, but they also refer to the land acquisition value. I believe in here it's referenced as 692 and I believe there was a dispute of whether that should be 1450 or 692.

MS. FOLEY GANNON: Well, the land acquisition is 500 per acre. The 692 is for the long-term management funding.

MR. RITCHIE: I'm sorry, that was the long-term planning. I'm sorry, I mixed those up. But that's another one where the 500 versus the 1000.

MS. FOLEY GANNON: The parcel size, the acre -- the cost per acre and the long-term management funding. Those are the three numbers.

MR. RITCHIE: Right, so those numbers, to the extent they're placeholders, are the low estimates that applicant has proposed. They're not the status quo of what staff is currently proposing.

MS. FOLEY GANNON: Um-hmm, that's right.

MR. WHITE: Staff would comment. Condition 13 and 17 contains similar language with regard to the security, the amount of security, calculating the amount of security, and a variety of other considerations that go into, not only security, but the mitigation lands themselves, and the NFWF account and so forth.

We've worked with the applicant with a different revision to Bio 17, rather than 13. But the structure and text and calculations are very similar.

MS. FOLEY GANNON: Right.

MR. WHITE: We would suggest that the applicant provide us with comments on the discussion draft that we provided yesterday, bearing in mind staff will continue to recommend using the REAT estimates for various parameters

that go into calculating the security. And, as you suggested, if REAT suggests other numbers at some point, then there is language in there, we believe -- although you're welcome to edit it, to accommodate those changes as REAT develops them.

But Bio 13 and Bio 17 kind of go and in hand, in terms of their approach to funding.

HEARING OFFICER KRAMER: And we don't have your new Bio 17 in front of us do we?

MR. WHITE: No, you don't. It was a discussion draft that we worked with a little bit yesterday, but we'd be glad to provide it.

STAFF COUNSEL ADAMS: Well, I'd suggest that if we're taking a day or day and a half to try to whip some of our proposals into shape. That would be a good candidate for it, because not everything was nailed down in what we provided at the workshop. And we did -- just to elaborate for a second on what Scott said.

We did have in what applicant character rises as a reorganization and simplification, there are a number of wording changes. And you know the details are very important in these conditions. And we came across a number of provisions that were not equivalent. I mean, on the surface, they were somewhat parallel, but certainly not equivalent from a regulatory standpoint and were

concerned to us. And we spent a fair amount of time in this working draft for the workshop in parsing through that in Bio 17.

And I think the issues raised by the reorganization and simplification as its characterized is -- but unless we're going through this line by line, it's going to be hard to identify them all.

So I think in light of that, we can -- can we do Bio 17 by Friday, and --

MR. WHITE: We'd really welcome having suggested edits to the discussion draft, that we worked with on Bio 17. That would make the task go a lot faster.

MS. FOLEY GANNON: We'll try. I mean we still think this really is a good approach. We think that this is not an overly prescriptive approach.

STAFF COUNSEL ADAMS: Well, we --

MR. WHITE: But we think ours is better.

(Laughter.)

MS. FOLEY GANNON: We think that this captures it. Yeah, well, I know. That's why I'm trying to figure out is if this is just one -- and I know we are committed to trying to resolve as many things as we can, so we don't have to leave it up to you. I mean obviously you have to make the final decision, but the more things we can get resolved ahead of time, we know is better.

But we'll look at it again. I have to say I didn't look at it obviously today, and I have to do that again.

STAFF COUNSEL ADAMS: That was an attempt by staff to go through the changes you had recommended and accept them to the degree we felt comfortable with them and tweak language you'd propose.

MS. FOLEY GANNON: Okay, I understand that.

STAFF COUNSEL ADAMS: So it's going to be kind of wasted effort to some degree, if you --

MS. FOLEY GANNON: Can you send us a Word versions of that.

STAFF COUNSEL ADAMS: Yeah.

MS. FOLEY GANNON: If you could send us that in morning, that would be helpful.

STAFF COUNSEL ADAMS: Well, I guess we -- well I don't know we'll figure that out.

MS. FOLEY GANNON: She wants it tonight.

MR. WHITE: I'm not sure about the procedural rules.

MS. FOLEY GANNON: Of sending it out?

STAFF COUNSEL ADAMS: Yeah send it to the entire list.

MS. FOLEY GANNON: You send it to the parties. You send it to everybody.

MR. WHITE: Oh, we sent an Email already.

MS. FOLEY GANNON: Just if you send it to all the parties.

MR. RITCHIE: And Mr. Kramer, I'm somewhat afraid to ask this question. But I don't suppose there's going to be any opportunity to comment on the proposed mitigation measures at all by intervenors?

HEARING OFFICER KRAMER: You mean the conditions?

MR. RITCHIE: The conditions, yeah.

HEARING OFFICER KRAMER: Can you try filing something by the end of Friday, but -- I mean, you have a lot of time.

MR. RITCHIE: In this case again, I'll note our concern, I believe you understand, is you know Sierra Club objects to the inability to review and comment Conditions of Certification, which are vital to the mitigation of the project.

HEARING OFFICER KRAMER: We understand, and there still is the PMPD comment period.

MR. RITCHIE: Yeah.

HEARING OFFICER KRAMER: It might be a good time to note that we have tentatively on our calendars booked August 20th for the PMPD comment hearings. Is that a Monday?

STAFF COUNSEL ADAMS: That's happened.

MS. FOLEY GANNON: September 20th

HEARING OFFICER KRAMER: September, yeah, right. It's late.

And we had the idea that we could do Imperial in the morning and

(Laughter.)

HEARING OFFICER KRAMER: -- and Calico in the afternoon. So you really think it's possible?

MS. FOLEY GANNON: Sure.

HEARING OFFICER KRAMER: Okay optimism rains.

MR. RITCHIE: Can I note for the record I'm getting married that week.

HEARING OFFICER KRAMER: Well, congratulations. Later in the week.

MR. RITCHIE: So I may not be bothering you as much that day.

HEARING OFFICER KRAMER: Oh, okay. Well, you can send Gloria.

MR. RITCHIE: Sorry.

HEARING OFFICER KRAMER: So mark your calendars, because that's a date that worked for the people up here.

MS. FOLEY GANNON: Imperial in the morning and Calico in the afternoon is what you're thinking?

HEARING OFFICER KRAMER: Yes. So Calico may not start right away. But there's so many of the same people,

it just seemed right to try to have it that close together with we could.

Okay, but I'm seeing that we're going to probably have a bunch of business, and maybe we'll be having these same discussions then. Have we done about all we can for Bio 13 then at this point?

MS. FOLEY GANNON: I think so.

HEARING OFFICER KRAMER: Okay. Next?

MS. FOLEY GANNON: Bio 15, is that what this is?

This is one in which again BNSF and we agree to add language. And this was on the second page of the exhibit -- what was the exhibit number?

MR. LAMB: 1209.

MS. FOLEY GANNON: And what we did with this language, was we put it under 1E, and we -- and let me read it, because we changed it slightly.

We said -- derailment or other emergency is the subtitle. "In the case of derailment or other emergency, project owner is required to provide BNSF excess to the project site for emergency response. This access may include, among other activities, temporary removal of portions of Desert Tortoise exclusionary fence and the placement of a temporary fence."

HEARING OFFICER KRAMER: So that's in addition to the existing B?

MS. FOLEY GANNON: It's an existing -- no, it's a new 1E.

HEARING OFFICER KRAMER: Oh, okay.

MS. FOLEY GANNON: It's under the Desert Tortoise Exclusionary Fence Installation Section.

HEARING OFFICER KRAMER: I see.

Any comments from the parties?

MR. WHITE: Staff has no objections.

HEARING OFFICER KRAMER: Ms. Gannon, this all going to be reflected in yet another version of the --

MS. FOLEY GANNON: We have it -- we can submit it electronically.

HEARING OFFICER KRAMER: A Word version at least for the Committee.

MS. FOLEY GANNON: Sure.

HEARING OFFICER KRAMER: Okay, what's the next discussion point?

MS. FOLEY GANNON: We've added a new 1E.

STAFF COUNSEL ADAMS: One of our concerns is that there are existing criterion in the condition about how long a fence can remain down without new surveys and so forth. So we'd want to make sure those parameters apply to the emergency removal by BNSF.

MS. FOLEY GANNON: I think that's right. That's the intent.

STAFF COUNSEL ADAMS: Is it in the same paragraph as the others?

MS. FOLEY GANNON: It's all under -- this is all the same paragraph, isn't it?

MR. WHITE: In our paragraph D, which precedes that, we've got the statement, "Any damage to the fencing shall be temporarily repaired immediately to keep tortoises out of the site and permanently repaired within 48 hours of observing damage."

That parameter might -- I don't know from --

MS. FOLEY GANNON: We can take part of that same language and put it in.

MR. WHITE: If we -- we might need to edit that a little bit and put it into this one, but that would be the idea.

MS. FOLEY GANNON: Okay, we will get that in this language before we send it to everybody tonight or tomorrow morning. It has to be the same language tweaked from D into E on the timing.

Okay, then I think the next discussion is in Bio 17, which I think is going to be pretty much the same result as Bio 13, because as Mr. Adams said, it's realty same comments in regard to the proposed restructuring and the phasing and the compensation amounts and our commission still reflects 3 to 1 and 1 to 1. It does not

have the 5 to 1 included in it.

MR. RITCHIE: And just briefly for the record, since we won't have much time to comment on it later, Sierra Club does officially object to including phasing for the security mitigation. We don't believe that it's appropriate to defer security payments for -- once the impacts begin. We think they should all be mitigated for and they should all be secured at the beginning of the project.

HEARING OFFICER KRAMER: So that would include phases 1 and 2 at the beginning?

MR. RITCHIE: Yes.

STAFF COUNSEL ADAMS: I'm not sure I understand that position that -- so if a particular phase as a 250 acre impact, then the security is being provided.

MR. RITCHIE: I believe we talked about it earlier. Mr. Huntley quite adequately talked about how there are kind of other factors that are considered in the mitigation lands, and in the mitigation payments, things like disruption to connectivity, disruptions to contiguous habitat. It's not just a pure number of tortoises, density of tortoises, acres of land, equation in what is being mitigated here.

And so we're concerned that, you know, once this project -- once this pristine land is disturbed, you know,

there are effects beyond just the being able to carve out whatever small amount of construction may have happened up to that point.

And if this land is -- if the mitigation the phased, then those impacts would not be accounted for and Sierra Club is concerned about that.

