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In Pro per

STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:) Docket No. 97-AFC-1
)
)
)
The Application for Certification)
For the High Desert Power Project [HDPP])
)
_____)

**OPENING BRIEF
OF GARY A LEDFORD - PUBLIC INTERVENOR
ON
WATER
And Related Matters and Alternatives
FOR THE
HIGH DESERT POWER PROJECT**

Respectfully submitted:

November 3, 1999

GARY A. INTERVENOR
PARTY IN INTERVENTION
IN PRO PER

OPENING BRIEF ON WATER AND OTHER ALTERNATIVES FOR THE HIGH DESERT POWER PROJECT

I. INTRODUCTION

More than a year ago this intervenor brought to the attention of the CEC Staff and the Mojave Water Agency Board of Directors the environmental issue of Water to be used for Cooling Towers by HDPP and the cumulative impacts¹ associated with the Redevelopment of George Air Force Base. The issue of Water, its relationship to the proposed use by HDPP of this valuable resource and more importantly how the proposed approval fails to conform to the Judgment on Water Rights.

After four intensive days of testimony and the admission of evidence in this case, Intervenor believes the evidence is available for the Full Commission to validate Intervenor's claims and make findings and determinations that will mandate "Dry Cooling" as the only viable Alternative in this case. In the Alternative, or at the very least require that in order for High Desert Power to use the Water Resources of the High Desert that it must conform to the Rules [Standards], as set forth in the Judgment on Water Rights and provide new water to the basin as mitigation for the already overdrafted condition.

"The issue for today is to ensure that if this project is built and is going to use water for cooling, that there is not a precedent set that will set the stage for the future failure of the MWA to fulfill their role to recharge the overdrafted water basins and this has been my theme for the past year."²

"In Summary we are here today on Water to have hearings on contracts to use 15 to 20 percent of this valley's future water resources for cooling towers, but we don't have the slightest clue of how the Project is going to be put together"³

To address the overdrafted condition of the basin, each water producer is to "mitigate" the overproduction by buying replacement water. This is the 2 for 1 theory, discussed in detail later in this Brief. Precedent has been set for this type of mitigation, in the Regional⁴ Air Quality Requirements of 2 for 1.⁵ Air Quality Offsets required for this project are 2 tons retired for every 1 ton delivered into the atmosphere of the High Desert. Notwithstanding others arguments that

¹ A **project s** contribution is less than cumulatively considerable [i.e., not a significant cumulative impact] if the **project** is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact. Here the cumulative impact is the overdrafting of the water basins. (Sec.15130(a)(3).)

² Hearing Transcript October 8th 1999, page[s] 7 - 8 Opening Statement of Gary Ledford

³ Hearing Transcript October 8th 1999, page 11 Opening Statement of Gary Ledford

⁴ Hearing Transcript October 7th 1999, page 33 Lines 5 - 9

⁵ Hearing Transcript October 7th 1999, page 40 Lines 2 - 15

this project should never be built in the pristine air quality of the High Desert,⁶ this Intervenor shall remain silent on the Air Quality Issue,⁷ except to point out that High Desert is Purchasing 2 air quality credits for each one that it will create. More importantly, the benefit to this mitigation measure is to the South Coast Air Basin, not to the High Desert.⁸

John Steinbeck noted, "And it never failed that during the dry years the people forgot about the rich years, and during the wet years they lost all memory of the dry years. It was always that way." [East of Eden]

"We are analyzing current electricity supply after an unprecedented five years in a row, the longest string of wet years since precipitation records started in the late 1800's. . . . droughts will be back in California and the consequences will be devastating"⁹

II. PROCEDURAL COMMISSION ERROR

On October 8th 1999, the final day of the hearings after a conference, Hearing Officer Valkovsky erred in setting forth the following [four] edicts relative to "necessary guidance" on what the Commission would consider relative to the "**Project**".¹⁰ Intervenor places the edict's in standard copy, with *Intervenors comments in bold italics*.

1. The "Project", as defined under the California Environmental Quality Act is the "Power Plant" and its appurtenant facilities including the direct, indirect and cumulative environmental impacts associated with the power plant.

The evidence as it relates to Water, Air Quality and Biological Resources, in this case clearly shows that the Project is the Redevelopment of George Air Force Base, not a microspec project. The evidence is un-controverted - THE PROJECT as it relates to WATER is the Redevelopment of George Air Force Base.

2. Other Agency Actions: It is not our charge nor within our ability to consider the various policy decisions which the other agencies may have made and the legal strictures under which they operate.

The Commission allows agencies to use its document as a CEQA Equivalent.¹¹ Thus it is a gross injustice if CEQA issues are raised that demonstrate the potential projects

⁶ Hearing Transcript October 7th 1999, page 30 Lines 18 - 23

⁷ Hearing Transcript October 7th 1999, page32 Lines 8 - 15

⁸ Hearing Transcript October 7th 1999, page 33 Lines 10 - 15

⁹ CEC Docket 99 - CEO-1 - October 14th 1999 page A1 - COMMENTS OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES AND THE ASSOCIATION OF CALIFORNIA WATER AGENCIES-UTILITY SERVICE AGENCY ON ASSESSMENT OF SUPPLY ADEQUACY IN CALIFORNIA. Intervenor requests the Commission take Judicial Notice of this filing.

¹⁰ Hearing Transcript October 8th 1999, page[s] 13-15

¹¹ Hearing Transcript October 7th 1999, page 313 lines 3 - 23 - Randy Hill - waiting for CEQA Equivalent Document

impacts are of a regional nature and that mitigation must be dealt with regionally.^{12/13} Also the Commission has inconsistent policies, by way of example, Air Quality Impacts are dealt with on a regional basis, including the requirement of a separate EIS.¹⁴ The same is true for Biological Impacts and its related mitigation measures.¹⁵

If the other agency takes an action in conformance with its own requirements and we are presented with the results of that action, that is what we will react to.

That may well be the order of the day unless, clear evidence of abuse of discretion was presented. The Commission is then compelled to not allow the contract if it can be seen that it is in clear contravention of published Rules.

3. **Written Contracts:** For the provisions of water services, provide evidence, in our view of water availability. It is the applicants Burden to establish that water is, in fact, available for the Project. The absence of these contracts affects the overall persuasiveness of the evidence, which the Commission must consider to rendering its proposed decision.

While Intervenor agrees to a degree with the commission, there were no contracts presented as "final", and the one that was presented was clearly not acceptable to CEC Staff. Not less than five contracts need to be agreed and executed to provide continuous un-interruptable water service. Just one break in the chain and there is no water. Yet neither the Public or the Commission was allowed to see Drafts, nonetheless final contracts. The reason, each agency was waiting for the CEC, because each of the "Contracts" required CEQA.

4. **Private Contracts:** We believe the appropriate inquiry in these proceedings is to determine whether complying with the terms of any of these ancillary contracts would result in the "Project" causing environmental impacts which have not been analyzed and appropriately mitigated.

When this issue was investigated, relative to the "Contracts", with HDPP's expert, Mr. Bob Beebe¹⁶ on the matter, the following was determined;¹⁷

There were at least five contracts that needed to be entered into and none of these contracts is "Exclusive to HDPP"

- a. The first is a contract with MWA between the City of Victorville and MWA. That contract is an annual contract under Ordinance #9.¹⁸ The

¹² Hearing Transcript October 7th 1999, page 326 - 327 Beebe

¹³ Hearing Transcript October 7th 1999, page 331 - 332 Caouette - the application is not approved. It is awaiting the CEC CEQA Equivalent Document.

¹⁴ Hearing Transcript October 7th 1999, page[s] 35 - 75

¹⁵ Hearing Transcript October 7th 1999, page[s] 98-169

¹⁶ Hearing Transcript October 8th 1999, page[s] 22-

¹⁷ Exhibits 138 & 139 October 8th 1999

¹⁸ Exhibit 134[s] and 137 entered - October 8th 1999

application submitted to the CEC, from the MWA indicates the use of water for municipal and industrial purposes¹⁹. MWA requires CEQA to approve the contract.²⁰ The Parties admit the water can be used for other purposes other than the Power Project.²¹ Finally there is no draft or final contract for the Commission to review.^{22/23}

HEARING OFFICER VALKOSKY: "Okay, so again, just to relate it to this particular project, the City of Victorville, on behalf of the applicant, will be coming back every year, and **it's pretty much take your chances** depending on the availability of water?"

Mr. Cauoette: "That's correct"²⁴

- b. Aquifer Storage and Recovery Agreement: The Draft before the commission clearly shows that water is to be used for other purposes. Included in that is evidence from the Victor Valley Water District where the President and the Attorney advise the district Board that project can be used for their own uses.²⁵ However at the time of the hearing there was no final agreement for the Public or the Commission to review.^{26/27/28/29/30/31}

Hearing Officer Valkoski:

". .concerning the water supply agreement, is one, that an agreement be executed before the committee proceeds to its recommendation in this case. Basically you know, subject to

¹⁹ Hearing Transcript October 8th 1999, page 53 - " the water to be provided to industrial users, largest current proposed user is the High Desert Power partners electric plant cooling. To the extent that treatment facilities are constructed treated water shall be utilized for municipal purposes and ground water purposes."

²⁰ Exhibit 123 E-Mail - Norm Cauoette

²¹ Exhibit 137 October 8th 1999 page

²² Hearing Transcript October 8th 1999, page 59 - "Application Only"

²³ Hearing Transcript October 7th 1999, page 311 - 312 " No agreement between High Desert power and the City of Victorville.

