IN THE SUPREME COURT OF THE STATE OF NEVADA

COYOTE SPRINGS INVESTMENT, LLC; LINCOLN COUNTY WATER DISTRICT; AND VIDLER WATER COMPANY, INC., Appellants, vs. ADAM SULLIVAN, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.	Electronically Filed Dec 27 2022 03:11 PM Elizabeth A. Brown Clerk of Supreme Court **Supreme Court No. 85137** District Court Case No. A816761

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CERTIFICATE OF SERVICE

I certify that on the 27th day of December 2022, I served a copy of **JOINT APPENDIX** upon all counsel of record:

☐ BY MAIL: I placed a true copy thereof enclosed in a sealed envelope addressed as follows:

☐ BY FACSIMILE: I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below:

■ BY ELECTRONIC SERVICE: by electronically filing the foregoing document with the Nevada Supreme Court's electronic filing system, which sends an electronic notification to the following parties at the email address on file with the Nevada Supreme Court:

Coyote Springs Investment, LLC
Emilia Cargill (Wingfield Nevada Group)
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DATED this 27th day of December, 2022.

/s/ Christine O'Brien
Employee of Robison, Sharp, Sullivan & Brust

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

SOUTHERN NEVADA WATER AUTHORITY,	)	CASE NO. A-20-816761-C
LAS VEGAS VALLEY WATER DISTRICT,	)	A-20-817765-P
	)	A-20-817840-P
Plaintiffs,	)	A-20-817876-P
	)	A-20-817977-P
vs.	)	A-20-818015-P
	)	A-20-818069-P
NEVADA STATE ENGINEER,	)	A-21-833572-J
DIVISION OF WATER RESOURCES,	)	
	)	DEPT. NO. I
Defendant,	)	
	)	**Transcript of**
and related parties and actions.	)	**Proceedings**

BEFORE THE BITA YEAGER, DISTRICT COURT JUDGE

MONDAY, FEBRUARY 14, 2022

TRANSCRIPT RE:
PETITION FOR JUDICIAL REVIEW

APPEARANCES:

For the Plaintiffs:	PAUL G. TAGGART, ESQ. STEVEN C. ANDERSON, ESQ.
For the Defendant:	JAMES N. BOLOTIN, ESQ. Senior Deputy Atty. General
For Lincoln County Water District:	WAYNE KLOMP, ESQ.
For Vidler Water Company, Inc.:	KAREN A. PETERSON, ESQ.

RECORDED BY: LISA LIZOTTE, COURT RECORDER
TRANSCRIBED BY: LIZ GARCIA, LGM TRANSCRIPTION SERVICE

APPEARANCES (Continued):

For Nevada Cogeneration Associates Nos. 1 and 2:	FRANK C. FLAHERTY, ESQ.
For Muddy Valley Irrigation Co.:	ROBERT A. DOTSON, ESQ. STEVEN D. KING, ESQ. JUSTIN C. VANCE, ESQ.
For Center for Biological Diversity:	SCOTT LAKE, ESQ. LISA T. BELENKY, ESQ.
For Republic Environmental Technologies, Inc., Georgia-Pacific Gypsum, LLC:	LUCAS M. FOLETTA, ESQ. SYLVIA L. HARRISON, ESQ.
For Dry Lake Water, LLC, Apex Holding Company, LLC:	CHRISTIAN T. BALDUCCI, ESQ.
For Bedroc Limited, LLC, Western Elite Environmental:	DEREK K. MUAINA, ESQ.
For Moapa Valley Water District:	GREGORY H. MORRISON, ESQ.
For Coyote Springs Investment:	KENT R. ROBISON, ESQ. BRADLEY J. HERREMA, ESQ. WILLIAM L. COULTHARD, ESQ. EMILIA K. CARGILL, ESQ. HANNAH E. WINSTON, ESQ.
For Sierra Pacific Power Company:	JUSTINA A. CAVIGLIA, ESQ.
For The Church of Jesus Christ of Latter-Day Saints:	SEVERIN A. CARLSON, ESQ.
ALSO PRESENT:	COLBY PELLEGRINO MICHELINE FAIRBANK WADE POULSEN SCOTT MILLINGTON DOROTHY TIMIAN-PALMER GREG BUSHNER RYAN HOERTH PATRICK DONNELLY SYLVIA HARRISON LISA COLE JOSEPH DAVIS LON DALLEY STEVE REICH

LAS VEGAS, NEVADA, MONDAY, FEBRUARY 14, 2022, 9:58 A.M.