STAFF COUNSEL ADAMS: Okay.

MS. FOLEY GANNON: And the only thing I would say is that it's going to be based on the ratios that's sets at the habitat values. So if it was the higher habitat values that was impacted, it would be 5 to 1 mitigation as a security base.

MR. RITCHIE: We disagree with that position.

MS. FOLEY GANNON: All right.

STAFF COUNSEL ADAMS: I'd also note, just for the record, that staff, as we evaluate this, and this may be a challenge by Friday, intend to identify any indirect effects or, you know, isolation of habitat and include that in the appropriate phase. So it's not just a footprint.

And the other thing is that in a way, I think phasing can be seen as a benefit, in that it defers as opposed to authorizing take and -- throughout the project site, it limits it and defers a disturbance to a particular piece of the land. And you know if the project

isn't built a hundred percent out, then we have avoided the disturbance in that area.

So I think it can be viewed as having definite pluses for that. I know you probably don't want to full debate on this right now.

HEARING OFFICER KRAMER: I think we've heard a fair amount about it, so we'll look at your proposal and put out ours as a proposed decision.

Okay, so 17 we're waiting to hear more.

MS. FOLEY GANNON: And Bio 18 we propose changes to paragraph 2, which is related to as it had been proposed originally, it was supposed to be a per acre fee for the 40 years of raven management planning during the operation of the project.

In discussions with BLM and CDFG regarding how this fee was calculated, they had said that they had also looked at this originally as a per acre annual fee, because that's how it would be being implemented. And then they had used a calculation to figure out how much it would cost for 40 years of implementation of the plan.

We asked them to provide us a calculation of what it actually cost on an annual basis. And they said in currently market it's 750 per acre of permanent disturbance. And we said we would rather pay it on an annual basis, taking the risk that the amount may go up.

But we will pay whatever the actual cost is on an annual basis.

MR. WHITE: It's not clear to staff, at this point, that REAT accepts or is willing to take this approach -- or its Fish and Wildlife Service and the -- the implementation of the rangewide raven management plan. It's not clear to us yet that REAT can do it this way. We have no objections in the REAT group has no objections.

And I was curious of the applicant one of things that we talked about briefly but we never wrote down was a possibility of phasing the payment into the regional raven management program fund according to Phases 1A, 1B, and Phase 2 of the project, and if that would be an appropriate option to put in here?

MS. FOLEY GANNON: Well, I think it is, because it is per acre of permanent disturbance. So I think that that -- I think that certainly lends itself very well to phasing and we were assuming that that -- because it's not even just total acreages of the project, it's permanent disturbance. So I think it would be appropriate.

MR. WHITE: Sure.

STAFF COUNSEL ADAMS: But are you talking about as an alternative to the annual fee?

HEARING OFFICER KRAMER: So you're talking about

a phased annual fee?

MR. WHITE: No.

MS. FOLEY GANNON: We -- no, we're saying -- I think you're saying is that if the annual fee didn't work, then it would be phased?

MR. WHITE: Yeah. And I think what -- yeah there -- as it's written now, it's a one time payment on a per acre basis on another alternative would be to phase it, according to the proposed project phasing 1A, 1B and Phase 2.

And the third alternative that the applicant has suggested is to do it on an simple annual payment, on a per acre basis per year. And we don't object to any of those approaches, as long as the REAT group agrees on the actual funding amount.

So you know my suggestion would be to include this phasing approach as an option, and probably to put in a statement that an annual payment can be made as long as it's the number that REAT accepts.

HEARING OFFICER KRAMER: If it's a Fish and Wildlife program, why would the whole REAT group have to chime in on the suitability?

MS. FOLEY GANNON: I have no idea.

MR. WHITE: That's a good question, and the answer might be that it should be Fish and Wildlife

Service rather than REAT that --

HEARING OFFICER KRAMER: So is the staff going the propose something?

STAFF COUNSEL ADAMS: Well, you know, I don't know if we'll be able to track down an answer by Friday. We'll try.

MS. FOLEY GANNON: I mean, I think if you put it as if approved by U.S. Fish and Wildlife Service, we'd be totally comfortable with that.

MR. OTAHAL: Yeah, I believe Fish and Game also has indicated that to be fully mitigated that they have to be on board with this, I believe. I believe it's both agencies.

STAFF COUNSEL ADAMS: I would note, if we're going to an annual fee and plus phasing, then we've got a fee of about $1,700 in year one. And I don't know that that pays -- I mean, you are going to have employees and trash and the kind of things that need some mitigation. I don't know that $1,700 you does much mitigation.

MS. FOLEY GANNON: Do you know what raven management really is?

I mean, you know what raven management is, right?

STAFF COUNSEL ADAMS: A program to control ravens.

MS. FOLEY GANNON: And you know what they do,

right?

STAFF COUNSEL ADAMS: Do you want to tell me? No, I don't.

MS. FOLEY GANNON: They go out and shoot ravens. And so we're paying their -- you know, under this condition we're paying $650,000 to go out and shoot ravens for four years. I mean it's true.

MR. WHITE: I think it might be So we more complex than that.

MS. FOLEY GANNON: It's not that complex, really. I've seen these plans.

So I mean, we think that if there really was a smaller acreage, I mean, we'd be opening to doing something for an annual, that it could be a larger amount.

STAFF COUNSEL ADAMS: The bottom line is we don't have enough information to commit to something now.

HEARING OFFICER KRAMER: Well, then I suppose the timing, as long it keeps ahead of the actual impacts is, it would be perfectly susceptible of discussion in the PMPD comment period.

Okay, next?

STAFF COUNSEL ADAMS: I think 21.

MS. FOLEY GANNON: Yep, 21 is a -- this is the burrowing owl.

Well, this is more than that.

HEARING OFFICER KRAMER: So is this in effect attempting to nest?

MS. FOLEY GANNON: Yes. I mean, we --

HEARING OFFICER KRAMER: Pardon the pun.

(Laughter.)

MS. FOLEY GANNON: I didn't even get it, it's that late.

Yes, I mean, in our brief we have also argued that we don't think that we should be required to do any compensation, that we have accepted the avoidance and the minimization measures. We have put this in in case you didn't agree with that argument. And again we do believe that it's appropriate to imagine that the 14,000 plus acres of land in this vicinity is going to have burrowing owl habitat on it.

MR. WHITE: Staff accepts the nesting would work for the burrowing owl mitigation and probably don't need to talk about -- well, we need to look at the wording a little bit more carefully, but I think in terms of your intent and our intent, I think we're on the same page.

MS. FOLEY GANNON: Okay, thank you.

HEARING OFFICER KRAMER: Okay.

MS. FOLEY GANNON: And then I think our next change is in 26, which is surprisingly about nesting. This is the waters.

MR. WHITE: I think they're the same response. I said by and large we understand the intent and we agree that nesting of the State jurisdictional waters would likely be effective through the tortoise mitigation, so we'll check the wording but for the most part, we're okay.

MS. FOLEY GANNON: Okay, thank you.

MR. RITCHIE: And then again those numbers would be updated based on the final agreement with respect to Bio 17? There specific dollar numbers here.

MS. FOLEY GANNON: It's cross-referenced from 17.

MR. RITCHIE: Yeah. Just making sure that the final numbers end up across.

HEARING OFFICER KRAMER: So is that an agreement to the proposed changes?

MS. FOLEY GANNON: I think to the nesting yeah.

MR. WHITE: An agreement to the?

MS. FOLEY GANNON: Concept of nesting.

MR. WHITE: Not quite an agreement to the exact wording, but an agreement in concept. And we'll take a look at the wording and be sure and submit that to you. We're doing that on Friday morning.

HEARING OFFICER KRAMER: Okay.

MS. FOLEY GANNON: I think that's all our bio.

STAFF COUNSEL ADAMS: And disagreement again on the cost estimates.

HEARING OFFICER KRAMER: But they're only estimates.

STAFF COUNSEL ADAMS: Well, they're estimates that determine the amount of security that --

HEARING OFFICER KRAMER: Oh, okay.

STAFF COUNSEL ADAMS: Real dollars.

HEARING OFFICER KRAMER: That is real money, yes.

MS. FOLEY GANNON: It is.

HEARING OFFICER KRAMER: Although you pay really great interest on that, right?

(Laughter.)

HEARING OFFICER KRAMER: Okay, is it fair to say then we're done with bio, except for the one or perhaps a very quick two way exchange of papers on Friday?

MS. FOLEY GANNON: I think that's right.

HEARING OFFICER KRAMER: Okay, biologists in the room, thank you. And for everyone a five minute break.

(Thereupon a recess was taken.)

HEARING OFFICER KRAMER: We are on the record. Okay, that finished biology, so we have, what I hope are just clean up items. What did he have left on the visual? Some work on the glint and glare.

MS. FOLEY GANNON: Right, which we don't have to present to you tonight.

HEARING OFFICER KRAMER: Oh, oh you're not ready

in other words?

MS. FOLEY GANNON: Well, as we had said earlier, we had talked -- been working with BNSF to come up with the proposed condition. We are --

MR. LAMB: I think he's talking about visual not Trans 7.

MS. FOLEY GANNON: Use of the -- we didn't have any glint/glare for Vis.

MR. LAMB: I think he's talking about Vis 3.

MS. FOLEY GANNON: You're right, sorry.

MR. LAMB: You're talking about something else.

HEARING OFFICER KRAMER: So do we have the changes from awhile ago to Vis 3 --

MS. FOLEY GANNON: Yes.

HEARING OFFICER KRAMER: -- that were proposed by staff, if I recall correctly? Do I?

STAFF COUNSEL HOLMES: At some point what we did was remove -- excuse me -- establish the back to 223 feet.

HEARING OFFICER KRAMER: That's right. I keep bringing it up and you keep telling that it's taken care of.

MS. FOLEY GANNON: We're done.

HEARING OFFICER KRAMER: Okay.

MS. FOLEY GANNON: That's why I keep thinking, what is this? We must be done, right?

HEARING OFFICER KRAMER: All right, well it's a tradition now.

(Laughter.)

HEARING OFFICER KRAMER: Okay, so are we --

STAFF COUNSEL HOLMES: There are some traditions, Hearing Officer Kramer, that should not be continued.

HEARING OFFICER KRAMER: Okay. And why there any other changes in the applicant's compilation that we need to go over?