²⁴ Hearing Transcript October 7th 1999, page 336 lines 8 - 14

²⁵ Exhibit 137 October 8th 1999

²⁶ Hearing Transcript October 8th 1999, page 60 line 5

²⁷ Hearing Transcript October 7th 1999, page 267 lines 6 - 10. VVWD has to provide 100% redundancy.

²⁸ Hearing Transcript October 7th 1999, page 268 line 16 - 20, "use of HDPP wellfield for VVWD's own purpose - if they use water out of those wells"

²⁹ Hearing Transcript October 7th 1999, page 273 line 15 - Stored Water is available for "other uses" - as Mr. Ledford states lines 22 - 25. . there is nothing to prohibit a property owner constructing wells and using High Desert powers Water.

³⁰ Hearing Transcript October 7th 1999, page 284 line 11 - 16 ". .the agreement is for 80 years". The expected life of the Power Project is 30 years.

³¹ Hearing Transcript October 7th 1999, page 286 line 7 - 12 "Right now our agency is looking at and evaluating a Regional Water Treatment Plant. . ."

any correction, is the "will serve letter" for the project. I think that is as simple as I can put it.

And two, in conjunction with that, that any terms and conditions contained in that will serve letter not be in conflict with other conditions the commission may impose."³²

- c. Water Storage Agreement with MWA: The agreement with Victor Valley Water District and the MWA to store 13,000 acre feet of water. Many component parts exist with this type of an agreement and no such agreement exists today between any purveyor and the Agency. The Draft Agreement, in outline form, could even be subject to the approval by the court in the MWA adjudication which is pending review by the California Supreme Court. No such Proposed Draft was submitted into evidence and no executed agreement was available for the Commission or the Public to review.³³

Mr. Ledford: "It's not subject to his [Judge Kaiser's] approval, but any party could challenge. Would challenge it to the Kaiser Court, is that correct"

Mr. Caouette" That's correct.

Mr. Ledford: ". .so this process of a Water Storage Agreement, which is an integral part of this whole "WILL SERVE" process, hasn't even started yet, is that a correct statement? There is no Official Application for approval of a water storage agreement to the Water Master as of tonight?"

Mr. Caouette: "No"³⁴

- d. The "Will Serve Letter", None was offered into evidence, in either draft or final form.³⁵
- e. A Water Supply Agreement: Between the City of Victorville and High Desert Power Project. No one knows what this agreement is all about, but it is clearly listed on the chart. One would suspect it is the agreement for High Desert Power to provide water service to the expansion of George Air Force Base. However no agreement was available for the Public or the Commission to review.³⁶

³² Hearing Transcript October 7th 1999, page 305 lines 3 - 18

³³ Hearing Transcript October 8th 1999, page 60 line 15

³⁴ Hearing Transcript October 7th 1999, page[s] 343 - 344

³⁵ Hearing Transcript October 8th 1999, page 60 line 19 - 23

³⁶ Hearing Transcript October 8th 1999, page 61 line 1 - 10

5. **Other Areas:** Taxpayers Rights, Ownership of Water, the conformance of the CEC process with the California Environmental Quality Act and the Role of the Public in our process are not evidentiary matters, but are matters most appropriately reserved for closing arguments and final briefs.

It is difficult to ascertain how the commission could take such a stand, the issue before the commission is compliance with CEQA, in all of its criteria. The above issues are CEQA issues and properly aired in a Public Forum.

This Intervenor disagrees with the last day's edict set out by the Committee as the record clearly demonstrates.³⁷ The commission is not a "Project" advocate, it must remain neutral and impartial in its analysis. It cannot illicit testimony from subordinates that owe their jobs to their superiors, yet that is exactly what the evidence shows in this case.

The agencies as this Brief will clearly show intend to use the CEC "Equivalent Document" to approve many contracts for the "**Project**". The underlying problem is that the **Project** is vastly larger than what the Commission is considering.

It has been suggested that EIR s should be required to clearly define project objectives, to provide a more definitive basis for screening alternatives. Ordinarily, however, there will not be a single, clearly defined set of objectives for a project. The applicant, the lead agency, and each responsible agency will have its own objectives. If environmental review focuses to narrowly on declared objectives of the applicant or lead agency, feasible alternatives may be ruled out of consideration based simply on how the applicant or lead agency initially chooses to state the objectives of the project. The process of considering project alternatives serves to sort out the project objectives, helping to distinguish between basic project objectives and those outweighed by the objective of avoiding environmental damage.

Commonly voiced concerns are that in attempting to comply with CEQA's alternatives requirement, agencies include only infeasible "straw men" as alternatives in the EIR, or so narrowly define the project as to exclude analysis of clearly available alternatives. Neither approach is consistent with the Guidelines, which require consideration of alternatives, which can feasibly attain the basic objectives of the project. The "rule of reason" standard applied by Goleta II should address these problems. Moreover, while the obligation is on the lead agency to identify and consider alternatives, the public has the opportunity to propose additional alternatives and to submit independent analyses of alternatives, and the agency is required to make a reasoned response to such proposals and analyses. Thus, interested parties can force the EIR to discuss any alternative that is timely proposed. (See also, Goleta II, 52 Cal.3d at 567-68 (even untimely

³⁷ Hearing Transcript October 8th 1999, page 177 - 181

alternative proposals must be addressed, although they may be addressed outside the EIR.)³⁸

III. THE CEC HAS AN OBLIGATION TO BE IN COMPLIANCE WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT

1. BEGINNING WITH PROPERLY DEFINING THE PROJECT

First it is important to know what the **PROJECT**, for purposes of CEQA is. Perhaps no one could have explained it better than Mayor Caldwell:³⁹

" . . .the biggest reason is that it is a '**Project**' closely tied to the destiny of **the rehabilitation of the 5,000 acres that was once George Air Force Base.**"

" . . .to provide the revenues through our redevelopment agency at George in excess of \$100,000,000."

" . . .**the ability to bond, to raise the money to make the major infrastructure improvements and enhancements that need to be made at George Air Force Base for us to generate the 15,000 jobs that's projected to be the result of our mission statement to convert George Air Force Base into the premiere air cargo/air freight operation. . .**"

What does that have to do with this "Project"?

" . . a chance to use a piece of land that otherwise would not be put to productive use, and raise \$100,000,000 worth of revenue. . ."

" . . attracting the types of business and industry at George Air Force Base many of which will be rather intense energy users."

" . . our ability to market this base worldwide"

" . . the ability to purchase less expensive power for intense power users. "

Consider that this "**Project**", as designed, the water component of this **project is designed to take the water from the state water project, the aqueduct, . . go one step beyond** that and through the injection wells that have been proposed and agreed to and;

" . . take additional water, treat it and put it into the aquifer, and then from our perspective as those who live here and those who have to make the land use

³⁸ Citation from the California State Bar Association web site at <http://www.calbar.org/2sec/3env/4envalt.htm>

³⁹ Hearing Transcript October 7th 1999, page[s] 166-172

decisions and the environmental decisions, we find this a project without parallel in the context of the private sector being willing to invest money in infrastructure that will. . ."

"CREATE [sic] A WATER TREATMENT FACILITY THAT WILL ULTIMATELY BECOME AVAILABLE TO THE GENERAL PUBLIC FOR USE AS WE BUILD AND GROW AT GEORGE AIR FORCE BASE AND BEYOND"

Terry Caldwell
Mayor of the City of Victorville
Chairman of the southern California International Airport Authority
Vice Chairman of the Victor Valley Economic Development authority

It was convincing testimony to this Intervenor that the Mayor's **PROJECT** was to provide water through a "treatment facility, that will become available to the general public". Nowhere in this process does the CEQA document discuss such a project, If it did however, we would find that "ultimately", based on the 1991 EIS⁴⁰, the redevelopment of George Air Force Base was going to require up to 40,000 acre-feet of water per year. We would also find that so crucial was that issue that MWA filed a lawsuit, with an eventual settlement agreement⁴¹, so that a SOURCE of water for each project at the redeveloped George Air Force Base would have water. The issues in that settlement agreement have not been addressed in this CEC process.

Section 21065 of the Code describes "Project" as . . . an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

- (a) An activity directly undertaken by any public agency.
- (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
- (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

The Project that is clearly before the commission is the review of the entity of George Air Force Base. Unfortunately, the City of Victorville and those other agencies[MWA,VVWD,VVEDA and the City of Victorville] who must approve the use of water for the **"Project"** and other related activities, want to use the CEC document to build a 24" Pipeline to provide water for the Power Project as well as to further develop George Air Force Base, create 15,000 jobs and its related housing and industrial water needs, yet the CEQA project

⁴⁰ Exhibit 116, Final EIS for the Redevelopment of George Air Force Base

⁴¹ Exhibit[s] 137 & 138

that is before the commission is at best only to use State Project Water for Evaporative Cooling and no other reason. The use of the Energy Commission document as a CEQA Equivalent Document is a violation of the intent and purpose of CEQA.

IV. WHAT ISSUES REQUIRE CEQA COMPLIANCE UNDER THE "PROJECT"

The environmental impact is that the proposed water purveyor whether VVWD or the City of Victorville, is continuing to overdraft a water basin. This fundamental negative impact on the environment cannot be exacerbated by this project, without the project coming under the jurisdiction of the judgment and the Regional Water Management Plan⁴². Since the document the CEC is to produce must be an equivalent document under CEQA all of the impacts associated with the project and the cumulative impacts must be addressed and mitigated, that includes the regional overdraft. A Water Purveyor who has not cured its own environmental issues of overdraft, cannot use SWP water, 100% consumptively for a new project.

