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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])
)
_____)

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

Respectfully submitted:

November 16, 1999

GARY A. LEDFORD
PARTY IN INTERVENTION
IN PRO PER

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

I. INTRODUCTION

Intervenor responds to the Opening Briefs of the Energy Commission Staff and the Applicant HDPP. The response to the Brief's is that:

A. FUNDAMENTAL PRINCIPALS OF LAW ARE VIOLATED

1. **Private Contracts:** "We [the Committee] 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. [Hearing Officer Valkosky]¹

" .if there are contract terms that tell us this **Project** may have impacts that we haven't looked at. . " [Staff Counsel Holmes]²

2. Hearing Officer Valkosky begs the question...First; the "Project" must be properly defined. CEQA requires BEGINNING WITH A PROPERLY DEFINED PROJECT. In the HDPP case, no one could have defined the project better than Mayor Caldwell who stated the Project is to:³

**"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"**

B. Significance Criteria For The Use of Water

As the Energy Commission Staff tells us, "One of the most contentious issues in the HDPP AFC concerned the project's proposed use of water." The applicant's water plan changed several times throughout the case, with the final proposal involving both the direct use of State

¹ Hearing Transcript October 8th 1999, page 15 Lines 5 - 9

² Hearing Transcript October 8th 1999, page 12 Lines 16 - 24

³ Hearing Transcript October 7th 1999, page[s] 166-172

Water Project (SPW) water and the banking of SWP water in the aquifer for use when the SWP is not providing water directly to the region.

1. The Concern: The dissipation of injected water from the water bank and the effect of the banking proposal on nearby wells operated by the Victor Valley Water District (VVWD).

2. The CEC Staff Solution: Staff deferred to VVWD to determine whether any such impacts are significant and what mitigation would be appropriate for such impacts.⁴

3. The Problem: VVWD is not a party to this proceeding. While other relevant agencies, such as Fish and Game and the Regional Air Quality District, have conducted their own Environmental Impact Study (EIS) or other environmental review on relevant issues and become parties to this proceeding, the VVWD has not. More importantly, to date, there is nothing whatsoever in the record from the VVWD relating to "What mitigation would be appropriate" as required by Staff. There has been no - CEQA analysis whatsoever by VVWD. They intend to rely entirely on the Energy Commission's analysis for Project impacts that both the Energy Commission and VVWD admit will be used for uses other than HDPP. This is clearly in contravention with the CEC rules.⁵

CEC Staff clearly misses the point when it states that Intervenor is the only party contesting the sufficiency of Staff's analysis and Staff's significance criteria. Two other parties attempted to Intervene late in the process, these being Baldy Mesa Water District and Mr. Brad Foster. Both Petitions for Intervention were denied. The Department of Fish and Game also declared their concerns with the "Contract[s]" in the hearings.⁶

The principal flaw in the analytical approach used by Staff for its significance criteria is revealed by Gary Ledford's direct testimony relating to the Project's cumulative impacts of providing water to the redevelopment of George Airforce Base. Staff admits that the region's aquifers are severely overdrafted and that the riparian habitat of the Mojave River has declined. (Exh. 131; Soil and Water Resources, page 20) Yet given these circumstances, Staff never-the-less determined that it is appropriate to apply a set of criteria only to the HDPP project's specific water impacts. Staff further admits that the VVWD will continue to overdraft the water basin

⁵ Hearing Transcript October 7th 1999, page[s] 278-302

over the life of the HDPP. Staff's position clearly defies logic. How can a water purveyor that has not mitigated its own problems be allowed to provide a "Will Serve Letter" for a project that would currently increase its potential obligation by over 25%? CEQA demands that the Regional Significance be defined and mitigated to a level of non-significance. The HDPP is clearly a Regional Project and it lacks a Regional EIR to address the concerns of the Regional Overdraft of the Water Basin.

C. Staff Misstated the Evidence Relative to Aquifer Storage Agreement:

At the October 7, 1999 hearing, the General Manager of the Victor Valley Water District (VVWD) and the applicant **attempted** to jointly present a draft aquifer storage and recovery agreement (Exh. 133).⁷ (Hereafter called Proposed Agreement).

After extensive questioning of the Applicant's witness by Fish and Game and contradictory testimony by both Applicant's witness and Randy Hill, the applicant withdrew the Proposed Agreement.

"We are not going to sponsor this. We did not place into the record the draft that this replaces." [Mr. Thompson for the applicant]⁸

However, under the terms of the Proposed Agreement between VVWD and HDPP, the VVWD was to provide water, not singularly to the High Desert Power Project, but cumulatively for other projects:

"AVAILABLE TO THE GENERAL PUBLIC FOR USE AS WE BUILD AND GROW AT GEORGE AIR FORCE BASE AND BEYOND"

How can the VVWD rely on the Presiding Members Decision as a CEQA equivalent document for this Project? The simple answer is it cannot. Had the VVWD early in the process conceived this joint project⁹ for a recharge basin, to be used for the General Public as George Redevelopment grew, it could have designed such a project and put it before the public forum to be studied in the local area. Instead, VVWD has attempted to do an end run around the CEQA

⁶ Hearing Transcript October 7th 1999, page[s] 166-172

⁷ There is No agreement yet.