STAFF COUNSEL HOLMES: Yeah, I think -- I believe there are several. And I'm going to take just 30 seconds to walk through it, because I think otherwise the record could be fairly unclear.

I'm going the start with hazardous materials management.

HEARING OFFICER KRAMER: Oh, okay. I was talking about visual.

STAFF COUNSEL HOLMES: I'm sorry, well, if you look at our brief, the applicant had proposed changes to Vis 1, 2, and 3. And we accepted all of them, although we noted that the change to Vis 1 would make a significant adverse impact even more adverse, but we did accept them.

MS. FOLEY GANNON: Right.

HEARING OFFICER KRAMER: Can you give me a page number, I'm trying to find them in here.

MS. FOLEY GANNON: It starts on 179. And we did talk through these, the Vis ones too this morning or early this afternoon some time.

HEARING OFFICER KRAMER: That's true, yes.

MS. FOLEY GANNON: Christopher said this was to accept these both, that was acceptable.

HEARING OFFICER KRAMER: Okay, the comment though that this increases the significance of the impact is --

STAFF COUNSEL HOLMES: Plus, there's a reference in our brief to the transcript. It's not a feasible -- if it's not feasible, it's not feasible. We just wanted to point out that it would make the impact worse.

HEARING OFFICER KRAMER: Well, there arguably was unreasonable to assume that you could have made it better perhaps, but okay.

STAFF COUNSEL HOLMES: It's too late for that.

HEARING OFFICER KRAMER: Increases impact.

Okay, so that does it for visual then.

STAFF COUNSEL HOLMES: Right.

PRESIDING MEMBER EGGERT: On this one in particular is it also fair to say that it potentially improves the aspects of reliability and efficiency.

MS. FOLEY GANNON: Well, yes, trying to comply with this could have very serious implications for reliability. Yes. And efficiency.

HEARING OFFICER KRAMER: And the reason would be, because it wouldn't reject heat as well and things like that or --

MS. FOLEY GANNON: The darker you get it can over heat.

HEARING OFFICER KRAMER: Okay. Well, I don't have to follow the matrix that I laid out. Is it fair to say that everything we need to discuss is -- could now be in reference to the compilation of conditions? Are we at that point, without any need for further testimony? And that would be a question of everyone.

STAFF COUNSEL HOLMES: Well, I think that we had -- the reason that Mr. Tyler is here is to talk about one specific condition where staff has an alternative proposal.

HEARING OFFICER KRAMER: Okay. Then maybe we could -- do you want to go right to that, so we could set Mr. Tyler free?

STAFF COUNSEL HOLMES: That's fine. So these are -- do you want to just walk through the worker safety conditions one by one or --

MR. TYLER: That would probably make sense.

HEARING OFFICER KRAMER: Yes, it just helps me find it if you give me the page number and the compilation.

MS. FOLEY GANNON: 186.

HEARING OFFICER KRAMER: Go ahead.

STAFF COUNSEL HOLMES: And staff is fine with the proposed change to Worker Safety 2. In fact, I think it's our change.

MS. FOLEY GANNON: I think it is too.

(Laughter.)

HEARING OFFICER KRAMER: Okay, and as we're going along here for the other parties, if you have an issue, just chime in speak up.

STAFF COUNSEL HOLMES: And with respect to Worker Safety 6, we believe that there are two additional changes that would be helpful. One is in response to a conversation that we've had with the fire chief, and the other is we think reflective of some concerns that Burlington Northern Santa Fe had expressed to us.

The first change -- Rick, why don't you provide the first change orally in subdivision B?

HEARING OFFICER KRAMER: As in dog?

STAFF COUNSEL HOLMES: B as in boy.

HEARING OFFICER KRAMER: Okay.

MR. TYLER: In the second sentence, "This road shall be...", and then we'd strike the words "at a minimum an all weather gravel road". We would add the words, "treated with soil tack or its equivalent".

HEARING OFFICER KRAMER: That's actually in the compilation.

MR. TYLER: Right.

STAFF COUNSEL HOLMES: Right, so get to the new language.

MR. TYLER: And then the next after the comma, add that "with 80 percent compaction". That's the latest concern from the fire department, and then another comma behind that, "at least 20 feet wide" --

STAFF COUNSEL HOLMES: Et cetera.

MR. TYLER: Et cetera.

STAFF COUNSEL HOLMES: So in other words the fire department has asked for 80 percent compaction on the road.

MS. FOLEY GANNON: But weren't we taking out the culverts?

MR. TYLER: Yes, we're taking out the culverts as we agreed to that.

MS. FOLEY GANNON: So it's just at least 20 feet wide period.

MR. TYLER: Period, right.

MR. BRIERTY: Just for the record, this is Peter Brierty Assistant Chief for San Bernardino County Fire, and I'm to the line.

STAFF COUNSEL HOLMES: And did we accurately

reflect your concern?

MR. BRIERTY: Absolutely, correct.

STAFF COUNSEL HOLMES: And then the other proposed change, and I can actually pass this out, because it's a little bit longer, is proposed addition, a new paragraph E.

And, Rick, can you briefly explain why you drafted this paragraph?

MR. TYLER: There was concern regarding the secondary access road and the at-grade crossing in that access road, with regard to safety of the emergency vehicles passing through there. It is a area with limited visibility. The trains travel at high speeds, and it is a very steep grade leading up to that crossing.

So we have added this paragraph to provide that -- the applicant will provide for a gate that basically would be openable by the fire department, that it would be posted that any emergency vehicles passing through gate should inform BNSF before doing so, which would -- which would allow them to basically stop or give the emergency responders direction about passing.

And we also would note -- would also notify -- would also require that any road improvements that were recommended by the fire department near the crossing be funded by the applicant as well.

MS. BELLOWS: One thing, and I notice you put above-grade crossing. Above-grade crossing is what we typically think of as a bridge.

MR. TYLER: At grade.

MS. BELLOWS: At grade, thank you.

MR. TYLER: I'm sorry, it should be at-grade crossing.

MS. BELLOWS: Thank you.

MR. TYLER: I am sorry.

MS. FOLEY GANNON: Then we'll get those looks off our face.

(Laughter.)

MR. TYLER: At-grade crossing.

STAFF COUNSEL HOLMES: We wondered why you were looking so puzzled.

(Laughter.)

STAFF COUNSEL HOLMES: I think it would be appropriate to mark this as an exhibit, since he didn't read it verbatim. And I don't honestly know what exhibit we're up to, since I think there were several Bio exhibits from staff while I was out of the room today.

HEARING OFFICER KRAMER: I have 315.

STAFF COUNSEL HOLMES: Okay, that's fine. So I'd like to mark this as exhibit 305, with the understanding that

MS. FOLEY GANNON: 315.

STAFF COUNSEL HOLMES: 315 -- with the understanding that the word "above" in the first sentence has been changed to "at".

(Thereupon the above-referenced document was marked by the Hearing Officer as Exhibit 315.)

STAFF COUNSEL HOLMES: And so with those two changes, those are staff's recommendations for changes to the applicant's proposed Worker Safety 6.

With respect to Worker Safety 7 and 8, we had understood last night that there was going to be a change in the timing that we had agreed to, but we didn't see it reflected.

MS. FOLEY GANNON: The timing that we agreed to, can you remind me where that is?

STAFF COUNSEL HOLMES: You wanted November 1st.

MS. FOLEY GANNON: Oh, yes, we didn't get that in there.

STAFF COUNSEL HOLMES: So if you'd like to propose that on the record, we'd be happy to accept it on the record.

MS. FOLEY GANNON: Yeah we're going to submit -- we've inn core rated the NSFs into this new Word document, which now we can have almost be the next day.

So we curve it be tomorrow's date rather than today's, which has that language in there, but we can read it to you, if you'd like to hear it.

STAFF COUNSEL HOLMES: If it's the same as we heard at the workshop last night, that's fine.

MS. FOLEY GANNON: Yeah, that's it. It's the same as we heard at the workshop.

STAFF COUNSEL HOLMES: And then the last issue with respect to, I believe it was -- it was Worker Safety 7 and 8 both, you had recommended a phasing proposal, and we said we needed to talk with the fire department. I'm glad the fire department is on, because what we heard was that the phasing proposal was acceptable. Chief Brierty, can you confirm that?

MR. BRIERTY: Yeah this is Chief Brierty, and we talked it over with staff and we agree to a phasing proposal.

STAFF COUNSEL HOLMES: Okay, so staff obviously has no objections to that.

MS. FOLEY GANNON: Thank you.

STAFF COUNSEL HOLMES: So that would conclude the proposed changes to Worker Safety 7 and 8.

HEARING OFFICER KRAMER: Is the phasing already in Worker Safety 8 in this compilation?

STAFF COUNSEL HOLMES: It is.

MS. FOLEY GANNON: Yeah.

STAFF COUNSEL HOLMES: But when we were discussing it last night, we said we couldn't agree to it, unless we had confirmation from the fire department that it was acceptable, and then we've now received that as you've heard.

So I think that the

HEARING OFFICER KRAMER: Okay, so you --

STAFF COUNSEL HOLMES: The conditions will stay as is with the exception of the fact that they're changing one of the dates.

HEARING OFFICER KRAMER: And that's in Worker Safety 8?

MS. FOLEY GANNON: That's in Worker Safety 7.

STAFF COUNSEL HOLMES: Seven I believe.

HEARING OFFICER KRAMER: Can you just tell me roughly where, so I circle, so I make sure to look at the next version.

MS. FOLEY GANNON: Yeah. It's in the verification, which is on page 192, in the first line. And it's going to say, "Prior to November 30th, the project owner shall provide to the CPM..." -- now that's going to be at least 30 days prior to November 30th. Prior to November 30th.

HEARING OFFICER KRAMER: Of this year?

STAFF COUNSEL HOLMES: Yes, of this year.

MS. FOLEY GANNON: Yes, 2010.

And the same change should number Worker Safety 8.

HEARING OFFICER KRAMER: Can I get another copy of the compilation, because I've marked this one up enough that I need a clean one for the exhibit book.

MS. FOLEY GANNON: I'll do this compilation, not the new one that we're going to submit after midnight.

HEARING OFFICER KRAMER: Right, yeah. I just collect paper.

MS. FOLEY GANNON: Okay. I want another hard copy of it now?

HEARING OFFICER KRAMER: Please. If you could microwave it.

MS. FOLEY GANNON: We have two.

HEARING OFFICER KRAMER: Is that it for --

STAFF COUNSEL HOLMES: I believe that's it for worker safety.