It is inherent on the CEC as the lead agency in this process to insure that the subordinate agencies, in this case the MWA, VVEDA, VVWD or the City of Victorville can cure their own in-house water problems before relying on SWP water for new projects, where there is no benefit to the basin.

Staffs position that Given the nature of the competitive market, one assumes that the liability of the project not operating due to no water rests with the project owner and not with society⁴³, is untenable, it is the Energy Commission s responsibility as the lead agency to insure that the law is complied with.

Under Section 21000. Legislative Intent - Policies - our Legislature found and declared as follows:

(a) The maintenance of a quality environment for the people of this state now and **in the future is a matter of statewide concern.**

(d) The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state **take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.**

(e) **Every citizen has a responsibility to contribute to the preservation and enhancement of the environment.**

(f) The interrelationship of policies and practices in the management of natural resources and waste disposal requires systematic and concerted efforts **by public and private interests to enhance environmental quality and to control environmental pollution.**

⁴² Exhibit 110 - MWA Regional Water Management Plan

⁴³ Exhibit[s] 83, 131, 140, 141, 142

(g) It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, **shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.**

The California Energy Commission is mandated under Section 21001.1., The review of Public Agency Projects: That projects to be carried out by public agencies be subject to the same level of review and consideration under this division as that of private projects required to be approved by public agencies. In other words where, the City or MWA is required to provide a CEQA analysis as to the regional consequences of any action that a "**Project**" proposes so is the requirement of the CEC.

V. PROJECT ALTERNATIVES

21002. Approval of Project

It is the policy of the state that public agencies [such as the MWA, VVWD VVEDA and the City of Victorville] should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. In the case of this project, the redevelopment of George Air Force Base, many components need to be addressed, and need to comply with the terms and conditions of the rules of the Mojave Water Agency as well the underlying adjudication. It cannot be done in a vacuum.

Dry Cooling as well as the purchase of "vested water rights" are viable alternatives for consideration in this project."⁴⁴

VI. Use of Environmental Impact Reports

Section 21002.1.

The following policy shall apply to the use of environmental impact reports prepared pursuant to this division:

(a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.

⁴⁴ Exhibit 121 - Direct Testimony Gary Ledford on Dry Cooling and Other Alternatives

(b) **Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.**

(d) In applying the policies of subdivisions (b) and (c) to individual projects, the responsibility of the lead agency shall differ from that of a responsible agency. The lead agency shall be responsible for considering the effects, **both individual and collective, of all activities involved in a project.**

VI. Concurrent Processing

Section 21003.

(a) Local agencies integrate the requirements of this division with planning and environmental review procedures otherwise required by law or local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively.

VII. PUBLIC COMMENTS

Section 21003.1.

It is the policy of the state that:

(a) Comments from the public and public agencies on the environmental effects of a project shall be made to lead agencies as soon as possible in the review of environmental documents, including, but not limited to, draft environmental impact reports and negative declarations, in order to allow the lead agencies to identify, at the earliest possible time in the environmental review process, potential significant effects of a project, alternatives, and mitigation measures which would substantially reduce the effects.

(b) Information relevant to the significant effects of a project, alternatives, and mitigation measures which substantially reduce the effects shall be made available as soon as possible by lead agencies, other public agencies, and interested persons and organizations.

(c) Nothing in subdivisions (a) or (b) reduces or otherwise limits public review or comment periods currently prescribed either by statute or in guidelines prepared and adopted pursuant to Section 21083 for environmental documents, including, but not limited to, draft environmental impact reports and negative declarations.

CORE VALUES FOR THE PRACTICE

OF PUBLIC PARTICIPATION⁴⁵

1. People should have a say in decision about actions which effect their lives
2. Public participation includes the promise that the public's contribution will influence the decision
3. The public participation process communicates the interests and meets the process needs of all participants,
4. The public participation process seeks out and facilitates the involvement of those potentially affected.
5. The public participation process involves participants in defining how they participate.
6. The public participation process communicates to participants how their input was, or was not, utilized.
7. The public participation process provides participants with the information need to participate in a meaningful way.

VIII. ENACTMENT OF TWO FOR ONE RULE ON HIGH DESERT POWER

Section 21004.

In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division. However, a public agency may use discretionary powers provided by such other law for the purpose of mitigating or avoiding a significant effect on the environment subject to the express or implied constraints or limitations that may be provided by law.

The provisions of Division 13 (commencing with Section 21000) of the Public Resources Code confer no such independent authority. Rather, the provisions of that division are intended to be used in conjunction with discretionary powers granted to a public agency by other law in order to achieve the objective of mitigating or avoiding significant effects on the environment when it is feasible to do so. Compliance with the requirements of that division identifies the manner in which significant effects of a project can be mitigated or avoided, and imposes an additional requirement that these mitigating or avoiding actions be taken whenever it is feasible to do so. In order to fulfill that latter requirement, a public agency is required to select from the various powers which have been conferred upon it by other law, those which it determines may be appropriately and legally exercised to avoid or mitigate the significant effects of the project as required by that division.

Thus, for example, if the California Constitution, a charter, a statute, or some other law generally confers upon a public agency the authority to levy a fee or to impose another type of exaction for public welfare purposes, that public agency may, to the extent expressly or

⁴⁵ U.S. EPA "The Model Plan for Public Participation". 1996

impliedly permitted by such other law, choose to impose that fee or exaction for the purpose of mitigating or avoiding a significant effect on the environment which has been identified pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code. Or, if a public agency is generally authorized to exercise the power of condemnation, it may, to the extent expressly or impliedly permitted by such other law, choose to do so in order to mitigate or avoid a significant effect on the environment which has been identified pursuant to that division. The provisions of Section 21004 of the Public Resources Code do not modify the holdings expressed in *Golden Gate Bridge, etc., Dist. v. Muzzi*, (1978) 83 Cal. App. 3d 707; and *San Diego Trust & Savings Bank v. Friends of Gill*, (1981) 121 Cal. App. 3d 203.

IX. PREJUDICIAL ABUSE OF DISCRETION

The CEC failure to address the Public's comments and alternatives creates an abuse of discretion. This Intervenor has raised the various Water Issues over the 12 months yet the CEC has failed to address his issues, within the context of the Environmental Document. No written responses have been made except by way of staff rebuttal, basically stating that they don't have to address the "Cumulative Impacts of the entire project".

The Public would get the sense that the CEC's Staff has become the project advocate and not an impartial agency - processing a project. It is clear where air quality for example is a regional issue it is addressed by the local air quality management district and federal agencies. Mitigation measures are adopted on a 2 for 1 basis. Here, however, except for one docketed e-mail and an unprocessed application the regional issue of water and water quality remains the responsibly of the CEC. The Regional Issues of Water are not addressed or mitigated.

Section 21005. Information Disclosure Provisions

(a) The Legislature finds and declares that it is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.

(c) It is further the intent of the Legislature that any court, which finds, or, in the process of reviewing a previous court finding, finds, that a public agency has taken an action without compliance with this division, shall specifically address each of the alleged grounds for noncompliance.

X. REQUIRED FINDINGS FOR HIGH DESERT POWER PROJECT

Section 21081.

Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified

which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:

(a) The public agency makes one or more of the following findings with respect to **each significant effect**:

(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency. *It is clear that the City of Victorville intends to use the Water Treatment facility, the pipeline and water storage for more than just the "Cooling Towers"*

(3) Specific economic, legal, social, technological, other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

XI. FULLY ENFORCEABLE PERMIT CONDITIONS

Section 21081.6.

(a) When making the findings required by paragraph (1) of subdivision (a) of Section 21081 or when adopting a mitigated negative declaration pursuant to paragraph (2) of subdivision (c) of Section 21080, the following requirements shall apply:

(1) The public agency shall adopt a reporting or monitoring program for the changes made to the project or conditions of project approval, adopted in order to mitigate or avoid significant effects on the environment. The reporting or monitoring program shall be designed to ensure compliance during project implementation. For those changes which have been required or incorporated into the project at the request of a responsible agency or a public agency having jurisdiction by law over natural resources affected by the project, that agency shall, if so requested by the lead agency or a responsible agency, prepare and submit a proposed reporting or monitoring program.

(b) A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures. Conditions of project approval may be set forth in referenced documents which address required mitigation measures or, in the case of the adoption of a plan, policy, regulation, or other public project, by incorporating the mitigation measures into the plan, policy, regulation, or project design.

XII. THE ENVIRONMENTAL DOCUMENT

Section 21082.1. Preparation of Environmental Documents

- (a) Any draft environmental impact report, environmental impact report, or negative declaration prepared pursuant to the requirements of this division shall be prepared directly by, or under contract to, a public agency.
- (b) This section is not intended to prohibit, and shall not be construed as prohibiting, any person from submitting information or other comments to the public agency responsible for preparing an environmental impact report, draft environmental impact report, or negative declaration. The information or other comments may be submitted in any format, shall be considered by the public agency, and may be included, in whole or in part, in any report or declaration.
- (c) The lead agency shall do all of the following:
 - (2) Independently review and analyze any report or declaration required by this division.
 - (3) Circulate draft documents, which reflect its independent judgment.
 - (4) As part of the adoption of a negative declaration or certification of an environmental impact report, find that the report or declaration reflects the independent judgment of the lead agency.

XIII. THE ENTIRE RECORD MUST BE CONSIDERED

Section 21082.2.

- (a) The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record.