* * *

THE COURT: So just to -- I know today we started a little bit later so that everyone could get their tech stuff situated. My plan is that we will be going from 8:30 to 5:00 most days. Just to let you know, tomorrow at one o'clock I do have to do our in custody Mental Health Court and Co-Occurring Disorders Court termination hearing, so what I plan on doing is having our break from 12:30 to 1:30 so that way I could do that hearing. Other than that, I think what we had planned on doing was doing an hour lunch break, but if it looks like we're starting to get low on time, then moving to half hour lunch breaks.

Are there any questions about the scheduling? No? Okay. All right. I just want to also make sure that everyone feels comfortable. I know the mask mandate has lifted. You know, Officer Breed does have a thermometer that she can check everyone's temperatures when they come in. Would people feel more comfortable if we did that every morning? No? Okay. I just wanted to give that option out there.

Are there any other housekeeping matters before we start? Okay. Then I think we are starting with Las Vegas Valley Water District. And we have Officer Breed that's working the timer. Is it set to four? I know that it, like, undoes when it -- is it set?

THE MARSHAL: Yes.

THE COURT: Okay.

MR. ROBISON: Should we do appearances, Your Honor?

THE COURT: Oh, yes.

MR. ANDERSON: That was what I was about to say, Your Honor.

THE COURT: Oh, yes. You know what, I totally forgot about that. Yes. Let me -- let's start with appearances. Thank you for reminding me. My clerk would have killed me.

All right. So who is here on behalf of Las Vegas Valley Water District and Southern Nevada Water Authority?

MR. TAGGART: Your Honor, my name is Paul Taggert. I'm here on behalf of the Water District and the Authority. And with me is Colby Pellegrino, who is the general manager -- I mean, the deputy general manager of SNWA and Las Vegas Valley Water District, and she's seated here.

THE COURT: Okay, great.

MR. TAGGART: And also with me is Steve Anderson, who is an attorney with the Water Authority.

THE COURT: Okay, thank you. All right. Who is here on behalf of the Nevada State Engineer?

MR. BOLOTIN: Good morning, Your Honor. Senior Deputy Attorney General James Bolotin on behalf of the Nevada State Engineer. And with me I have Deputy Administrator

Micheline Fairbank from the Division of Water Resources.

THE COURT: Okay. All right. Who's here on behalf of Lincoln County Water District?

MR. KLOMP: Good morning, Your Honor. Wayne Klomp on behalf of Lincoln County Water District. And with me is the general manager, Wade Poulsen.

THE COURT: Thank you.

COURT RECORDER: Can I have them speak up if they're not near the microphone. I'm not picking it up.

THE COURT: Okay. Did you hear that was Wayne Klomp with Wade Poulsen?

COURT RECORDER: Yes.

THE COURT: Okay. All right. Who is here on behalf of Vidler Water Company?

MS. PETERSON: Thank you, Your Honor. Karen Peterson from Allison MacKenzie Law Firm. And with me I have Dorothy Timian-Palmer, who is the chief executive officer of the water company, Greg Bushner, vice-president of water resource development, and Ryan Hoerth, project manager. Thank you.

THE COURT: Thank you. All right. And who is here on behalf of Nevada Cogeneration Associates Nos. 1 and 2?

MR. FLAHERTY: Good morning, Your Honor. This is Frank Flaherty, Dyer Lawrence, LLP, participating via BlueJeans today.

THE COURT: Okay, great. Thank you. Who is here on behalf of Muddy Valley Irrigation Company?

MR. DOTSON: Good morning, Your Honor. Rob Dotson on behalf of Muddy Valley Irrigation Company. I have with me today Steve King and Justin Vance, my colleagues, and they also will be attending via BlueJeans. And I expect Scott Millington, who is the general manager of the irrigation company, will be attending via BlueJeans today and in person tomorrow.