HEARING OFFICER KRAMER: Okay.

MR. BASOFIN: Mr. Kramer, I have a question. I apologize I'm zoning in and out of reality. Did we pass up reliability, the reliability condition, because I had a question about that, if we did?

HEARING OFFICER KRAMER: We're jumping around.

So I didn't have it on the list, but just remember to ask it later, when we get -- you can ask it a little later.

MR. BASOFIN: Okay.

HEARING OFFICER KRAMER: Well, if we're done with worker safety, Mr. Tyler has nothing to do with reliability, right?

STAFF COUNSEL HOLMES: He's going to be Haz, but we can go to -- what page are you working on?

MR. BASOFIN: Page 169. I believe it's the only condition on reliability. It's a pretty simple question. My question is, if the project is approved and this condition Reliability 1 is adopted, will the information that's stipulated here be available to the public? And if so, how?

STAFF COUNSEL HOLMES: We talked about this with respect to the Imperial project. My understanding is that a lot of the information that comes in will be proprietary. To the extent that we can aggregate it, in some way mask it, that's what we would propose to do, if people want to take a look at it.

MR. BASOFIN: Okay, well, I just want to be on record as objecting to the extent that the information that's coming in under Reliability 1 is confidential, Defenders objects to that.

STAFF COUNSEL HOLMES: Well, the applicant will

submit an application for confidential designation, and the Commission will make a determination at the time that the information comes in.

MR. BASOFIN: Okay.

STAFF COUNSEL HOLMES: And there's -- there can be a public process. We've had a number of them as people are familiar with cultural resources are aware. And --

MR. BASOFIN: Okay, I just want to be on record as stating that it's Defenders position that that information should absolutely be public information, to the extent that it goes to the reliability of the project and how it's operating, when it's fully operational.

HEARING OFFICER KRAMER: Well, I think from the Committee's standpoint, we're not going the try to overrule the general commission regulations on the -- that regulation confidentiality of information. So it will be treated according to that process, like any other data.

STAFF COUNSEL HOLMES: And there is a presumption that data that comes into the Commission is public, and that's why applicants have to affirmatively file applications, and they to have make a case, and the Commission rules on it, and there's an opportunity for public participation. So if you stay involved, you'd have an opportunity to participate in that.

HEARING OFFICER KRAMER: Okay. So did you want

the go to hazardous next.

STAFF COUNSEL HOLMES: Right, I think that's a good idea.

There were some proposed changes -- I don't know if these are reflect in here or not.

MS. FOLEY GANNON: What pages does Haz start on?

STAFF COUNSEL HOLMES: Well, we had agreed to the changes to Haz 2

MR. LAMB: What page are we on

STAFF COUNSEL HOLMES: I'm sorry, 144. We had agreed to those.

MR. LAMB: Thank you.

STAFF COUNSEL HOLMES: And we had proposed changes that are in Haz 5 on page 146. And so not surprisingly we don't oppose those.

And we had agreed to the changes to Haz 7 on page 147. The intervenor Burlington Northern Santa Fe had proposed adding language to Haz 7 saying, "No hydrogen will be transported under or over BNSF main line or through the BNSF right of way". And staff doesn't have -- staff doesn't oppose that change.

MS. FOLEY GANNON: And we've inserted that in, which will be in the next version. It's just at the end of that paragraph on Haz 7.

STAFF COUNSEL HOLMES: And then with respect to

Haz 8, again Burlington Northern Santa Fe had recommended --

MS. FOLEY GANNON: No, we did change the -- so it says stored hydrogen on site for that verification for Haz 7 too. Instead of just having it be hydrogen on site, as we discussed yesterday.

STAFF COUNSEL HOLMES: Right, and I think that at some point Hearing Officer Kramer was going to change it to generated or --

MS. FOLEY GANNON: But then we decided we didn't want to have it be generated, right.

STAFF COUNSEL HOLMES: Yeah, we all -- right.

MS. FOLEY GANNON: All right.

STAFF COUNSEL HOLMES: And then Burlington Northern Santa Fe had also recommended changes to Haz 8, that's in Exhibit 1209. Staff doesn't oppose their proposed change to paragraph A, but we have a proposed -- is it an addition? And, Rick, why don't you explain that and then pass it around. The parties have seen this.

Well, I thought I had the copies.

MR. TYLER: Basically, we added a section C, D, and E, which is address, we believe, the issues raised in Item C, but the suggestions by Burlington Northern under Item C.

I would also note that actually Item E is redundant with the proposal for Haz 7. So the first one is ensure -- the new item C is, "Ensure that hydrogen compressor stations, piping, connecting the compressor stations and piping between the compressor stations and the hydrogen generator or at least 500 feet from the BNSF right of way".

We reviewed that with the applicant. That is not a difficult circumstance to deal with, and that was to address some concerns over the issue of potential interactions in the event of a derailment. So we tried to ensure that it wasn't implausible to get an impact on the system in the large part of the system.

Most of the hydrogen would be stored at high pressure in the locations that we've identified being 500 feet away. The only thing that would be left was what's on the individual SunCatchers.

Item D is include in the hydrogen handling and automatic system for notification of BNSF operations of any loss of containment from the hydrogen system. Basically, that's equivalent to the request for monitoring for hydrogen leaks. And the automated dialing system that BNSF had requested.

So basically, it's really detected in the system by a loss from the system or a change in pressure in the

system, which indicates that you have hydrogen leaking. And it's pretty difficult to measure hydrogen out in the open air. So this is a much more reliable method of doing that.

So BNSF would be notified if there was any loss of containment of hydrogen.

The final Item B is basically redundant with the Haz 7 proposal. And it says that no transport -- that the applicant shall not transport hydrogen across the BNSF right of way by any means.

So whichever -- it really doesn't -- I have no preference as to whether we go with a Haz 7 or Haz 8.

MS. FOLEY GANNON: So to be clear, you're really saying you're adding --

MR. TYLER: E could be removed --

MS. FOLEY GANNON: So you're adding D -- or wait a minute, I'm sorry.

MR. TYLER: I'm adding C, D, and E.

MS. FOLEY GANNON: But E is also redundant, right?

MR. TYLER: E is redundant.

MS. FOLEY GANNON: And F is redundant. So -- because what we had put in was C was what BNSF's language has been in their exhibit whatever this is, I'm sorry.

STAFF COUNSEL HOLMES: 1209.

MS. FOLEY GANNON: 1209. We put that as C. And they we'd put yours as D, E, and F. And I said it seems like D is necessary, E and F seem redundant with 7 -- with Haz 7.

MR. TYLER: E does, but I don't think that --

STAFF COUNSEL HOLMES: I don't think C and D is. And our thought was C and D was -- our thought was that with all due respect to Burlington Northern, we thought that C and D was a little bit more protective than the language that they had proposed.

MS. FOLEY GANNON: Okay.

PRESIDING MEMBER EGGERT: This is just awe question of curiosity, I don't want to interrupt the flow, but to not transport hydrogen across the BNSF right of way by any means, so that includes by truck or --

MR. TYLER: By truck, or pipeline underneath. In other words, the concern was and everyone agrees that that addresses the entire realm of concerns that anyone could have. They're generating hydrogen on both sides of the facility, and they have independent separate systems. So there's -- there is actually no need or requirement to --

HEARING OFFICER KRAMER: Does that mean the plan to transport bottles is off the table?

MR. TYLER: That's off the table.

HEARING OFFICER KRAMER: So there --

MR. TYLER: There's no pipeline going under the rail.

MS. FOLEY GANNON: Well there's two separate generators. If we want to use pipes, we could just go from the two separate generate authors, one north, one south.

MS. BELLOWS: Yeah, you just can't take the bottles across the bridge.

MR. TYLER: They could still do K-bottles, just from the different sides.

MS. FOLEY GANNON: Yeah, it's just from the two different generators.

HEARING OFFICER KRAMER: Okay.

MR. TYLER: But they're still proposing to maintain the option to go either to K-bottles filled at the individual generators or to have discrete piping to each of the SunCatchers.

HEARING OFFICER KRAMER: But originally you might have just filled -- you might have had one generator and trucked the bottles across.

MS. FOLEY GANNON: Correct. That's what it was originally right.

HEARING OFFICER KRAMER: Okay.

MR. TYLER: Or had a pipeline, which was also

discussed. But none of those options are necessary.

PRESIDING MEMBER EGGERT: Okay, I mean, I guess if the applicant agrees, I think that's fine. You know, certainly the energy that's contained within the gasoline tank of your car is equally as dangerous as K-bottles crossing the tracks.

MR. LAMB: I heard you say that Commissioner Eggert, and I couldn't disagree with you more, but I appreciate that that's what you say.

(Laughter.)

PRESIDING MEMBER EGGERT: I'll have plenty of references to provide, if you would like to read.

Not to mention the fuel tankers on the rail cars themselves.

MR. LAMB: Right, but those we have some control over. That's the issue.

STAFF COUNSEL HOLMES: That's it for Haz from staff's perspective.

MR. LAMB: And by the way, we would agree not to have our fuel tankers in their SunCatcher fields. I think that would be fair.

HEARING OFFICER KRAMER: Did you say that you agreed can Haz 2 changes as well?

STAFF COUNSEL HOLMES: Yes.

HEARING OFFICER KRAMER: So, okay, I'm confused

about 7 and 8. We just -- or which version of 8 should we use? Would it be the new version that's going to be provided by the applicant tomorrow?

MS. FOLEY GANNON: Well then, I guess, let's make sure we understand. So BNSF are you comfortable with not having your paragraph C and using staff's paragraph C and D instead?

MR. LAMB: My understanding is is that staff has reviewed what we've done, and they've recrafted that. And that's their prerogative to do that.

MS. FOLEY GANNON: Right, that's what I mean. Right, yeah, so just using that language is acceptable to you too?

MR. TYLER: I guess the only question is you had indicated that you were going to have a Haz 7, which was that no hydrogen will be transported over or under the --

MS. FOLEY GANNON: Right.

MR. TYLER: That's redundant to --

MS. FOLEY GANNON: We could take it out of either one. I don't care.

MR. TYLER: Right. So that's really a matter of -- I don't know if BNSF has a preference. It doesn't really matter the staff, I don't think.

MR. LAMB: Well, we like the over and under and through language.

MS. FOLEY GANNON: Okay, so we'll leave it in 7 and take it out much 8.

MR. TYLER: That's fine.