XIV. CLOSURE OF GEORGE AIR FORCE BASE

Section 21083.8. Closure and Reuse of Military Base

- (a) For the purposes of this section, the following terms have the following meaning:
 - (1) "Reuse plan" means an initial plan for the reuse of a military base adopted by a local government or redevelopment agency in the form of a general plan, general plan amendment, specific plan, redevelopment plan, or other planning document.
 - (2) "Military base" or "base" means any military base or reservation either closed or realigned by, or scheduled for closure or realignment by, the federal government.

(c) This section shall remain in effect only until January 1, 2001, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 2001, deletes or extends that date.

21083.8.1. Baseline Provisions

(a)(1) For purposes of this section, "reuse plan" for a military base or reservation has the same meaning as the term as defined in paragraph (1) of subdivision (a) of Section 21083.8, except that the reuse plan shall also consist of a statement of development policies, including a diagram or diagrams illustrating its provisions, and make the designation required in paragraph (2) of this section.

(2) The reuse plan shall designate the proposed general distribution and general location of development intensity for housing, business, industry, open space, recreation, natural resources, public buildings and grounds, roads and other transportation facilities, infrastructure, and other categories of public and private uses of land.

(B) Identify pertinent responsible agencies and trustee agencies and consult with those agencies prior to the public hearing as to the application of their regulatory policies and permitting standards of the proposed baseline for environmental analysis, as well as to the reuse plan and planned future nonmilitary land uses of the base or reservation. The affected agencies shall have not less than 30 days prior to the public hearing to review the proposed reuse plan and to submit their comments to the lead agency.

(e) All subsequent development at the military base or reservation shall be subject to all applicable federal, state, or local laws, including, but not limited to, those relating to air quality, water quality, traffic, threatened and endangered species, noise, and hazardous or toxic wastes, substances, or materials.

21091. Review Periods - DEIR and Negative Declarations

(a) The public review period for a draft environmental impact report shall not be less than 30 days. If the draft environmental impact report is submitted to the State Clearinghouse for review, the review period shall be at least 45 days.

(d)(1) The lead agency shall consider any comments it receives on a draft environmental impact report or on a proposed negative declaration, which are received within the public review period.

(2)(A) With respect to the consideration of comments received on a draft environmental impact report, the lead agency shall evaluate any comments on environmental issues that are received from persons who have reviewed the draft and shall prepare a written response pursuant to subparagraph (B). The lead agency may also respond to comments that are received after the close of the public review period.

(B) The written response shall describe the disposition of any significant environmental issue that is raised by commenters. The responses shall be prepared consistent with Section 15088 of Title 14 of the California Code of Regulations, as those regulations existed on June 1, 1993.

XV. THE PUBLIC AGENCIES RESPONSIBLE FOR HDPP AND ITS RELATED ACTIVITIES MAY TIER EIR'S.

In this siting case the CEC as lead agency should have required that the Mojave Water Agency, Victor Valley Water District, the City of Victorville, the Victor Valley Economic Development Authority and perhaps others conduct tiered EIR's. Certainly other agencies did separate EIR's, including the Department of Fish and Game, the Department of Interior and the Air Quality Management District. Why was such an important CEQA issue ignored by the local agencies?

21093. Public Agencies may Tier EIRs

(a) The Legislature finds and declares that tiering of environmental impact reports will promote construction of needed housing and other development projects by (1) streamlining regulatory procedures, (2) avoiding repetitive discussions of the same issues in successive environmental impact reports, and (3) ensuring that environmental impact reports prepared for later projects which are consistent with a previously approved policy, plan, program, or ordinance concentrate upon environmental effects which may be mitigated or avoided in connection with the decision on each later project. The Legislature further finds and declares that tiering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental effects examined in previous environmental impact reports.

(b) To achieve this purpose, environmental impact reports shall be tiered whenever feasible, as determined by the lead agency.

XVI. APPROVAL OF LATER PROJECTS - AT GEORGE AFB

21094. Later Projects

(a) Where a prior environmental impact report has been prepared and certified for a program, plan, policy, or ordinance, the lead agency for a later project that meets the requirements of this section shall examine significant effects of the later project upon the environment by using a tiered environmental impact report, except that the report on the later project need not examine those effects which the lead agency determines were either (1) mitigated or avoided pursuant to paragraph (1) of subdivision (a) of Section 21081 as a result of the prior environmental impact report, or (2) examined at a sufficient level of detail in the prior environmental impact report to enable those effects to be mitigated or avoided by site specific revisions, the imposition of conditions, or by other means in connection with the approval of the later project.

(d) All public agencies which propose to carry out or approve the later project may utilize the prior environmental impact report and the environmental impact report on the later project to fulfill the requirements of Section 21081.

(e) When tiering is used pursuant to this section, **an environmental impact report prepared for a later project shall refer to the prior environmental impact report and state where a copy of the prior environmental impact report may be examined.** However when this Intervenor requested a copy of the underlying document, the CEC could not provide it.

XVII. THE OVERDRAFT

While it is fully acknowledged that the ground water basins are in a state of severe and critical overdraft.⁴⁶ The Victor Valley Water District [VVWD] the apparent source of backup water for HDPP haven't done anything to correct their individual overproduction of their wells⁴⁷, and apparently they do not intend to do so without a direct order from some court. Currently the MWA, along with the municipal producers are requesting that the Supreme Court hear their arguments on the Merits of the Judgment of the Physical Solution for the balancing of the basin[s] and curing the overdraft.⁴⁸ The MWA's opening Brief to the California Supreme Court gives us a view of the problem of "overdraft" as presented to the court:

"In 1990, water producers within the Mojave River Basin (an area of approximately 3,600 square miles and home to about a quarter of a million people) were confronted with an alarming water supply problem. Since the mid-1950's, the annual demand for water from the Basin' had exceeded the annual natural supply - resulting in a continuous and ever increasing "overdraft." **Rapid urban development in the 1980's had exacerbated the problem by dramatically increasing the demand on the already overdrafted system.** [bolding and underling added by Intervenor for emphasis]

"By 1990 the cumulative overdraft on the Basin exceeded one million acre feet. If the situation is allowed to go unchecked, **the result will be ground subsidence, decreased water quality, increased costs to pump from constantly increasing depths, destruction of the underground storage capacity, and, ultimately, complete exhaustion of the underground supply.**" [bolding and underlining added by Intervenor for emphasis]

Clearly the City of Victorville and the Victor Valley Water District along with the other law firms and their selected engineers concurred with this analysis as can be seen by their signatures on the Brief.⁴⁹

The adjudication was started to determine vested water rights to "Natures Free Production", which the parties were advised was recharged into a common pool of water.

⁴⁶ Exhibit 112 - Mojave Water Agency Brief to the California Supreme Court

⁴⁷ Exhibit 120 - Well Interference Report

⁴⁸ Exhibit 112 - Mojave Water Agency Brief to the California Supreme Court

⁴⁹ Exhibit 112 - Mojave Water Agency Brief to the California Supreme Court

(Referred to in the adjudication as the Tea Cup Theory). The "theory" was, since all producers in the common pool were equally responsible for the overdraft, so everyone was to share equally in the cure. New production on the other hand was required to pay the full price to bring in new water into the basin[s]. The Fourth Circuit Court stated it clearly, "**Equity dictates that all persons in the same position be treated alike.**" (Civ. Code, /3511 ["Where the reason is the same, the rule should be the same. I.])⁵⁰ Farmers were promised that over a five-year period they would be paid handsomely for their "**Free Production Allowance**". They could make more money selling or leasing their water than they could farming. Yet five years after the adjudication went into effect, many farmers still cannot sell their water, or if they can it is at bargain basement prices.⁵¹

"The trial court Judgment is supposed to provide an equitable mechanism, a "Physical Solution," for allocating pumping rights and financing the purchase of imported water supplies essential to the ongoing enjoyment of all classifications of water rights in the Basin."⁵²

Within the past 90 days a long awaited study of the migrating water that was to have been released by the USGS⁵³, at this writing the written report is still not available, but several public meetings have been made by the USGS. The result is that the vast majority of the municipal wells in the Alto Basin where the HDPP project is proposed, pump only ground water. There is no common pool.⁵⁴ The Natural Recharge Water goes directly into the Main Stem of the Mojave River, in the Flood Plain Aquifer. That means that all of the natural water belongs only to the overlying producers, who enjoy this "**Free Production**" of nature's water. In order for a municipal producer to obtain a legal right to this water they must purchase the right. The Regional Aquifer is not naturally recharged.⁵⁵

In the case of the Victor Valley Water District, of the 33 wells they have only two that are potentially in the FloodPlain Aquifer, and both of them were drilled after 1990. CEC staff states that all "**. . VVWD s water supply is entirely from groundwater.**"⁵⁶ Each and every year of production the Victor Valley Water District mines, all of their water from their wells. Each year the hydrographs indicate that their well levels go down.⁵⁷

⁵⁰ Published Opinion on the MWA Case 4th Circuit Court of Appeal - Intervenor requests Judicial Notice

⁵¹ Exhibit 109 Fifth Annual Report to the Court

⁵² Exhibit 109 Fifth Annual Report to the Court

⁵³ Exhibit not yet available

⁵⁴ Exhibit 120 Well Interference Report

⁵⁵ Exhibit 120 Well Interference Report

⁵⁶ Exhibit 83 Staff Water and Soils Testimony

⁵⁷ Exhibit 120 Well Interference Report

XVIII. ISSUES TO BE ADJUDICATED BY THE COMMISSION

1. Can the Energy Commission approve the use of State Water Project Water for "Cooling Towers" when the entire MWA entitlement will not cure the existing overdraft?