THE COURT: Okay, thank you.

MR. DOTSON: Thank you, Your Honor. Pleased to be here.

THE COURT: All right. Who's here on behalf of the Center for Biological Diversity?

MR. LAKE: Good morning, Your Honor. Scott Lake for the Center for Biological Diversity. And I'll have the Center's Nevada director -- or, sorry, Great Basin director, Patrick Donnelly, and co-counsel Lisa Belenky on BlueJeans.

THE COURT: Okay. Who is here on behalf of Republic Environmental Technologies, Inc.?

MR. FOLETTA: Good morning, Your Honor. Lucas Foletta for Republic and also for Georgia-Pacific [inaudible]. I believe Ms. Sylvia Harrison is also participating via BlueJeans.

THE COURT: Okay, thank you. Who's here on behalf

of Dry Lake Water, LLC?

MR. BALDUCCI: Good morning, Your Honor. Christian Balducci appearing on behalf of Apex and Dry Lake Water. Also appearing over BlueJeans intermittently is Lisa Cole. She's a client representative and a consultant.

THE COURT: Okay, great. Thank you, Mr. Balducci. All right. Next I've got -- oh, and then are you also here on behalf of Apex?

MR. BALDUCCI: I am.

THE COURT: Okay. Let's see. Bedroc Limited, LLC.

MR. MUAINA: Good morning, Your Honor. This is Derek Muaina, participating via BlueJeans. I'll be here monitoring for Bedroc and Western Elite Environmental.

THE COURT: Okay. And then are you also here on behalf of City of North Las Vegas?

MR. MUAINA: No.

THE COURT: Oh, okay. Who is here on behalf of Western Elite?

MR. MUAINA: Sorry, that was me as well. I'm here for Western Elite and Bedroc Limited.

THE COURT: Okay. Is there anyone here on behalf of City of North Las Vegas?

MR. MUAINA: Not that I'm aware of.

THE COURT: All right, thank you. Moapa Valley Water District?

MR. MORRISON: Good morning, Your Honor. Greg Morrison here on behalf of Moapa Valley Water District. And also on the phone are Joseph Davis, general manager, and Lon Dalley, the assistant general manager of the district.

THE COURT: Okay, thank you. Coyote Springs?

MR. ROBISON: Good morning, Your Honor. Kent Robison for Coyote Springs, together with co-counsel Brad Herrema, Emilia Cargill, and on BlueJeans is Hannah Winston. Our expert, Steve Reich, is with us today. And our technician is Mark Ivy.

THE COURT: Okay, thank you. Sierra Pacific Power Company.

MS. CAVIGLIA: Good morning, Your Honor. Justina Caviglia on behalf of Sierra Pacific Power Company and Nevada Power Company.

THE COURT: All right, thank you. Who's here on behalf of the Church of Jesus Christ of Latter-Day Saints?

MR. CARLSON: Good morning, Your Honor. Sev Carlson here on behalf of the church.

THE COURT: Okay. Good morning.

Is there anyone that I have missed? Okay, it doesn't look like I've missed anyone.

So with that, we will start argument. And I think first up is Las Vegas Valley Water District. Do you need a minute to set up or are you ready to go?

MR. TAGGART: No. We're ready, Your Honor.

THE COURT: Okay.

MR. TAGGART: Good morning again. Paul Taggart on behalf of the District and the Authority. Is the audio picking me up okay?

COURT RECORDER: Yes.

MR. TAGGART: Okay, thank you. So I'm going to talk for about an hour, I think, here this morning and I'm going to specifically address issues with 1309, Order 1309 that we oppose. And we largely agree with Order 1309, but we have one specific area that we disagree and that's what the purpose of my argument today is. In the areas where we agree with the State Engineer, we'll be arguing as a respondent intervenor after the State Engineer presents argument.

And then I think we have three intervenors that may argue, and then we would go in order of petitioners/responding intervenors after that. And so I'll do that. And then when we're done with our responding, with the answering arguments, if you will, and we come to the reply arguments, we'll also argue then on the same issue that I'm talking about this morning.