HEARING OFFICER KRAMER: Just by the way, the Haz 8 language that was handed out is Exhibit 316. I guess a question there, that handout has a different version of paragraph A, is that -- is that no longer suggested or?

MS. FOLEY GANNON: BNSF's paragraph?

STAFF COUNSEL HOLMES: This was -- what this --

MR. TYLER: Yeah the word BNSF had wanted to include after the word hazard analysis, including for rail operations. In other words, they're basically asking that the PSM and the hazard analysis include a consideration of rail operations. We have no objection.

STAFF COUNSEL HOLMES: Yeah, this version of Haz 8 was -- Rick made the changes to this on top of an older version of staff's Haz 8. We only handed this out for purposes of C, D, and E.

HEARING OFFICER KRAMER: Okay.

MR. TYLER: I would also just mention that I would certainly encourage the applicant to include BNSF in the Haz Op study and PSM, that that would be -- would provide significant benefit to all parties. That's generally what's done as any interested party is -- also staff would be willing participate if that's desirable.

HEARING OFFICER KRAMER: Okay. We'll wait for the -- for both 7 and 8 we'll look at the revised versions.

And again for the other parties, chime in if you have an issue otherwise we're just moving along

Okay, so thank you Mr. Tyler.

MR. TYLER: Thank you.

HEARING OFFICER KRAMER: Should we work from the front of this, is that the most efficient approach at this point or Ms. Holmes, do you have other --

STAFF COUNSEL HOLMES: I don't. The only other concerns that I'm aware of has to do with two separate issues in toil and water resources.

The first one has to do with the applicant's proposed changes to Soil and Water 7 and 9. This reflects discussion, cross-examination from the hearings. Staff prefers that its proposed changes to Soil and Water 7 and 9 that were -- I don't know if they were provided in the brief. I'd have to check on that. I think they were provided in the second errata, which is Exhibit 310. We believe that those changes are more appropriate than the ones made by the applicant --

HEARING OFFICER KRAMER: So then the version

STAFF COUNSEL HOLMES: -- in Exhibit 108. So the version that we would prefer is the version that's in

Exhibit 310.

HEARING OFFICER KRAMER: Okay, and Ms. Gannon, would that be which you have in 10 --

STAFF COUNSEL HOLMES: No, they have something different --

MS. FOLEY GANNON: We put our changes on top of it. If it was -- if yours had been in the errata --

HEARING OFFICER KRAMER: Right, but if we took out her changes we would have your proposal from staff?

STAFF COUNSEL HOLMES: No, I believe what I'm saying is that the changes that we recommended in Exhibit 310 didn't make it into your -- I don't believe. I could be mistaken. Everybody is looking very puzzled -- into Exhibit 108.

MS. FOLEY GANNON: We did. As a baseline, and then we changed it. We think. Yeah, 157.

STAFF COUNSEL HOLMES: What pages are your soil and water?

MS. FOLEY GANNON: 157, Soil and Water 7.

STAFF COUNSEL HOLMES: You're correct they are. I apologize. That's my mistake. So you did incorporate them. Thank you.

HEARING OFFICER KRAMER: So you do not agree with the applicant's changes?

STAFF COUNSEL HOLMES: No, we do agree.

HEARING OFFICER KRAMER: You and the applicant's changes that are in -- okay, page 157 of exhibit --

STAFF COUNSEL HOLMES: I agree that the applicant made the staff recommended changes.

HEARING OFFICER KRAMER: But then they did more.

MS. FOLEY GANNON: Hmm-um.

HEARING OFFICER KRAMER: Or no.

STAFF COUNSEL HOLMES: No, yes you did.

MS. FOLEY GANNON: Just the verification timing you mean.

STAFF COUNSEL HOLMES: I'm looking at page 157, there's additional underline and strike out that's not -- that doesn't come from changes that we had proposed.

HEARING OFFICER KRAMER: Would you agree to those?

MS. FOLEY GANNON: Oh, those were from us, yes.

HEARING OFFICER KRAMER: Would you agree to those proposals?

STAFF COUNSEL HOLMES: Never having held myself out as a soil and water person, I'll have to -- let me read them for a moment.

Well, I think the only -- the concept that's not captured is that we're interested in trends that are related to the project. I understand what you're saying

and it's not quite captured.

MS. FOLEY GANNON: That's exactly what we're trying to get, because we thought --

STAFF COUNSEL HOLMES: I understand.

MS. FOLEY GANNON: -- yeah, we thought that your condition was -- could potentially be going much broader and not --

STAFF COUNSEL HOLMES: No, we're interested. And we want the baseline, and then we want to capture project related trends.

MS. FOLEY GANNON: That's what we want to.

STAFF COUNSEL HOLMES: Could you say, "Simulated trends due to construction and project operation"?

MS. FOLEY GANNON: Um-hmm.

STAFF COUNSEL HOLMES: I don't know. I'll let you -- since your making another filing -- we're on the same page.

MS. FOLEY GANNON: "Due to" is good, yeah. And project operation, yeah that's right.

MR. LAMB: And just for the record. This is BNSF, we have two minor additions to Soil and Water 8 and 7 that I believe are going to be incorporated.

MS. FOLEY GANNON: Oh, that's right. I'm sorry.

STAFF COUNSEL HOLMES: I was going to get there in just a second. And you proposed --

MS. FOLEY GANNON: In Soil and Water 8. And we're fine with the proposal that's shown in Exhibit 1209. Oh, 7, I'm sorry because they were -- yeah they're not --

STAFF COUNSEL HOLMES: You're talking about their changes.

MS. FOLEY GANNON: No, we're now looking at their changes in 7.

STAFF COUNSEL HOLMES: And --

HEARING OFFICER KRAMER: So applicant's agreeing to the changes to Soil and Water 8 and 7 in Exhibit 1209?

MS. FOLEY GANNON: With the changes of -- where it's going to say the applicant or the project owner instead of Calico Solar.

STAFF COUNSEL HOLMES: And we had discussed with BNSF earlier this afternoon that in addition to the language about BNSF commissioning a hydrology study, we think it would be appropriate to provide that study to the CPM that's not in there now. We think that would be appropriate.

And we had no objection in the verification to adding BNSF as an entity that can review the 30, 60, 90 percent designs in Soil and Water 8.

HEARING OFFICER KRAMER: That would be review and comment?

STAFF COUNSEL HOLMES: Yes.

MS. FOLEY GANNON: We're fine with that.

HEARING OFFICER KRAMER: Okay, so you'll add that in?

MS. FOLEY GANNON: And we changed the language that BNSF had proposed for Soil and Water 8 to make it clear that we're actually paying for the hydrogen study, that you're not? I mean the hydrology. And that it's our requirement to have the study done?

MR. LAMB: Yeah, we're happy.

MS. FOLEY GANNON: So we said, "Prior to installing any SunCatchers or construction of the detention basins, project owners shall pay for a hydrology study commissioned by BNSF, which will determine the impact, if any, on the rail safety and BNSF operation of its planned placement of SunCatchers and detention basins and determined appropriate mitigation measures, if necessary, to be paid for by project owner."

That will again be --

MR. LAMB: That captures the intent of 1209, and you're going to put that in --

MS. FOLEY GANNON: We already have it in. So we'll send it out in the next version.

MR. LAMB: -- in your new submittal.

MS. FOLEY GANNON: In the next version, yes.

STAFF COUNSEL HOLMES: And then we wanted to have

the CPM gets a copy of that.

MS. FOLEY GANNON: And CPM gets a copy, yes. We've got that.

STAFF COUNSEL HOLMES: Then I think we just went over 8.

MS. FOLEY GANNON: Yeah.

MR. LAMB: We did.

STAFF COUNSEL HOLMES: And with respect to 9, I believe the language that you've proposed in Exhibit 108, I believe that staff rejected that in the hearing, when this issue came up. I believe that that was offered in the context of a cross-examination question. And that it was rejected.

MS. FOLEY GANNON: And we're still suggesting -- we're still asking the Committee to accept it.

STAFF COUNSEL HOLMES: Okay. And there is some discussion I think in the record on that.

MS. FOLEY GANNON: There is. I think our -- I think we have our evidence in and we're suggesting that it's appropriate. So that's a agree to disagree.

That's all the soil and water, isn't it?

STAFF COUNSEL HOLMES: That's it.

HEARING OFFICER KRAMER: Okay.

STAFF COUNSEL HOLMES: And then staff does not have any objection to BNSF's proposal for Transmission

Line Safety and Nuisance 5. We had indicated so in our brief, but we didn't provide. We had indicated so in our brief, but we didn't provide any language. So that language is acceptable.

MR. LAMB: And just for the record on that, we understand that where we put Calico Solar if they want to conform that to put project owner, we don't -- it makes no difference to us.

MS. FOLEY GANNON: Yeah, I think that's all we changed.

HEARING OFFICER KRAMER: And that's a new condition, right?

MR. LAMB: Yes, sir.

MS. FOLEY GANNON: It is. Homes and with respect to technical errors, other than biological resources and cultural resources, I believe that that resolves everything.

MS. FOLEY GANNON: I think it does.

HEARING OFFICER KRAMER: Okay, so no more -- nothing more on the issue of the mitigation and worker safety for fire protection?

STAFF COUNSEL HOLMES: With respect to glint and glare, I believe that's in.

HEARING OFFICER KRAMER: No. No. The county's request for mitigation.

STAFF COUNSEL HOLMES: We had proposed the same condition that was proposed for Imperial, and the applicant has accepted that.

MS. FOLEY GANNON: And then the fire department -- yeah the phase.

STAFF COUNSEL HOLMES: And we included the phasing, right.

HEARING OFFICER KRAMER: Is that contained in the brief then?

MS. FOLEY GANNON: It's in here. It's in 108.

HEARING OFFICER KRAMER: Oh, it's in here already. Which --

STAFF COUNSEL HOLMES: It's also in the brief.

HEARING OFFICER KRAMER: And it's worker safety which?

STAFF COUNSEL HOLMES: It's in both places, except that the brief doesn't have the phasing proposal.

MS. FOLEY GANNON: It's Worker Safety 8 is it?

HEARING OFFICER KRAMER: On page?

MS. FOLEY GANNON: Seven, eight I think is, 193.

STAFF COUNSEL HOLMES: Right, I believe the only condition outside of biological resources and cultural resources that staff will not be in agreement with when the applicant files their updates tomorrow is the Soil and Water 7. I think that's the only one.