If High Desert Power Project were allowed to Purchase 4,000 Acre feet of SWP water for Cooling Towers with a 100% consumptive use rate, the High Desert Power Project will have a negative environmental impact on the cumulative ability of the MWA to cure the overdraft and manage the water and water resources of the High Desert.⁵⁸ Approval the project in an area of severe and chronic overdraft by VVWD a Water Agency that itself has failed to mitigate its overproduction of its well fields will only continue to exasperate the issue.

The overdraft began in the Basin in the mid 1950's. As a result of the overdraft, well levels and water quality declined significantly throughout the Basin. The safe yield of the Basin has been estimated as approximately 75,000 acre feet annually. In 1990, the safe yield was exceeded by approximately 63,000 acre feet. The trial court found that all water producers had contributed to the overdraft.

"Overdraft" occurs if average annual consumptive use of water from a basin exceeds its safe yield plus any temporary water supply surplus. "Safe yield" is defined as the maximum quantity of water which can be withdrawn annually from a ground water supply under a given set of conditions without causing an undesirable result. The phrase "undesirable result" refers to a gradual lowering of the groundwater levels resulting eventually in depletion of the supply. (*San Fernando, supra*, 14 Cal.3d at pp. 278-281.)

The dangers of overdraft have been recognized for many years in areas throughout California, as well as the need to address that problem in order to protect water rights and protect the public interest in the water supply.

Full importation of MWA s SWP entitlement of 75,800 acre feet of water would significantly lessen the amount of overdraft within the basin, however it is never anticipated that MWA will receive more than 70% of its total entitlement in any one year.⁵⁹ Although the full 20% rampdown of the basin has been achieved, the MWA has failed to collect any money from VVWD under the judgment to purchase "Replacement" water to recharge this chronically overdrafted basin.⁶⁰

In 1991, an Environmental Impact Statement was prepared for the transition of George Air Force Base.⁶¹ That EIS identified substantial Environmental Impacts associated with the

⁵⁸ Exhibit 110 - MWA Regional Water Management Plan

⁵⁹ Exhibit 110 - MWA Regional Water Management Plan

⁶⁰ Exhibit 109 - Fifth Annual Report to the Court

⁶¹ Exhibit 116 - George AFB EIS

Development and Redevelopment of the Base and its surrounding property. MWA sued VVEDA and entered into a settlement agreement.⁶² That agreement states in part:

Section 5. Water Issues: With respect to the water issues. . . the Parties hereby agree as follows:"

"a. VVEDA shall comply with the California Environmental Quality Act ("CEQA"). . .and **shall evaluate each individual project to be undertaken** in connection with the implementation of the 1993 Redevelopment Plan and **which may in any way impact upon water resources, directly or indirectly.** For its growth inducing potential and its impact on local water resources. VVEDA shall not approve any project **unless available water resources** for the project are adequate to meet projected demand of the project." [Bolding added by Intervenor]

"b. To the extent permitted by law, VVEDA shall seek to become a party in the Mojave River Adjudication, Riverside Superior Court Case No. 208568, if it becomes a water purveyor and in such event agrees to be bound by any judgement which is entered including any physical solution is finally agreed upon by the Parties in settlement of the water adjudication litigation"

In December of 1992 MWA required additional comments be added to the EIS:⁶³

At page 94: " . . .Of the total operational storage capacity, approximately 881,000 acre-feet remains in storage, with the remainder have been previously extracted."

At page 100: "The City and/or the purveyor should participate in the **annual cost to the Mojave Water Agency for the purchase and delivery of imported supplemental water to offset the increase to overdraft with will result from this project.**";

"Delivery of imported water can be accomplished through the oversized "reach one" of the Morango Basin Pipeline, which is currently under construction. Reach one will include a turnout allowing the discharge of up to **36,000 acre feet of water per year for recharge to the Upper Mojave River near the Rock Springs Road Crossing**"

It is abundantly clear that MWA intended that all water coming into the basin, was going to used for direct recharge and that VVEDA would be required to comply with the terms of the judgement.

In a sworn declaration before the Superior Court for approval of the Interlocutory Judgment⁶⁴ Mr. Larry Rowe testified, that in San Bernardino Case No: 247481, Judge Kruge found and held in 1988 that:

⁶² Exhibit 137 & 138

⁶³ Exhibit 109 - George AFB EIS

⁶⁴ Exhibit 128 Larry Rowe Deposition/Declaration

". . the MWA could not contract away a portion of its State Project Water Entitlement to entities within the Mojave River Basin **until it addressed and solved** {emphasis added} regional water management concerns"

In a deposition taken on October 6, 1994,⁶⁵ Mr. Caouette testified when asked if VVEDA would get a "Free Production Allowance" in the adjudication? He replied:

"If VVEDA became a new producer and water purveyor, I don't think they would have a free production allowance. **They would all be new production subject to assessment.**"

In the same deposition, when asked if the Victor Valley Water District had available water for new developments, including VVEDA, Mr. Caouette testified:

"Once again, the terms of the judgment which would require them to purchase **replacement water.**" Page 27 lines 14 - 15.

"Water that would be available to them under the Stipulated Judgement through the purchase of **replacement water** above their free production allowance." Page 32 lines 2-5.

"Any new development over the overdraft would be - - would result in an increase to the overdraft" page 64 lines 14 - 16.

In the same deposition when asked how will balance be achieved, Mr. Caouette testified:

"Through the **replacement water** purchase". Page 118 lines 10 - 16

Replacement Water Assessments is described in the Judgement⁶⁶ as follows:

"Replacement Water Assessments shall be levied against each Producer on account of such Producer's Production, after any adjustment pursuant to Paragraph 24(q), in excess of such Producer's share of the Free Production Allowance in each subarea during the prior Year."

Paragraph 24(q) states:

"If the Watermaster determines, using the Consumptive Use rates set forth in Exhibit "F", that a new Purpose of Use of any Producer's Production for any Year has resulted in a higher rate of Consumption than the rate applicable to the original Purpose of Use of the Producer's Production in the Year for which Base Annual Production was determined, Watermaster shall use a multiplier (1) to adjust upward such production for the purpose of determining the Producer's Replacement Water Assessment and, (2) to adjust upward the Free Production

⁶⁵ Exhibit 117 Norm Caouette Deposition

⁶⁶ Judgement After Trial; Barstow et.al; Intervenor requests that the CEC take Judicial Notice of the Judgement

Allowance portion of such Production for the purpose of determining the Producer's Make-up Water Assessment. The multiplier shall be determined by dividing the number of acre feet of Consumption that occurred under the new Purpose of Use by the number of acre feet of Consumption that would have occurred under the original purpose of use for the same Production." Page 33 - 34 of the Judgment

This means that, all municipal and agricultural water under the judgment is averaged at 50%, however if an industrial user, under Exhibit "F" of the Judgment is a 100% user, then, if the water is pumped for this 100% consumptive use then the Producers Replacement Water Assessments and Make-up Water go up.

Based on LORS, the CEC cannot adopt conditions to approve the use of SWP water unless and until the overdraft has been cured and there is a demonstrated surplus amount of water available.

2. Is the Energy Commission [As the Lead Agency] required under CEQA to study and comment on the "Cumulative Impacts" of the proposed HDPP PROJECT based on the use of the "Overdrafted Water Basin", for a Project [the Redevelopment of George Air Force Base] which the CEC admits is forecasted to continue to be mined over the next 30 years?

The CEC Staff has testified⁶⁷:

". . . the cumulative impacts of groundwater use in the Mojave River Groundwater Basin (Basin) have caused overdraft of the region's aquifers and the progressive decline in riparian habitat along the Mojave River. This overdraft problem is severe and at present is continuing."

"Base flow of the Mojave River, measured at the Lower Narrows, is currently 50 percent below the minimum flow of 21,000 acre-feet/year decreed by the court-approved judgment resulting for the adjudication of the Basin. In addition, even the extremely low current rate of base flow of the Mojave River is tenuous. Some of the discharge from the VVRA wastewater treatment plant, which comprises most of the current flow in the river, may soon be diverted for other purposes (Bilhorn 1999; Cauoette 1999). **Therefore, there is a real potential for the project to contribute to a significant cumulative adverse impact to local groundwater supplies and base flows within the Mojave River.** "

The more fundamental question is whether to commit 4,000 acre feet of consumptive use water to Cooling Towers . The environmental impact is that in this area where the population will only grow with new water, 4000 acre feet of consumptive use, is equal to 8,000 new

⁶⁷ Exhibit 83

households, or a population of up to 32,000. This population will purchase one billion dollars in new homes [8,000*125,000], paying at least twice the amount of taxes of the power plant. They will create 12,000 jobs, add numerous industrial parks and commercial developments. The cumulative impacts of taking 4,000 acre feet of any entitlement to water whether SWP or otherwise in the long term planning of the Future of the Victor Valley is mandated for consideration.

3. Do existing taxpayers own the existing entitlement to all of the MWA water unless and until the overdraft is cured?

The MWA's mission as provided under the ACT is stated clearly in information published by the Agency:

"The Mojave Water Agency (MWA) was founded July 21, 1960, **due to concerns over declining groundwater levels.** The Agency was created for the explicit purpose of doing any and every act necessary, so that sufficient water may be available for any present or future beneficial use of the lands and inhabitants within the Agency's jurisdiction."

As a state water contractor, MWA is entitled to receive an annual allotment of up to 75,800 acre feet of water from the State Water Project via the California Aqueduct.