⁸ Hearing Transcript October 7th 1999, page 302 Lines 15 - 22

⁹ Hearing Transcript October 7th 1999, page 315 Lines 2 - 6

process and not tell the public that the true intent is for the VVWD to use up to 40,000 acre feet of water in this massive redevelopment project depriving other users an equal and equitable opportunity for this limited and valuable resource.

Several features of the Proposed Agreement are not consistent with the Staff's proposed Conditions of Certification. Even if they were, the CEC has no jurisdictional control over the VVWD and its contracts. If the VVWD does not comply with CEC conditions will the CEC shut down the \$350,000,000, Power Project? Certainly not, or if the Energy Commission tries, it will result in years of litigation.

D. Mojave Water Agency Requirements

Several days after the conclusion of evidentiary hearings, the Mojave Water Agency (MWA) Board of Directors directed its staff to prepare amendments to Ordinance 9, which governs the sale of SWP water. This water sale would pertain to at least two of the proposed contracts and as the attorney for the VVWD stated:

"If in the event that, for some reason, there is not an agreement with MWA, to provide imported water, then this agreement becomes superfluous." [VVWD]¹⁰

These changes, if adopted, would result in a requirement that the applicant (and other new users of SWP water) purchase an additional acre-foot of water, for the benefit of the basin, for each acre-foot of water consumed.

The MWA decision brought out the true colors of this Applicant. After this board vote, Applicant allegedly spent over \$75,000 in a smear campaign against the directors who, having studied the issue all year, approved the initiation of the ordinance. This illegal campaign of applicant-backed lies, defiles the very ground rules of our government, providing that:

As the Cardozo and Jess Ranch Appellants have explained in their respective brief's to the California Supreme Court, the physical solution drafted by the large municipal producers and the Mojave Water Agency ("MWA") impacts the property rights of every water producer in the Mojave River Basin. The announced goal of the municipal producers was to put agricultural producers out of business, and to take over their water production. Through the physical solution,

¹⁰ Hearing Transcript October 7th 1999, page[s] 316-317

the municipal producers can accomplish their goal without paying the just compensation required by the federal and state constitutions. As James Madison tells us:

Private Property

"This term in its particular application means that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual. In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or money is called his property. . . In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."

"Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties or his possessions. Where there is an excess of liberty, the effect is the same, tho' from an opposite cause. Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own."¹¹

So blatant is the goal of the municipal producers to steal the valuable property rights of the farmers that they stoop to tarnish the integrity of those very well qualified citizens who served on the MWA Board of directors.

II. Conclusion

The HDPP has not provided an un-interruptable source of water for its proposed project. There are Five Contracts, required to complete the water chain. No contracts have been produced. Furthermore, even if the contracts were before the Energy Commission, none comply with the requirements of CEQA. Any water source HDPP proposed is subject to a least five separate agreements and each contract are the subject of a separate CEQA analysis.

¹¹ James Madison explained the importance of constitutional protection for private property in the following excerpt from one of his essays:

(The National Gazette (Mar. 29, 1792)

The evidence before this commission is that the VVWD and City of Victorville intend the water from the proposed new MWA pipeline for projects other than the HDPP. CEQA has not been conducted for these other projects. Expecting to take benefit of more than just HDPP, the evidence clearly shows that the cumulative impacts of the chain of contracts are not studied as a Regional Project. Staff's contention that the applicant has resolved "most of the issues" that would affect its ability to obtain a license does not meet the requirement that without an un-interruptable source of water, HDPP cannot use Wet Cooling.

Intervenor requests the Committee to carefully consider Intervenor's Water and Related Alternatives testimony which demonstrates that this project is one of Regional concern. As you're Energy Commission Staff has repeatedly stated there is an **"extremely serious groundwater situation in the vicinity of the project"** including significant reductions in Mojave River base flow.

As a result of overdraft in the area of now well over **1,000,000 acre-feet**, the most comprehensive analysis possible needs to be undertaken to restore ground water levels and recharge the basin. Allowing the HDPP to use SWP Water and not mandate that HDPP place one acre foot water back into the basin for each one that it uses, deprives each resident of the MWA Region with a significant **Property Right**¹², that is one of equal treatment. Allowing a new 100% consumptive water use for cooling towers gives unfair preference to HDPP because all other local water users are mandated under the Judgment for Water Rights that use water on average 50% consumptively to replace and restore the basin.

The Energy Commission should be looking for Conditions of Certification that will be effective in ensuring that the Project to Redevelop George Air Force Base will do more than not have an adverse effect on the Mojave Basin groundwater situation. Intervenor urges the Committee to recognize that the seriousness of the water problems in the HDPP project vicinity requires that HDPP be conditioned to Replacement Water Standards imposed on all other water producers or in the alternative that Dry Cooling be mandated for this Project.

¹² Hearing Transcript October 6th 1999, page 7 Lines 9-16 [Ledford] ". .the issue is one of Property Rights. . ."

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STATE OF CALIFORNIA

Energy Resources Conservation
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For the High Desert Power Project [HDPP])
_____)

I Kathie Mergal declare that on _____, I deposited copies of the attached **REPLY BRIEF OF GARY A LEDFORD 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:

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

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