MS. FOLEY GANNON: Right.

PRESIDING MEMBER EGGERT: So I have a question on Worker Safety 7. When do we think we might actually be able to have a selection of an independent contractor and a fire needs assessment risk assessment completed?

MS. BELLOWS: This is for a -- I'm sorry, I closed that. That's the negotiation on the fire department, right?

MS. FOLEY GANNON: And whether you have to go to a third-party consultant.

MS. BELLOWS: I would hope within the next two to three weeks that -- I don't know, Mr. Brierty, if you're still on the line, but the notion was that --

MR. BRIERTY: Yes, I am.

MS. BELLOWS: -- we were to -- we were supposed to get together on that within the next week or two and attempt to resolve it.

MR. BRIERTY: That's correct. This is Chief Brierty and that's absolutely correct.

PRESIDING MEMBER EGGERT: When you say attempt to resolve it, meaning attempt to resolve the level of the payment?

MS. BELLOWS: Correct.

MR. BRIERTY: Yes.

PRESIDING MEMBER EGGERT: And then if that's not

successful, then it triggers the needs assessment is that -- or is it?

MS. BELLOWS: That's correct.

MR. BRIERTY: That's correct.

PRESIDING MEMBER EGGERT: Okay. And I guess if that is that subsequent independent contractor and the fire needs assessments and risk assessment is triggered, does anybody have an estimate of how long that would take to conduct a adequate assessment?

MS. BELLOWS: I would think a month.

PRESIDING MEMBER EGGERT: A month okay.

MS. BELLOWS: Max.

MR. BRIERTY: Agreed.

HEARING OFFICER KRAMER: And then there's the deposit to secure things on long the way.

MS. WHITE: I just want to point out in the verification on page 92, it says at least 10 days and then it's parens zero parens. I think you're missing a one in that.

HEARING OFFICER KRAMER: No, they changed to prior to November 30th.

MS. WHITE: On this particular one, prior to November 30th?

HEARING OFFICER KRAMER: Both on Worker Safety 7 and 8.

MS. WHITE: Okay. Sorry about that.

Thank you.

HEARING OFFICER KRAMER: Okay so, Ms. Holmes, does that complete your --

STAFF COUNSEL HOLMES: I believe it does.

HEARING OFFICER KRAMER: Okay. Ms. Gannon, do you think we've overlooked any conditions that you want to run by staff?

MS. FOLEY GANNON: I don't think so.

HEARING OFFICER KRAMER: Well, that was swifter than I thought it would be.

MS. FOLEY GANNON: Now we've just got these exhibits.

HEARING OFFICER KRAMER: Oh, exhibits.

Okay, and just to remind myself, nuisance shocks we've taken care of by the routing of the transmission line; is that correct or --

MR. LAMB: Our concern -- this is BNSF. Our concerns were addressed by PLSN 5, the new one we just discussed.

HEARING OFFICER KRAMER: Okay. I need to look -- just give me a moment here.

Okay, let's turn to the exhibit list. I'm going to actually do this in real time. So if I get to the right place, the document will be on your screens if

you're on WebEx.

And I think my first -- I can find the date for the FEIS later. Exhibit 94 was a revised version of I believe it was -- was it the off-site consequences map from Exhibit 90 A?

MS. FOLEY GANNON: One second.

HEARING OFFICER KRAMER: I think it was relating to the hydrogen.

MS. FOLEY GANNON: Yes, it was.

HEARING OFFICER KRAMER: So I'll find that later and queue that for you more precisely. I do seem to be missing 96, 97, and 98.

MS. FOLEY GANNON: So this was the additional air quality analysis was docketed like on the 7th or something wasn't it?

HEARING OFFICER KRAMER: This is for the reconfigured --

MS. FOLEY GANNON: It was the $NO_2$.

It was when we discussed it with the air quality discussions on 84.

HEARING OFFICER KRAMER: Okay.

MS. FOLEY GANNON: I mean we can resubmit it to you.

HEARING OFFICER KRAMER: No, I think it's just a matter of -- I'll let you know if I'm missing documents.

MS. FOLEY GANNON: Okay.

HEARING OFFICER KRAMER: Okay, 97.

MS. FOLEY GANNON: That was the hydrogen compressor map. So that was -- the first map was the one we submitted that showed the basic layout. And then I think there was a request for additional details on that map. And so we submitted the second map.

HEARING OFFICER KRAMER: Ninety-eight?

MS. FOLEY GANNON: This was Sierra Club had requested us to provide the data sheets for the Desert Tortoise translocation plan. We provided them.

HEARING OFFICER KRAMER: Okay, 99 I called the Phase 1A plan. Was it just Phase 1A or was it the phasing plan in general?

MS. FOLEY GANNON: It was actually Phase 1A with the acreage showing it and then it had a description of the specific activities that would occur within Phase 1A. So there was a narrative and a map.

HEARING OFFICER KRAMER: Okay. Then I got sort of caught up.

MS. FOLEY GANNON: And there are three items which we had docketed since our last hearing, which we would also like to offer into evidence.

HEARING OFFICER KRAMER: Everybody's getting very soft spoken now.

MS. FOLEY GANNON: My throat is feeling a little sore. We had tree additional items which we had docketed, since our last hearing, either in response to questions that came from staff or that were raised at that hearing, which we would also like to offer as exhibits and offer into evidence.

HEARING OFFICER KRAMER: Okay. Do your notes reveal their nature?

MS. FOLEY GANNON: The notes in front of me do, which fortunately I can share it with you.

HEARING OFFICER KRAMER: Please do.

MS. FOLEY GANNON: Actually, it's four, isn't it?

The first one was applicant's submittal of staff's request for Phase 1 fencing information. That was a map.

And the second was the applicant's submittal of numbers of employees and numbers and types of equipment for the beginning of the construction.

And then we had --

HEARING OFFICER KRAMER: Hold on. And was just through Phase 1 or by phase?

MS. FOLEY GANNON: It was actually only for Phase 1. It came up in response to questions about how many -- when we were looking at the access roads an how many employees would be on site during the first

initiation of construction activities.

HEARING OFFICER KRAMER: Okay that's 102.

MS. FOLEY GANNON: Oh no, I thought we already -- did you stop at 100?

HEARING OFFICER KRAMER: Yeah.

MS. FOLEY GANNON: Oh.

HEARING OFFICER KRAMER: What did you give me?

MS. FOLEY GANNON: Then I've got more to go. Let's go back to 100.

HEARING OFFICER KRAMER: I have the abstract of the Fort Irwin study.

MS. FOLEY GANNON: Okay, you have that as?

HEARING OFFICER KRAMER: 100.

MS. FOLEY GANNON: 100?

HEARING OFFICER KRAMER: Is that correct?

MS. FOLEY GANNON: Okay. No, we had that later, but that's okay.

HEARING OFFICER KRAMER: No, we can change it.

MS. FOLEY GANNON: Okay. See, we had 100 as being the revegetation acreage. I don't know what that was. What was that?

Oh, we were asked just to give the calculation of the acreage that would be revegetated and we gave that.

We have 101 as being the updated detention basin specifications and figure.

HEARING OFFICER KRAMER: Okay, hold on. Revegetation, acreage. And that was -- okay 101 was?

MS. FOLEY GANNON: Updated detention basin specifications and figures.

HEARING OFFICER KRAMER: Okay, 102?

MR. BASOFIN: Mr. Kramer, I have 100 being the Fort Irwin --

HEARING OFFICER KRAMER: Well, see I'm not the only one.

MS. FOLEY GANNON: We can move it if you want. It was later on my list for some reason.

HEARING OFFICER KRAMER: Okay. Did you refer to it in your briefs as 100?

MR. BASOFIN: No. I'm just trying to -- I didn't refer to it. I'm just trying to make sure I have everything in order on my list. But I guest I have the same list as you.

HEARING OFFICER KRAMER: Oh, okay, if you're just reading from my list, you're going to be misled by me.

MR. BASOFIN: Okay.

HEARING OFFICER KRAMER: So. Okay, we'll continue with the renumbering of that abstract.

MS. FOLEY GANNON: I now have a space at 102, so we can put it in there.

HEARING OFFICER KRAMER: Okay, what did you have

it though before as?

MS. FOLEY GANNON: I had it down at 113, but we can do that here. It's fine.

HEARING OFFICER KRAMER: Okay, so the abstract will be 102.

MS. FOLEY GANNON: And then we have 103 -- or we can switch it.

HEARING OFFICER KRAMER: I wonder if we're going the mess up the transcripts references? Well, we'll deal with that later.

Okay, so the abstract will be 102.

MS. FOLEY GANNON: And 103 we had as the applicant's proposed revisions to cultural Conditions of Certification.

HEARING OFFICER KRAMER: Okay.

MS. FOLEY GANNON: And 104 we had as applicant's proposed revisions to biological Conditions of Certification.

HEARING OFFICER KRAMER: 105?

MS. FOLEY GANNON: IVS glint/glare -- glint and glare report.

HEARING OFFICER KRAMER: What was the first?

MS. FOLEY GANNON: IVS.

HEARING OFFICER KRAMER: I --

MS. FOLEY GANNON: V, Imperial Valley Solar.

HEARING OFFICER KRAMER: Oh. Glint and glare report. 106 was Nixon Hollis testimony. Hollis being H-o-l-l-i-s. And Hollis resume.

HEARING OFFICER KRAMER: So Nixon and Hollis?

MS. FOLEY GANNON: Nixon slash Hollis, yeah Nixon and Hollis.

MS. BELLOWS: Hollands.

MS. FOLEY GANNON: Hollands that's not the way it's listed here. Oh, it's Hollands, I'm sorry. H-o-l-l-a-n-d-s.

HEARING OFFICER KRAMER: Okay. 106, 107.

MS. FOLEY GANNON: 107 was Lange testimony resume.

HEARING OFFICER KRAMER: 108?

MS. FOLEY GANNON: 108 was the Calico conditions, revised that we've been going through this evening.

HEARING OFFICER KRAMER: That's right, yes.

MS. FOLEY GANNON: And 109 was the applicant's submittal of staff's request for a Phase 1 fencing information, which was the map that was up.

And 110 was the applicant's submittal of staff's request for road information.

HEARING OFFICER KRAMER: Wait a minute. Okay 110, give it to me again.

MS. FOLEY GANNON: Applicant's submittal of

staff's request for road information.

And then the last is BLM's routes maps from the west Mojave plan.