"The imported water supply is crucial to the area's survival, because local aquifers have been in overdraft since the early 1950's, according to recent studies. For the past four decades, residents have been using more water than is replaced naturally."

The Agency's essential mission was strongly reaffirmed with the conclusion of the Mojave River Adjudication. The Court's ruling notes that the Agency area continues to be in severe overdraft. The Court ordered the Agency to seek sources of water, including supplemental water, and to deliver that water in the most effective fashion to ensure the quality of life within its boundaries. The judgment also mandated the MWA to continue its traditional role of encouraging conservation.

4. If "Banking" were approved would HDPP have to Bank two acre feet of water for each acre foot to be consumed in the Cooling Towers, in order to equitably comply with the intent of the Physical Solution, wherein all "Producers" must buy Replacement Water on a two for one basis?

The equitable principals of the adjudication was that every producer be treated alike. If the VVWD is allowed to take SWP water for an independent 100% consumptive use project, this

in and of itself is precedent setting and would prevent the ability of the MWA to fulfill its obligations under the terms of the judgement. The argument that MWA is not purchasing its entitlement of water anyway and therefore someone else should be allowed to purchase it only flies in the face of the facts that to the MWA has not fulfilled its mandate.

The issue before the commission is essentially mute if the commission can determine that MWA cannot meet its obligations to cure the overdraft even using all of its entitlement water. On the other hand if the commission is required to determine if the "laws, rules and ordinances" are being complied with, then this provision must be studied and addressed as a part of the environmental analysis.

MWA ACTION ON THE 2 FOR 1 ISSUE:

The Mojave Water Agency took an action to adopt a policy to require all 100% consumptive water users to purchase 2-acre feet of water for each acre-foot of water consumed for wet cooling. This action puts a 100% consumptive user of water on the same playing field as all other water users.

During oral arguments this intervenor will previously unavailable evidence of how community minded the Applicant is and just what intentions it has to be cooperative with community leaders in the future. The MWA Board of directors worked for over a year to study the equity issues of a 2 for 1 consumptive use policy, yet when adopted, local smear politics, defeated two of the key directors votes. High Desert Power Project spending upwards of \$100,000, sent out mailer after mailer of lies and distortion about candidates. Actually is seems it can summed up that HDPP would attempt to use political pressure this way:

**"Those four board members who voted for this
should be run out of Town on a Rail"**

Mayor Terry Caldwell⁶⁸

5. Does the use of SWP Water for the 100% Consumptive use of water comply with Water Resources Control Board Resolution No.75-58.

"State Water Resources Control Board Resolution 75-58, discourages the use of fresh inland water for power plant cooling and encourages the use of wastewater or other alternative non-potable water sources, such as wet/dry cooling. . . particularly in water-short areas."⁶⁹

This Intervenor believes that the future growth of California is dependent on State Project Water and that 100% of use is contrary to Resolution 75-58.

⁶⁸ Exhibit "A" Attached hereto - Victor Valley Daily Press - October 17th 1999 [various other articles]

⁶⁹ Exhibit 124

6. Does the use of SWP Water for the 100% Consumptive use of water comply with the California Constitution Article X, Section 2, referring to Highest and Best Use?

*The California Constitution Mandates That Beneficial Uses Of Water Resources Be Maximized!*⁷⁰

The overriding policy of the State of California is to maximize the beneficial uses of its scarce water resources. This policy is expressed in Article X, Section 2, of the California Constitution, which states in pertinent part:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to **beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented,** and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare...."

Since the adoption of Article X Section 2, of the *California Constitution*, courts have both the power and the duty in water rights cases to admit evidence relating to possible physical solutions, and if none is satisfactory, to suggest a physical solution on their own. (*City of Lodi v. East Bay Municipal Utility District (1936)* 7 Cal.2d 316, 341.) See Section IV, A. at p. 16, *infra*, for discussion of Article X, Section 2.

This Constitutional provision has been interpreted to mean that: "Public interest requires that there be the greatest number of beneficial users. . .".

In the case of a Power Project that uses Wet Cooling to evaporate 100% of the water into the atmosphere there is only one use of the water. All other uses of water are considered to have 50% return flows so that other people can use the water.

The CEC as a State Agency has a mandate to comply with the California State Constitution.

7. Will the California Supreme Court Make a Different Ruling than the Kaiser Court or the 4th Circuit?

⁷⁰ Exhibit MWA Brief to the California Supreme Court

Nothing is more certain, that uncertainty and the mere fact that the MWA and other Parties have requested the California Supreme Court to Rule on the "Merits" of the case, make any prediction as to the time or the outcome merely speculative.⁷¹

Regardless of the outcome the MWA Regional Water Plan provides⁷²:

Consistent with its legislative charge and with the intent of the Mojave Basin adjudication, the basic objective of MWA is to develop and implement a plan which would eliminate the overdraft of the ground water basins

MWA's SWP water supply is projected to yield an average of approximately 40,000 acre-feet per year. This even with full utilization of its SWP water, MWA will require additional supplies or reduction in demand on the order of 53,000 acre-feet per year by the year 2015 in order to eliminate a total overdraft of approximately 93,000 acre-feet

The fundamental issue of the overdrafted water basin has not been addressed. The MWA cannot supply water to HDPP except on an annual basis from surplus water after curing the overdraft. The MWA ACT, its adopted Water Management Plan prepared by the Bookman Engineering Firm at a cost of well over \$800,000⁷³ and the Physical Solution of water rights mandates that the basins be brought into balance.

The issues clearly are not settled and the Supreme Court may make further rulings that could substantially affect the use of water by the Power Project.

XIX. USE OF STATE WATER PROJECT

As noted above, the HDPP (1997a; Bookman-Edmonston 1998a,b) intends to use State Water Project water for the power plant water supply whenever this water is available. There is not a water purveyor that has provided to the Energy Commission an unconditional Will Serve letter, indicating that it has the necessary water rights to provide an uninterrupted water supply for this project. VVWD intends to supply HDPP by continuing to pump its 33 wells until they go dry.

Total MWA entitlement to SWP water is approximately 50,000 acre-feet, plus a further possibility of 25,000 acre-feet of Berrenda Mesa Water. In the Berrenda Mesa Public Bond Indebtedness Documents⁷⁴, the following information was disseminated to the Public:

"The Agency [MWA] has responsibility to alleviate overdraft. . . "

"Pursuant to its responsibilities under the courts order, the Agency has entered into an agreement with Berrenda Mesa Water District. . . "

⁷¹ Hearing Transcript October 7th 1999, page 308 lines 1-3

⁷² Exhibit 110 - Regional Water Management Plan

⁷³ Hearing Transcript October 8th 1999, page 47 lines 7-12

⁷⁴ Exhibit 125 Berrenda Mesa Certificates of Participation

MWA's estimate of 70%, appears to be on the optimistic side. CEC Staff tells us that the SWRCB (1998) and Department of Water and Power estimates that the State Water Project has a 65 percent chance of delivering 3.25 million acre feet and an 85 percent chance of delivering 2.0 million acre feet in any given year under 1995 water demands. The calculated average annual delivery during a repeat of the 1928-1934 drought under these assumptions is estimated by SWRCB (1998) to be about 2.1 million acre feet per year. For year 2020 estimated demands, the model shows that full deliveries (4.2 million-acre feet) will occur less than 25 percent of the time, but that approximately 3 million acre feet will be available 70 percent of the time.

Given the uncertainty, MWA (1994; 1998) CEC Staff's best case estimate of the average of 70 percent of the agency's SWP entitlement will available, is even unlikely. Using the Basic contract and Berrenda Mesa purchase, the MWA's best case, can only assume it can deliver approximately 53,000 acre feet of water annually. Certainly not nearly enough water to cure the overdraft.

The unknown factor is the actual amount of SWP water MWA will require for addressing the overdraft. The adjudication (1995) clearly identifies the reduction in groundwater pumping and the importation of water as the key elements in addressing the overdraft. While the adjudication, is silent on the amount of water that needs to be recharged, it mandates the balancing of the Water Basin and the cure of the overdraft as the MWA's and Watermaster's top priority as can be seen in the Regional Water Management Plan.⁷⁵

A firm estimate of production safe yield has also not been made and must wait until more hydrologic information is available (Caouette 1999).⁷⁶ {bolding and Underlining added by Intervenor} This estimate also assumes SWP water importation will sharply increase after the year 2000 due to the fact that most FPAs that can be transferred will have been transferred and, therefore, the amount of payments to MWA for makeup water will increase. **It should be noted that during SWP water shortages, use of SWP water for recharge, if deemed necessary by the watermaster, will take priority over non-recharge uses (Cauoette 1998b).**⁷⁷ The availability of such water in the future is not known.

Based on the Regional Water Management plan the CEC Staff testified it "has no way to assume that SWP water will be available to the MWA to address the overdraft"⁷⁸. The evidence is that presently MWA is lacking water to cure the overdraft. Lacking information that dictates a specific amount of the MWA's SWP entitlement is necessary to addressing the existing overdraft, CEC Staff cannot argue that all of the imported water is necessary to address the overdraft and none would be available for the project". However a simple look at the Chart in the Water Management Plan⁷⁹, clearly shows that MWA Entitlements will not cure the overdraft.