And we hope this gets done this week. I'm working hard to keep it short, as short as I can. So anyway, that's a little bit of a roadmap of where we're going to go.

So the Water District and the -- hold on a second.

While he's doing that, I have a PowerPoint that I'm going to talk from and I have copies of it that I haven't handed out, so I apologize for that.

May I approach, Your Honor?

THE COURT: Yes.

MR. TAGGART: So this is a copy for you. Don't be afraid, I won't be talking about all of that. It's not like five minutes per page or anything like that.

THE COURT: Okay. Did you want to have a copy entered as an exhibit, as a Court's exhibit?

MR. ROBISON: Well, Your Honor, I thought we agreed to mark our PowerPoints just so they are part of the record.

THE COURT: Right.

MR. ROBISON: And if there's a transcript we know what we're talking about.

THE COURT: Sure.

MR. ROBISON: Coyote Springs already marked theirs.

THE COURT: Okay. Mr. Taggert, we're going to mark this one as a Court's exhibit for Las Vegas Valley Water District and Southern Nevada Water Authority.

MR. ROBISON: Is there a number to that, Your Honor?

THE COURT: She hasn't numbered it yet.

(The Court confers with the clerk)

THE CLERK: I have yours as CSI A and B. And then --

THE COURT: So why don't we mark it in the order

that they argue --

THE CLERK: Okay.

THE COURT: -- so that way it's clear. So this would be -- this would go before CSI.

THE CLERK: It's 1?

THE COURT: Yeah.

MR. ROBISON: So it's going to be Exhibit A with the individual pages numbered 1 through 75 or 200?

MR. TAGGART: I think it's 78, Ken.

THE CLERK: So it's going to be Exhibit 1. It's just going to be Las Vegas Water District Exhibit 1.

MR. ROBISON: All right. Thank you.

THE CLERK: And yours will be CSI A through --

MR. ROBISON: Right. All right, thank you.

THE COURT: All right. Thank you.

MR. TAGGERT: All right. So, Your Honor, I gave you yours in single-sided and I made a copy -- with everybody else they get double-sided so we wouldn't have too much paper.

THE COURT: Okay.

MR. TAGGERT: All right. So, Kent, that time didn't count against me, right? Okay.

THE COURT: What time is it?

MR. ROBISON: You're on the clock.

THE COURT: Donna, what time is it right now?

THE MARSHAL: Five minutes.

THE COURT: Okay. We'll give you an extra five minutes at the end, since that took a little bit of time.

MR. TAGGART: That's okay, I'm just joking.

ARGUMENT BY THE PLAINTIFFS

MR. TAGGART: Okay. The Water District, as you may know, and the Water Authority, they deliver water here in Las Vegas to -- SNWA to purveyor members. So the individual agencies who deliver water to people, the Las Vegas Valley Water District, for instance, is a member of SNWA. We think of it as SNWA is kind of the wholesaler of water and the individual purveyors who are members of SNWA are the retailers. They deliver the water every day. That's two million residents or over that now and 40 million -- pre Covid, 40 million visitors, and so that's a large task that the District and Authority take on every day. And the interest that they maintain is that they need to maintain a sustainable water supply for all of those customers and all of those needs.

And so in this case the key is that we are protecting water that we get from the Muddy River that makes it to Lake Mead and then in Lake Mead we treat it -- we take it out of Lake Mead, we treat it and we deliver it in the Las Vegas valley. So there's water that we get from the Muddy River that you'll hear us talk about that we are trying to protect.

Also, Coyote Springs has a proposed subdivision in Coyote Spring valley and we, the Las Vegas Valley Water District, is the general manager of the general improvement district for that subdivision. So if homes got built, then those subdivisions would get built and the Water District, the Las Vegas Valley Water District was appointed by the Clark County Commission to be the general manager of that GID. So they would also be -- they would be responsible --

THE COURT: GID?

MR. TAGGERT: The General Improvement District.

THE COURT: Okay.