HEARING OFFICER KRAMER: Okay, 111. I thought we numbered your answers to the Committee questions as 110?

MS. FOLEY GANNON: We marked it as -- oh, you're right, I didn't have -- you're right. Sorry. I put it down there as being edit in there. That screws everything up.

HEARING OFFICER KRAMER: Now, we could change that, since nobody's.

MS. FOLEY GANNON: Yeah, since no one is referencing that, why don't we just put that -- give that the last number, which is what?

HEARING OFFICER KRAMER: Okay so you're responses will be 112.

MS. FOLEY GANNON: 112.

Should we give an exhibit number to what we're going to submit tomorrow as the revised conditions?

HEARING OFFICER KRAMER: Yes. Revised compilation we'll call it and submitted August 26th.

MR. LAMB: Is that 112?

MS. FOLEY GANNON: 113.

HEARING OFFICER KRAMER: That's 113.

MS. FOLEY GANNON: Revised compilation submitted

August 26th.

HEARING OFFICER KRAMER: And that was it?

MS. FOLEY GANNON: Yes that's it.

HEARING OFFICER KRAMER: Okay, let's move on then to the staff. I think I'm more complete with staff.

We began the day with 310 being the second errata and then -- I have 311 as August 25th letter. Let's see, that was.

PROJECT MANAGER MEYER: Is that the SHPO letter?

HEARING OFFICER KRAMER: Yes, that sounds right.

MS. FOLEY GANNON: Yeah hi the SHPO letter as 311.

HEARING OFFICER KRAMER: Which I just received today, correct?

PROJECT MANAGER MEYER: Yeah, that is correct.

HEARING OFFICER KRAMER: And I've already lost.

Okay, so that's August 25th letter from Wayne Donaldson to Roxy Trost of the Bureau of Land Management.

And then 312 is the Cultural 4 insert.

313 is staff response to Committee questions.

314 is a Tonya Moore Email to Chris Huntley.

315 is --

PRESIDING MEMBER EGGERT: Hearing Officer Kramer, I'm just going -- I wanted to do a check here with respect to the subsequent steps that we have before us this

evening. I want to give any of the folks here in the room that may want to go catch up on sleep the opportunity to so. But I want to make sure that everybody has proper information about what we need to do to conclude this evening.

HEARING OFFICER KRAMER: Okay well, I guess before we let people go, we should ask if there's anybody in the room who -- I don't think there's anybody from the public here. But do we have any members of the public either in the room or on the telephone who wish to make a public comment?

Hearing none, then really we just need to go through the exhibits. We are allowing the staff and the applicant to file, as we discussed, further compilations or revisions and suggested new revisions to the Conditions of Certification.

Other parties can fire back their comments, if they wish, by the end of the day on Friday. And we will issue a proposed decision hopefully on Monday.

PRESIDING MEMBER EGGERT: Well, I think -- well, when we're able to, when we have all the necessary information, which you know, we'll do as quickly as possible, but --

HEARING OFFICER KRAMER: But Monday is the current hope, but, you know, there's been a lot of

complications. So it may take a little bit longer to digest. And I can't say for sure which business meeting the adoption hearing, if that's the recommendation, would be on, but it would be no sooner than the 29th September.

MR. LAMB: Then what again is the hearing on the 20th?

HEARING OFFICER KRAMER: Oh, that's -- in our process when a Presiding Member's Proposed Decision goes out, we have a 30-day comment period.

MR. LAMB: Right.

HEARING OFFICER KRAMER: And so we don't have to have actually a committee hearing to consider comments. But in a complicated case, or even a semi-complicated one, we like to have an opportunity for a face-to-face discussion, similar to what you've been doing today on the conditions, if nothing else. You may comment requesting a particular change, and this let's the other parties interact with you and perhaps workout a compromise. It doesn't work as well if we just have you know comment letters fired back and forth. It's hard to really have any effective resolution of what might otherwise be relatively minor differences.

So we normally have a hearing for that purpose. It also allows members of the public who don't want to go to the effort of filing a written comment, the opportunity

to come in and have it reduce today writing by the court reporter.

And there's always the possibility that there may be some minor bits of clean up evidence that need to come into the record. The Committee on its own motion may even want the parties to bring some new evidence. And you may also find that when we issue the decision, we may have run into a couple snags and taken an approach that we will highlight to you and suggest that you comment on those specifically, because we're -- you know, we're looking for your input.

So it's a -- that's the purpose is to talk things out. And we try to do it near the end of the period. Because of scheduling, this is a little bit earlier than optimal, because it probably will allow, oh, you know slightly less than or right about three weeks. And for the parties, we encourage you to file your comments ahead of that meeting so we can have, at least those that you can come up with, about conditions. It's especially important for the applicant, because in my experience -- I think it will be less so here -- but applicants sometimes, you know, they read the conditions again, or they show them to a new person, or to the person who's actually going to be constructing the project. And we always seem to get requests for revisions, because of that.

And so if they bring those to that hearing or file them slightly in advance, then we can have a much better discussion, because we try to avoid trying to iron out those last minute wrinkles in front of the full Commission at the adoption hearing, although that is an option, but it's not our preferred option.

That was kind of long winded, but I hope that answered your question.

MR. LAMB: Yes, sir. Thank you.

HEARING OFFICER KRAMER: So, when we work through exhibits here, I think that that will be it. Does anybody else anticipate any other issues?

MS. FOLEY GANNON: Then we have to offer them into evidence.

HEARING OFFICER KRAMER: Right, we'll do that.

STAFF COUNSEL HOLMES: Are there any pending objections to any of the exhibits?

HEARING OFFICER KRAMER: I do not recall any pending objections?

Well, Ms. Gannon was -- there was an exhibit that came in today, the Tonya Moore Email. Did you decide that that can just come in.

MS. FOLEY GANNON: I think based on the discussion, it's fine.

HEARING OFFICER KRAMER: Okay. So I guess we

don't have any pending objections.

MR. LAMB: We do, Mr. Kramer. We have a pending objection that we had stated to Exhibit 105 and we still assert it.

HEARING OFFICER KRAMER: Oh, that's right. Okay. So, Ms. Gannon --

MS. FOLEY GANNON: Exhibit 105 is?

MR. LAMB: Right, 105 --

HEARING OFFICER KRAMER: Let's make sure we're talking about the same 105.

MR. LAMB: 105 as I understand it, is the Imperial Valley Solar Glare and Glint Study. And our objection is that it's not for the Calico project. It's not relevant. And there was no testimony from the applicant involving that exhibit at all. They just put it in or tried to put it in.

MS. FOLEY GANNON: We offered it, because it's relevant to the technology, which is the same.

HEARING OFFICER KRAMER: And do I recall correctly that your experts testified to a degree that would have been based on that?

MR. LAMB: They had no experts who testified at all, period.

MS. FOLEY GANNON: He did not testify.

HEARING OFFICER KRAMER: Staff did your experts

use that study at all.

STAFF COUNSEL HOLMES: Our experts prepared their own study, I believe.

MR. LAMB: That's correct. Which was Appendix A.

STAFF COUNSEL HOLMES: Appendix A to the traffic and transportation.

HEARING OFFICER KRAMER: Right. Okay.

MR. LAMB: What we call the Jewel Report.

STAFF COUNSEL HOLMES: Right. Then they may have relied on that in part in preparing it, but I don't know, since I wasn't handling that portion of the hearing. But to the extent that they testified, they were relying on their own report.

MS. FOLEY GANNON: But I think they did use it as a baseline information about the -- our understanding was they used it as baseline information again about the technology.

HEARING OFFICER KRAMER: Ms. Gannon?

MS. FOLEY GANNON: Yes.

HEARING OFFICER KRAMER: Could you offer a little more explanation about its relevance.

MS. FOLEY GANNON: It was -- first of all, we never claimed that it spoke to how the glint/glare would behave on this project site. What it was talking to was the way that the technology responds to sunlight and it

was speaking to like when it's on track, off track, you know what is the reflective ability of it, how does it respond in the environment.

I mean, it's like a lot of the information that we have provided about Maricopa, which of course doesn't speak to how something is going to be behaving on the Calico site, but it does speak to the technology, which we believe is relevant to the issue of how glint/glare can affect receptors off the site.

MS. BELLOWS: And it does analyze impacts to motorists. So it is relevant from that perspective on any site with a highway going by it.

MR. LAMB: Well, and again, just so we're all clear, we have to have an opportunity to cross-examine on any evidence that's presented and the basis therefore to include any experts. They presented no experts, no testimony about this whatsoever.

MS. FOLEY GANNON: We did present written testimony about it and we did say he was available. He was on the phone line. We didn't offer him as to any direct evidence in oral testimony. We did provide written testimony.

MR. LAMB: I didn't see any written testimony. What exhibit would that be?

There's no testimony about this report.

MS. FOLEY GANNON: I'm sorry, I made an error. He was actually on vacation when we submitted our rebuttal and we couldn't get his signature. So we did not put it in. We had him on the telephone. We didn't have any direct testimony on it. You're correct.

HEARING OFFICER KRAMER: All right I think there's quite a bit of testimony without that study.

MS. FOLEY GANNON: That's fine.

HEARING OFFICER KRAMER: We will not accept Exhibit 105.

MR. BASOFIN: Mr. Kramer, just to complicate things a little bit Defenders is also going to have an objection to one of the applicant's exhibits as well.

HEARING OFFICER KRAMER: Which one would that be?

MR. BASOFIN: I'm not sure what the number is, but it's the abstract of the study at Fort Irwin tortoise relocation projects.

MS. FOLEY GANNON: We're fine to take that out. You want to strike it? We can strike it. Go ahead.

MR. BASOFIN: That was easy.

HEARING OFFICER KRAMER: Okay. That was the subject of cross-examination though, and people were asked about it.

MS. FOLEY GANNON: Again, we don't care.

HEARING OFFICER KRAMER: And we have the study

itself now. That's in evidence, correct?

STAFF COUNSEL HOLMES: No, I don't believe the report is.

MR. BASOFIN: Dr. Berry, I think referenced the fact that it exists now, but I don't believe it was offered in evidence.

HEARING OFFICER KRAMER: The went the 2008 and 2009 --

MR. BASOFIN: No definitely not.

HEARING OFFICER KRAMER: -- report? Oh, that was something else. Okay.

Well, so that was Exhibit 102. So the applicant is fine with it not coming in, so it will not come in.