⁷⁵ Exhibit 110 Regional Water Management Plan

⁷⁶ Exhibit 109 MWA's 5th Annual Report to the Court

⁷⁷ Exhibit 117 Norm Caouette Declaration

⁷⁸ Exhibit 110 Regional Water Management Plan

⁷⁹ Exhibit 110 Regional Water Management Plan page 9 figure 10

Future conditions may change, there is no guarantee that SWP water will be allocated to the HDPP project. Court decisions about the adjudication, or competition for SWP water may limit the availability of this water. SWP water from MWA must be applied for each year. Clearly, Ordinance No. 9 was adopted to provide water on a single year basis to allow decision-makers as much flexibility in allocating what may become a scarce resource as possible.

XX. INTERFERENCE WITH PRIVATE PROPERTY

Well Interference

Staff and CURE [Fox]⁸⁰ also considered the potential for well interference between the proposed HDPP wells and the local production wells. Well interference is the result of overlapping drawdown from two or more pumping wells. Wherever the drawdown from separate wells overlaps, the drawdown is compounded, groundwater levels are lower and the cost for pumping lift increases. The magnitude of the impact of well interference depends on the number and proximity of the wells, the rate of pumping, and the physical parameters of the groundwater system. **Staff analyses indicate that well interference would occur between the proposed HDPP well field and nearby water supply wells.**

HDPP's proposed wells would be located within a VVWD planning area referred to as VVWD Pressure Zone 2 (Bookman-Edmonston 1998a). **There are currently a total of 33 production wells within the vicinity of the proposed HDPP well field, including one VVWD well located within a one-mile radius of the proposed wellfield and ten VVWD wells are within a two-mile radius of the wellfield. Two wells, installed for the Bureau of Prisons Facility on the SCIA and which is still under construction, are also within a two-mile radius of the proposed wellfield. Twenty additional wells are within a three-mile radius of the proposed wellfield, including eight VVWD wells, six City of Adelanto wells and six former GAFB wells. As part of the base closure, the GAFB wells are to be turned over to the City of Adelanto.**

As noted above, groundwater essentially supplies all water used within the HDPP Project area. There is a significant difference between the Ground Water being mined by the Victor Valley Water District and nature's Free Water, which annually recharges the Mojave River alluvial Aquifer. The Mined Ground Water cannot be replaced on an annual basis and the continued mining of these 33 wells will continue to degrade the water quality in the vicinity. Further at some point in the near future subsidence will begin to occur.

HDPP's annual water use would be 4,000 af, which would represent an increase of almost 25 percent over the VVWD's existing water demands. More importantly it is 40% more than VVWD allocated Free Production Allowance ["FPA"], for one single project to use 100% consumptively. In 1994-1995, water demand within the VVWD Pressure Zone 2 was 10,458 gpm while supply was only 7,207 gpm. Furthermore, this is the area the district anticipates the largest amount of growth over the next 15 years. Pressure Zone 2 has seen the greatest population growth over the last ten years of any area within the VVWD boundary (So 1998).

⁸⁰ Exhibit 120 - Well Interference Report - Prepared by Dr. Phyllis Fox

This only indicates more wells with the cone of depression increasing. As of yet the staff has not addressed by modeling the cumulative impacts of this continued pumping.

Well interference would be the largest in nearby wells during the time the HDPP wells were actively pumping. Drawdown from a pumping well forms a cone of depression, which radiates out from the well like a pressure wave, decreasing in magnitude with distance from the well. The specific magnitude and rate of transmission of the drawdown impacts would depend on groundwater system parameters in the area of the project. The impacts of the project pumping on groundwater levels were evaluated using a 3-dimensional groundwater model, based on the best current estimates of the groundwater system parameters. The result of this evaluation is described below in the section entitled Quantitative Analysis of Project Impacts. **Given the proposed location of the HDPP well field, the operational pumping requirements and the available information on aquifer conditions, some degree of well interference with nearby production wells during HDPP pumping periods would be unavoidable.**

XXI. IS DRY COOLING A VIABLE ALTERNATIVE?

Based on the evidence in this case as provided by CURE, Intervenor and the MWA, the following determinations in relation to Wet Cooling vs. Dry Cooling should be made.⁸¹

1. HDPP has failed to demonstrate that Dry Cooling is not a viable alternative. The evidence was that the CEC Staff did not know of their own knowledge that it was not viable. Mathew Layton: "I don't know".⁸²
2. Intervenor submitted un-controverted evidence that Dry Cooling as well as the use of "Vested Water Rights" are viable alternatives.⁸³ In testimony before the commission Mr. Layton stated he took "No Exceptions" to Mr. Ledford's testimony.⁸⁴
3. Many projects are now being approved in California require Dry Cooling.

Steve Baker - CEC Staff:⁸⁵

". .The Sutter Project is Dry Cooling and the Otai Mesa is also"

"I would say just on the face of it, the fact that the Sutter project will be built with Dry Cooling, shows that the owner of that project believes that it is economic."

When Staff's expert Mr. Mathew Layton was question as to whether Dry Cooling was being used successfully in a number of power plants in California his answer was, "Yes".⁸⁶

⁸¹ Exhibit 122 - Gary A. Ledford Direct Testimony - Dry Cooling and Other Alternatives.

⁸² Hearing Transcript October 8th, 1999. Page 163

⁸³ Exhibit 122 - Direct Testimony Gary A. Ledford - Dry Cooling

⁸⁴ Hearing Transcript October 8th, 1999. Page 164 lines 1-2

⁸⁵ Hearing Transcript September 16, 1999. Page 172

⁸⁶ Hearing Transcript October 8th, 1999. Page 160 lines 13 - 18

4. Projects in similar climates and elevations are now operating using Dry Cooling
5. The unrefuted testimony and exhibits demonstrate that HDPP project as proposed will potentially result in significant impacts on water resources. In addition, State Water Resources Control Board Resolution 75-58 discourages the use of fresh inland water for power plant cooling and encourages the use of wastewater or other alternative non-potable water sources. Based on these findings, Several CEC staff members have identified that dry cooling is feasible and the preferred alternative to the use of fresh inland water waters for HDPP cooling. Several CEC Staff members have recommended that Dry Cooling be implemented as it will mitigate to a level of non-significance water resources. These CEC Staff member's testimony is as follows:

A. Power Plant Efficiency - Steve Baker: "While utilization of dry cooling would yield a small drop in efficiency, the benefits of dry cooling in terms of water supply outweigh any such disadvantage."⁸⁷ Question: "Do you believe that Dry Cooling is a viable alternative?", Answer: "From an engineering Standpoint, Yes it is".⁸⁸ ". . there is only about a 2% overall annual drop in efficiency. I deemed that to be an insignificant drop in efficiency."⁸⁹

Zoran Rausavljevich [For Applicant]: Question: ". . .if there was not a reliable source of water the project itself would not be reliable" Answer "That is a good statement."⁹⁰

B. Waste Management - Ellen Townsend-Smith testifies: "The State Water Resources Control Board Resolution 75-58 discourages the use of fresh inland water for power plant cooling and encourages. . Or other non-potable water sources. The policy also requires the evaluation of dry cooling and wet/dry cooling as a means of water conservation. No new conditions of certification will be proposed by staff for waste management to mitigate the effects of either dry of wet/dry cooling alternatives." Further Mr. Tooker, for CEC Testifies for Staff, when asked by Hearing Officer Valkoski if "Waste Generation would be more or less with dry cooling, his answer was - "Less".⁹¹

C. Power Plant Reliability - Steve Baker: As a part of staff's analysis of soils and Water Resources, **staff identified that the project as proposed could potentially result in significant impacts on water resources.** In addition, State Water Resources Control Board Resolution 75-58 discourages the use of fresh inland water for power plant cooling and encourages the use of wastewater or other alternative non-potable water sources. Based on these findings, staff has identified that dry cooling or wet/dry cooling may be feasible alternatives to the

⁸⁷ Hearing Transcript September 16, 1999. Page 168-169 & 176-177

⁸⁸ Hearing Transcript September 16, 1999. Page 171

⁸⁹ Hearing Transcript September 16, 1999. Page 174

⁹⁰ Hearing Transcript September 16, 1999. Page 166

⁹¹ Hearing Transcript September 16, 1999. Page 195

use of fresh inland water waters for HDPP cooling. **Any reliability impacts on the electric system due to reduced availability on hot days should be insignificant.**⁹²

- D. Public Health - Obed Odomelam:** Mr. Obomelam's testimony before the commission was reconfirmed before the commission. "It will be appropriate, I believe that"⁹³ While non-biased professionals, may not necessarily make recommendations, his testimony was that Dry Cooling Was Appropriate. "The fresh water conserving policies of the State Water Resources Control Board points to Dry Cooling as an appropriate Alternative to wet cooling in power plants. **The Commission staff has noted this fact in identifying dry cooling as appropriate for the proposed project.**"
- E. Noise - Steve Baker:** As a part of staff's analysis of soils and Water Resources, staff identified that the project as proposed could potentially result in significant impacts on water resources. In addition, State Water Resources Control Board Resolution 75-58 discourages the use of fresh inland water for power plant cooling and encourages the use of wastewater or other alternative non-potable water sources. Based on these findings, staff has identified that dry cooling or wet/dry cooling may be feasible alternatives to the use of fresh inland water waters for HDPP cooling. The potential for increased cooling tower noise emissions, however is inconsequential for the HDPP.⁹⁴
- F. Visual Resources - Gary D. Walker:** The use of wet/dry cooling would reduce but not eliminate the potential for cooling tower plumes . . . Overall the difference in visual impact compared to the proposed project would be negligible. ". . .as I said in my Errata, overall, the use of dry cooling would reduce the visual impacts." He concluded it would be the best of the **two alternatives.**⁹⁵
- G. Water and Soil - Joe O'Hagen:** When questioned by Hearing Officer Valkosky as whether the use of Dry Cooling would cause any significant effects on Water. Mr. O'Hagen replied, "NO"⁹⁶ and: ". . .just from the basis of water conservation . . . dry cooling is a great idea."⁹⁷

⁹² Exhibit 85

⁹³ Hearing Transcript September 16, 1999. Page 159

⁹⁴ Exhibit 85

⁹⁵ Hearing Transcript September 16, 1999. Page 282

⁹⁶ Hearing Transcript October 8th, 1999. Page 142

⁹⁷ Hearing Transcript October 8th, 1999. Page 143 lines 13 - 15

XXII. SIGNIFICANCE CRITERIA

Significance Criteria: Definition of Negative Impacts

The significance criteria for evaluating environmental impacts of the HDPP must take into account, the regional significance of the Project - [the full redevelopment of George air Force Base], with its "Cumulative Impacts" and "Growth Inducing Impacts", including:

- a. the acute overdraft of the region's aquifers; [The entire Record on Water] [The Regional Water Plan]

page 2, Paragraph 7:

"Even with MWA purchasing all of the SWP water it is projected to receive (40,000 af/yr average), the overdraft on the ground water basins within the boundaries of MWA will increase from nearly 30,000 af/yr currently to 53,000 af/yr by the year 2015 unless additional supplies are obtained and/or demands are reduced."