MR. TAGGERT: Okay. So the General Improvement District that would have to serve water and sewer to the Coyote Springs development is the Coyote Springs Water Resources GID, and Las Vegas Valley Water District is the general manager of that entity. So they would be responsible for making sure those homes have water; you know, sustainable water supplies into the future.

So those are two big interests. The other is compliance with the Endangered Species Act and you'll hear about that quite a bit. We want to make sure that no one in the District or Authority are ever considered to be in violation of the Endangered Species Act, based on groundwater pumping primarily, so that's another key point that we have here in this proceeding.

So the big picture is that there's a series of groundwater basins that the State Engineer understood existed in southern Nevada. I'll show you a map in a second of exactly where we're at. But there's too many water rights granted than there is water available in that area. So roughly 40,000 acre feet have been granted in permits, but even when only 8,000 or so pumped there's issues.

And so the question is, what do we do about that? And that's really what this starting. And the other really important idea is that groundwater and service water are connected. And the Muddy River is -- you know, the water comes out of the ground and then it becomes a river, so there's a connection hydrologically between ground and surface water that is really important here, and how that gets managed is a key concern for the State Engineer and for us in this.

So currently roughly 8,000 acre feet get pumped and we're already seeing impacts to the Muddy River to -- in our view, the rights to the Muddy River, the water rights, and to the habitat for the endangered fish. And there's all these additional water rights that haven't even been pumped yet, and so the question is how do you deal with that. And then what sort of brought it to a head is that there's this large subdivision that wants to develop, and if it does then we'll be pumping even more water in that basin when we're concerned about how much is being pumped now.

So the State Engineer started a process of curtailment. So that's the word -- when you've issued water above the amount that's available and you have to cut it back, that's curtailment. And he started a two phase or maybe more, but primarily kind of how we talk about it is a two phase process. One is fact-finding and that's what this was, finding out exactly what's happening out there hydrologically. And so largely what we're going to hear about here is the fact finding that the State Engineer made. Then based on those facts and those determinations, then he'll manage the groundwater accordingly. And mitigation and management kind of go hand-in-hand of if there's been impacts to senior rights, that's where mitigation might occur. Like, what can we do to fix that problem.

But that's down the line. Right now we're in a fact -- we're reviewing the facts that the State Engineer decided on a lot of really highly scientific and technical hydrologic decisions. And so that's kind of the big picture.

We, the District and Water Authority, our position here is that the State Engineer has the ability to manage all of these groundwater basins as one unit and that he properly found that they're connected hydrologically. So we agree with him on that. We'll talk about that when we come back as a respondent intervenor.

Also, we think that the 8,000 acre foot pumping

limit which he set -- so he set an 8,000 acre foot pumping limit on all those basins -- we think that was correct, so we'll again defend that decision of his later.

But what we disagree with is that he concluded that the existing capture of Muddy River water by existing groundwater pumping does not conflict with senior rights. So conflict is a really significant legal term that we'll talk about a lot and it means that you have taken somebody else's water right from a legal standpoint. And so the State Engineer made a conclusion that existing pumping doesn't conflict. That's what we're challenging. So what we're asking is that you reverse that conflicts decision and then uphold the rest of 1309. So that's our prayer.

Now, here's a map. This is like the Rand McNally version of things, and you can see Las Vegas valley down in the left in the center or in the bottom in the center. I confuse left and right a lot, so -- it drives my kids crazy, so if I do that I hope I catch myself. So down in the center on the bottom you've got Las Vegas valley. Then Highway 15 heads up to Glendale. And that area that's shaded is the Lower White River Flow System boundary that the State Engineer has delineated. And the Muddy River is in a blue line that kind of flows down from -- there's a sign, Muddy River Springs, through Glendale, and then you can see it hits Lake Mead.

So, now, if you take I-15 up and you took 93 to the north, Coyote Springs, the development, is kind of right on each side of the county line on 93, so you can see the county line coming through there. So Lincoln on the north, Clark on the south, that's kind of where their development is.

This is a page out of our expert report. We'll look at it a lot later. But it's the same kind of shape area and it identifies all the wells and the monitor wells and the pumping wells and all the surface water measurements. There's an insert above there to the right which gets more granular on the Muddy River itself, so we'll be looking at that.