Okay, well let me finish -- we can get to the rest of the objections in a moment. Let me finish filling out the table.

So staff -- let's see, I was at Exhibit 315, which are revisions to Worker Safety 6.

And 316 was revisions to Haz 8.

And I think that was it for staff, wasn't it

STAFF COUNSEL HOLMES: Yes.

Okay, CURE.

MS. MILES: Yes.

HEARING OFFICER KRAMER: And you had quite a collection. And I was good up until 440. And then things

went --

MS. MILES: I believe we filed a revised exhibit list with this last submission of testimony and exhibits that went out this morning.

HEARING OFFICER KRAMER: Okay, has everyone seen that?

MS. FOLEY GANNON: I'm sorry, can you repeat that again.

MS. MILES: We filed an updated exhibit list that went out this morning by Email.

PROJECT MANAGER MEYER: Yeah, staff saw that.

MS. FOLEY GANNON: We got it. I haven't looked at it.

HEARING OFFICER KRAMER: Okay. May I just add those exhibits to the list in my free time?

MS. FOLEY GANNON: Yes.

STAFF COUNSEL HOLMES: Yes.

MS. MILES: Please.

(Laughter.)

HEARING OFFICER KRAMER: Defenders of Wildlife, we have 600 through 615.

MR. BASOFIN: Through 615, those are all correct and current -- not correct. I guess that's the current list that I have as well.

HEARING OFFICER KRAMER: Do you have more that

should be on the list?

Do you have more to add to the list?

MR. BASOFIN: No, I don't have anything to add. It's current as of what I have on my exhibit list.

HEARING OFFICER KRAMER: And when you say that, I hear an implication that you're going to file some more.

MR. BASOFIN: No.

HEARING OFFICER KRAMER: Okay, so you're done?

MR. BASOFIN: I'm done.

HEARING OFFICER KRAMER: Okay, good.

Basin and Range Watch. Ms. Cunningham, are you still with us?

I guess not.

Sierra Club?

I'm missing 1011 through 1019.

MR. RITCHIE: I believe those were additional photos. I can -- I don't have the actual descriptions of what they were. I can send them tomorrow morning or we can -- they don't have the go in the record.

HEARING OFFICER KRAMER: Well, if you want to just send them, does any party object to or just filling in the list with those.

MR. RITCHIE: Each of the ones too is labeled with what the picture is as well, so that will be easy to identify.

MR. LAMB: No objection.

HEARING OFFICER KRAMER: I may have those in the Email.

Newberry Springs, are you still with us?

I'm sorry, Newberry Community Services District?

Okay, I believe he just had these exhibits and did not start at 1100, so that's a placeholder.

And we have the opportunity to clean up mistakes in the record when we get to the next hearing, but I wanted to get a pretty complete exhibit list for the PMPD.

So the railroad, 1200 to 1206.

MR. LAMB: Sure. 1203, if you want to fill it in, is Joseph Schnell.

HEARING OFFICER KRAMER: Joseph, okay.

And Mr. Skeels?

MR. LAMB: Is Dennis.

HEARING OFFICER KRAMER: Two N's?

MR. LAMB: Two N's, yes, sir.

HEARING OFFICER KRAMER: And Dr. Krauss's first name?

MR. LAMB: David. And it's two S's.

And then 1207 is 7/1/2010 letter comments.

HEARING OFFICER KRAMER: Letter comments to whom?

MR. LAMB: To BLM and CEC.

HEARING OFFICER KRAMER: Okay.

MR. LAMB: And 1208 is 7/29/2010, letter comments to BLM and CEC. That's 1208. I think you've got 1209 there.

HEARING OFFICER KRAMER: Oh, I'll get it in a minute.

MR. LAMB: Okay, no problem.

1209 is the agreed upon Conditions of Certification.

HEARING OFFICER KRAMER: Why don't we call that proposed.

MR. LAMB: Okay, proposed Conditions of Certification.

HEARING OFFICER KRAMER: Conditions. And that was -- what was the first one?

I've got it TLSN.

MR. LAMB: Oh, TLSN 5?

HEARING OFFICER KRAMER: Five, et cetera.

MR. LAMB: Yes, sir.

And then 1210, which is the last one, is the general code of operating rules. The general code of operating rules.

HEARING OFFICER KRAMER: Would it be stated railway or -- parenthetically?

MR. LAMB: You can.

HEARING OFFICER KRAMER: Just so people realize

what it was.

And that was it, right?

MR. LAMB: That's it, sir.

HEARING OFFICER KRAMER: Okay, so, Mr. Basofin, we dealt with your objection to the applicant's exhibit.

Any other objections to any of the exhibits on the list?

MR. LAMB: We have no further objections from BNSF.

HEARING OFFICER KRAMER: From any party.

MS. FOLEY GANNON: We're trying the remember who entered in -- there was a map shown down in Barstow, and it had, like a Google Earth image of the --

MR. RITCHIE: Yeah, that was us.

MS. FOLEY GANNON: What was the exhibit number on that?

MR. RITCHIE: It was our last one, 1020 I believe.

MS. FOLEY GANNON: We have an objection to that map, because we believe it does not accurately reflect the conditions on the site. What it was -- and you can correct me how it was created, but it was a Google map and then it was -- the project side was laid out on top of it, but it was not done like with a GIS layer. It was not done -- in our view, it completely distorted the

relationship between the mountains and where the project site boundaries are. And it really was not an accurate representation.

MR. RITCHIE: Mr. Cashen, I think might be able to speak to that.

MR. CASHEN: Well, I can't speak to whether, you know, to object or not object to that. But the intent of the map was to show a better reflection of what was located in those, so-called, east-west corridor north of the project site. It was taken directly from maps produced by the applicant. The same information could be obtained by pulling out a ruler and using it on the applicant's maps.

But those maps have omitted several of the geographic features that are located in that northern linkage area, such as rock outcroppings. I don't know if that was intentional or not, but the figure that we provided was just directly obtained from Google Earth, which is a GIS layer.

MS. FOLEY GANNON: But Google Earth does not have our project boundaries on it. And that's what we objected to was the way that the pilot project boundaries were shown on the site, because it was completely not in line with how close -- it basically would almost have us putting SunCatchers in the foothills. And we would not

put SunCatchers in the foothills. They wouldn't happen.

MS. BELLOWS: Yeah, that was the point. A SunCatcher can't be on a slope.

MS. FOLEY GANNON: It couldn't be where it was shown. And so we felt it was very misleading.

MS. BELLOWS: It showed us in the mountains.

MS. FOLEY GANNON: And if you can get the same information from going with a project map and using a ruler, we'd suggest that would be a more appropriate way to do it.

MR. CASHEN: Well, I guess the motivation of generating that map in the first place was that the applicant had not provided any maps that accurately depicted what -- the features that were located in that northern linkage area. And in fact, the maps provided by the applicant omitted several features that are in that area, which are very significant in evaluating use of corridors.

MR. RITCHIE: Yeah. And even just looking at the closest map I have is the translocation plan, Figure number 2, is I believe more of a Google Earth type image, and you -- I mean, the mountains do come right down into -- there are rock outcroppings that come right down up to the border of Phase 2.

MS. FOLEY GANNON: If we had that figure up now,

we could show -- we could compare the two of them. It really was not an accurate depiction. And again it wasn't -- you said you didn't use any layers. I mean it was just -- you were just eyeballing it and we think you just didn't eyeball it right.

MR. RITCHIE: I believe we stand by the accuracy of that map.

HEARING OFFICER KRAMER: Well, at the time, we certainly heard discussion of -- you know, the questions about the accuracy of the map and we will -- we'll take the exhibit in but mindful of the applicant's concerns about its accuracy.

MS. FOLEY GANNON: Okay.

HEARING OFFICER KRAMER: So any other objections to any of the exhibits?

MS. FOLEY GANNON: No.

HEARING OFFICER KRAMER: Okay, then is there any objection to deem the exhibits admitted except for those that I have -- the few were admitted earlier and they're marked in here -- and that would be except for exhibits 102, which is abstract of the study; 105, which was the Imperial Valley glint and glare report, and -- identify think that's all that would be excluded.

So seeing no objection, then we will admit all those exhibits.

(Thereupon the above-referenced documents were marked by the Hearing Officer for identification and received into evidence.)

HEARING OFFICER KRAMER: And I think that's all we need to talk about. There are no future briefs, which hopefully comes as a relief to you. And is there any other business we need to transact this evening?

Thank you all for your patience and I'll turn it over to Commissioner Eggert.

PRESIDING MEMBER EGGERT: Thank you, Mr. Kramer, I will be very brief, given the late hour. I just want to thank all of the parties for their active and enthusiastic participation in this proceeding and in this hearing. We do have, I think, a very difficult task before us.

Obviously, this project does have impacts, particularly in the area of biology, which I think, you know, we have to look at in the context of other associated project benefits, as well as a lot of other impacts under is CEQA analysis that we need to make sure that we're looking at the potential for mitigation and whether or not that's appropriate and adequate.

I would say of the cases that I'm involved in, this is certainly the most challenging for a number of reasons that I won't go into, but I have found that the hearings have been extremely informative. I think the

participation by the parties and particularly the intervenors and the testimony that they've brought forth, the experts, have actually contributed quite substantially to the record. I think it's definitely made for a better proceeding.

I want to thank the incredibly hard work of the staff. This was definitely a monumental task to try to do an evaluation of this project. Thank the applicant for their professionalism and their willingness to compromise on issues. I know definitely some of these new technologies do face a significant amount challenge, both in terms of the technical side as well as the economics, and aspects of project permitting that add costs can be quite painful.

But hopefully, where we consider doing that, it's for a good reason, and actually improves the overall project, including its potential impacts to the environment.

So I think Mr. Kramer had noted our aggressive timeline, in terms of trying to move towards a final decision. I just want to assure folks that as the presiding member along with the Associate Commissioner Byron, we will be taking a very hard look at the evidence and weighing that evidence for the purposes of the decision. But we will also be doing that as expeditiously

as we can and as fairly as we can. And so we will probably be seeing you rather shortly if all proceeds as planned.

And again, thanks. And I guess we'll all go get some sleep hopefully. I think with that we're off the record.

(Thereupon the California Energy Commission, Calico Solar Project Evidentiary Hearing adjourned at 12:58 a.m.)

CERTIFICATE OF REPORTER

I, JOHN COTA, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission 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 29th day of August, 2010.

JOHN COTA