- b. the progressive decline in riparian habitat; [The entire record on Water]
- c. the ongoing reduction of Mojave River base flows in the vicinity of the project and to downstream users; [The entire record on Water]
- d. the extreme uncertainty surrounding the long-term availability of water in the vicinity of the project [The entire record on Water]
- e. the severity of the current and projected future groundwater situation; [the entire record on Water]
- f. use of SWP Water will create significant adverse environmental impacts or exacerbate existing unmitigated environmental impacts that have been caused by the proposed purveyor of water; [Exhibit 110 - Regional Water Management Plan]
- g. proposed water banking water will be used by adjacent wells in the overdrafted basin and there will be no way to account for the water loss to other wells; [Exhibit 120 - Well Interference Report]
- h. The project well field will exacerbate the cone of depression with the cumulative pumping and overproduction in this pressure zone, lower water levels, creating a reverse pressure away from the river. This will cause negative impacts to the local base flow of the Mojave River; [Exhibit 120 - Well Interference Report]

- i. The project's cumulative impacts with current overproduction and future proposed overproduction of non-replenished groundwater will cause negative impacts on Mojave River flow that will affect downstream communities; [Exhibit 120 - Well Interference Report.]
- j. That the project will cause negative impacts to groundwater levels in the Mojave River Alluvial Aquifer, in that the failure of the Mojave Water Agency to cure the overdraft in accordance with the Judgment After Trial. [Exhibit 109 - Fifth Annual Report to the Court]
- k. The adopted Water Management Plan mandates the overdraft is cured first, before there is surplus water. Exhibit 110 - cover letter from Mr. Bob Beebe, who was paid over \$800,000 for the report states:

"The investigation and plan reported on herein was authorized by your Board in recognition of the generally deficient water supplies within the Mojave Water Agency and the need to develop a plan to manage both local and imported water supplies to - **eliminate overdraft conditions in the underlying ground water basins. Overdraft correction is also the subject of the adjudication of ground water pumping rights in the Mojave River portion of the Agency which was initiated during the course of the work on the plan.**"

Also; Norm Caouette states in a letter in the report:

"A basic objective of RWMP is to achieve a water supply balance within all of the Subareas.

- I. In the end it all boils down to:
 - (i) I = Issue: The full and complete Re-development of George Airforce Base with water treatment and "Beyond"
 - (ii) R = Rule of law: That the CEQA analysis and "Mitigation" must be addressed on the entire project
 - (iii) A = Analysis: The evidence is that all users of water in the High Desert are subject to 50% average consumptive use rule, and that in order for High Desert Power to use water, they like all other "new" users of water must also comply with this rule.
 - (iv) C = Conclusion: High Desert Power must either be a part of the Regional Water solution, or use Dry Cooling.

XXIV. FINDINGS OF FACT

1. The project s potential demand for water affects surface and groundwater supplies in an area of severe groundwater overdraft, not subject to any natural recharge;[CEC Staff] [MWA] [EIR - George reuse] [Fox- CURE] [Intervenor]
2. Groundwater overdraft within the Alto Subarea in 1990 was over19,900-acre feet per year. [MWA]
3. If Wet Cooling is used100% of the water used in the Cooling Towers will be consumptively Used.[CURE][CEC Staff][Intervenor][Badly Mesa]
4. The use of Water for Cooling Towers in a Critically Overdrafted Ground Water Basin, when the overdraft has not be cured is not the Highest and Best Use of Water.[Intervenor] [VVWD Brief to supreme Court] [Article X Section 2 California Constitution]
5. According to the evidence before this commission there will not be enough Water available from the SWP to meet the demands of curing the overdraft and future growth in the Victor Valley based on existing MWA Contracts.[MWA] [Beebe] [Bookman-Edmonston] [Malcolm Pirnie] [Decision 1619] [Judgement after Trial]
6. Part of the Cure to the Overdraft in the Judgment for the Adjudication of Water Rights is a Two for One replacement of water. [Dendy] [Hansen] [Principals of the Physical Solution] [Intervenor] [Replacement Water Defined in the Judgment]
7. The High Desert Power Project may be allowed to use State Project Water, on an interim and interruptible basis only if it is obligated to pay the Two for One replacement cost.[MWA] [Rowe] [Intervenor] [Badly Mesa]
8. The Commission has the obligation as the Lead Agency to insure that the Victor Valley Water District has the ability to serve this project, and has provided un-refutable evidence that it has mitigated it s already serve overdraft condition. [Settlement Agreement with MWA/VVEDA]
9. The commission cannot approve a project that does not have a fully unconditional Will Serve letter to provide uninterrupted water for this project. The contrary is to submit either the project to potential failure or the public to environmental consequences as the courts wrangle whether or not the plant should be shut down. [Settlement Agreement MWA/VVEDA]
10. The commission should mandate Dry Cooling for all future projects in California, because the cumulative impacts of evaporating water to the atmosphere and denying water to the residents of this state is not the Highest and best Use of Water Resources. ⁹⁸

11. The evidence in this case shows that "mining" of water by VVWD will lead to degradation of surface and groundwater quality in a regional ground water aquifer;⁹⁹

Intervenor requests that the California Energy Commission find the use of water as proposed by HDPP is not in compliance with all applicable laws, ordinances and standards [including the standards set forth in the Judgment for a Physical Solution to cure the overdraft, that the evidence in this case is clear that the use of DRY COOLING is the best alternative with the least amount of environmental consequence. There was no evidence presented that Dry Cooling is not economically feasible and in fact that many other projects are either voluntarily or being mandated to use Dry Cooling.

⁹⁹ Exhibit 112 - Mojave Water Agency Opening Brief to the California Supreme Court

XXV. CONCLUSIONS AND RECOMMENDATIONS

1. HIGH DESERT POWER PROJECT HAS NOT MET IT'S BURDEN OF PROOF:

Based on the Commissioners statements, the High Desert Power Project has not met its burden of proof that it can even acquire the un-interruptable source of water for it's proposed power Project. It can be clearly seen that many more months may be required before a process can be completed and several more CEQA processes. The use of water for cooling unless and until all of the relevant issues can be fully addressed should not be considered by the commission.

CEC Staff has concluded that allocation of SWP imported water supply to the project will cause a significant environmental impact unless the overdrafted conditions in the vicinity are mitigated to a level of non-significance. There is simply no assurance that can be done. In fact CEC Staff acknowledges that there is no mechanism to secure a long-term commitment of SWP water to the project. Given increased demand for this water, prolonged drought or court decisions regarding the adjudication, the project will not always be able to secure SWP water.

The real "Project", is the full redevelopment of George Air Force Base and not that of just providing Cooling Water. The Commission must determine that the CEC environmental analysis for the Power Project is not sufficient to comply with the CEQA requirements for other Public Agencies who might want to rely on the CEC document as "equivalent". Those agencies will have to be responsible for evaluating CEQA when providing permits, licenses or agreements, where the water is "Ultimately" going to be used for other public purposes.

2. DRY COOLING SHOULD BE MANDATED

Based on the foregoing conclusions and recommendations and findings of fact, DRY COOLING.

And further, the Energy Commission should implement a "Cumulative Impacts Analysis" of the Potential Impacts of using SWP Water in any new Power Plant Project located in California, based on the Highest and Best Use of this valuable resource that is owned by the Public.

EXHIBIT "A"

NEWSPAPER ARTICLES AND OTHER MAILINGS SINCE HEARINGS

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STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:) Docket No. 97-AFC-1
)
)
The Application for Certification) PROOF OF SERVICE
For the High Desert Power Project [HDPP])
_____)

I Kathie Mergal declare that on _____, I deposited copies of the attached **OPENING BRIEF OF GARY A INTERVENOR ON WATER AND OTHER RELATED MATTERS**, in the United States mail in Apple Valley California with first class postage thereon fully prepaid and addressed to the following:

Signed original document plus 11 copies to the following address:

California Energy Commission
Docket Unit
1516 Ninth Street, MS 4
Sacramento, CA 95814

In addition to the documents sent to the Commission Docket Unit, individual copies of all documents were sent to:

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I declare under penalty of perjury that the foregoing is a true and correct.

Kathie Mergal