This is the page out of a State Engineer's Order 1309 where he delineates that shape and all those basins. So that's what we'll be talking about.

Now, this is an insert that gets into more detail about the river. So there's gages and there's properties that are owned. The Church owns property. The Las Vegas Valley Water or SNWA owns a property along there. But we'll be talking a lot about where these gages are and where the river flows, where it starts and where it ends from a figure like that.

THE COURT: Mr. Taggart, let me interrupt you for just a minute. For the appellate record, it might be best to say this is page 8 of our PowerPoint, so that way it's clear on the record. Thank you.

MR. TAGGART: Okay, thank you. So, yeah, so I was just speaking from page --

THE COURT: It has it right up there at the top left. It's not all the way to the left, but sort of the middle of the page. See where it says 8 out of 78?

MR. TAGGART: Oh, yeah. I'll use that. Okay, thank you.

THE COURT: So, yeah, so that should be a good reference.

MR. TAGGART: That was page 8. Now here's just some pictures of the Muddy River. That's page 9 and page 10.

So the next big point is that there's a thing called the Muddy River Decree. So a decree is a court document that identifies who owns what water in a water system. And this is a decree from 1920 that was entered by, in our view, this court, the Eighth Judicial District. At the time, Clark and Lincoln were combined, but the river is in Clark County.

And so we consider this court to be the decree court. Like, if we were to come and ask for enforcement of the Muddy River Decree to protect our senior water rights, we would file that in the Eighth Judicial District Court. And I think there's a strong argument that we are actually -- you know, we're actually evoking the decree court in this case. It's not -- it hasn't really come up in a significant way, but that's how we filed our Petition for Judicial Review

is we claimed multiple jurisdictions for this case to be heard and that was one of them.

So when a decree court enters a water decree, it has continuing and exclusive jurisdiction over that water resource. And it's in the nature of -- you know, there's a res, which is the property. It's an in rem proceeding. The first court that takes control over it keeps control over it.

And what the decree said was that it adjudicated the total available flow of the Muddy River and consumes and exhausts all of the available flow of the river, its headwaters, sources of supply and tributaries. So that language, we'll use that quite a bit throughout. I'll try not to get repetitive about it, but the key point is that all the water in the river was appropriated to someone when the decree was entered. So if anybody is capturing any of it, it's our position they're conflicting or they're interfering with those particular water rights.

The water was divided up into two sections, upper and lower. And MVIC, who is Mr. Dotson's client, they're entitled to all the flow of the lower river. So instead of saying -- in a lot of decrees what you'll see is you'll see a map which shows acreage and it will say all these acres are water righted. In this decree it just said MVIC gets all the water below a certain point in the river to use on its lands.

And the Southern Nevada Water Authority has shares in MVIC, so that's how we own water. That's how the water district or the Water Authority owns water in the Muddy River, is they own shares of MVIC. And that's how people's water rights are recognized in MVIC, so farmers out there, they have shares in MVIC, too, and those shares represent an amount of water that they get for their fields. So -- and it's our view that the source of supply that the decree was talking about includes the groundwater from where the river comes from.

THE COURT: So let me interrupt you for a second. So then, is it your contention that anyone who is granted a right for groundwater would be conflicting with the Muddy Valley Decree?

MR. TAGGART: Yes.

THE COURT: Okay.

MR. TAGGART: So -- okay, so this is more specific. Intentionally Created Surplus. This is the way the Southern Nevada Water Authority converts the Muddy River water rights into water that it can take out at Lake Mead, and this is the shares that were acquired. So it's a program that allows the water district to augment the water in the main stem of the Colorado River. So the Colorado River is divided up among the states and Nevada gets a 300,000 acre foot allocation. But we can add to that with what we call Intentionally Created Surplus or ICS. We create a surplus. We get water, we buy

water, like at MVIC, and we let that go into the lake. Then the Bureau of Reclamation, the U.S. Bureau of Reclamation authorizes us to take more water out of the lake as a result of that.

And this is a critical element in our water resource portfolio and particularly during drought. And as you know, right now Lake Mead is low and getting this water is really important to maintain the ability to serve customers in the Las Vegas valley. And it's the District's view and the Authority's view that pumping captures -- pumping the Lower White River Flow System captures Muddy River water and then decreases the amount of ICS that we would get.

THE COURT: That you would be entitled to that you would then be able to get the additional waters out of Lake Mead from the Bureau of Reclamation.

MR. TAGGART: Right.

THE COURT: Okay.

MR. TAGGART: Okay. Now I'll just quickly talk about the Moapa dace. So this is an endangered fish. And --

THE COURT: And this is page 13?

MR. TAGGART: This is page 13. Thank you, Your Honor. I had a hearing officer pound me over the head for 20 years and I can't believe I'm not doing that. She would be really mad at me.

So the Moapa dace is a fish in the headwaters of the

Muddy River. So the Muddy River comes up in little springs and the fish are in those springs. It was listed by the U.S. Fish and Wildlife Service as an endangered fish and the Southern Nevada Water Authority owns the Warm Springs Natural Area, which is where a lot of these springs are located or a lot of the habitat for dace are located. And the Authority acquired that property to do conservation for the fish, and we'll talk more about that.

This is just a picture of a little pond, a little -- you know, this is where -- you can kind of see where water is coming up out of the ground and the fish are in there. And these are small, little, you know, places where water comes up out of the ground and then that water gets captured.

THE COURT: And that was page 14?

MR. TAGGART: That was page 14. Then on page 15 we have an insert from that map I was telling you earlier and you can see there's Warm Springs West. Right above where it says Pederson Spring it says Warm Springs West. That little -- we'll be talking a lot about that gage, the Warm Springs West area. Around that area is where the Warm Springs Natural Area is located.

This is page 15.

THE COURT: 16.

MR. TAGGART: Page 16. And down at the bottom where it's red, these are sections of habitat of the fish. And so

those waters that come up in those spring areas, they collect and then they kind of add to each other and then they flow down to what's called the Warm Springs West Gage, and we measure that to see how much water is available for fish. But that's the primary habitat for the fish. You can see temperatures listed there, too, and that's important because the fish live in warm water. And so that -- we'll get into that in more detail there, too.

So I think it's important to step back and think about a little bit of history. I'm watching the time to make sure we don't spend too much time on this, but it's really critical to understand where we come from and it's interesting, too.

So on page 17 I say, you know, where does this water come from? So out in the middle of the desert there's this river coming up out of nowhere. And when the scientists first went out there, the United States Geological Survey first went out there, they thought where is this water coming from? It just doesn't make any sense. They looked around, there's no mountains with snow. It flows at a steady rate. It's warm. You know, where is this water coming from? It can't be coming from anywhere local because there's no mountains or snowpack nearby.

And so they identified a regional groundwater system that went many miles to the north to where those mountains

were with the snow on them. And they came up with an understanding that, you know, this is really a large system. So in 1966, which is magic because that's the year I was born, in that year they wrote a report that we're going to look at in a little more detail, but it was a report that talked about this interconnected system.

And I guess the way I think it's simple to think about this is you think about a bathtub and you leave the faucet on and it starts to overflow and it overflows -- eventually it would overflow at a constant rate. And so I think about that, you know. Well, anyway, that's the river overflowing the hydrographic system. And if you lower the water level in the bathtub, there will be less water overflowing out of the bathtub until eventually there's no water flowing out of the bathtub. And so that's the larger concept when we think about this.

The fact that the flow is steady, which means it doesn't go up and down during -- like, I live in northern Nevada and we have these rivers that come off the Sierra and in the spring when it warms up and the snow melts you see all this water and then in the fall there's very little water, so it goes up and down over the year. This spring just flows pretty much the same all year long. And so it's not snowpack melt, it's something else. And it's also warm, which means -- the scientists said that means it was in the ground close to

something hot for awhile, long enough to heat it up.

And so that was like the original kind of concepts that they had. Here's another picture of the river. And this was the report that was done in 1966 by Eakin. And one of the things that it says, and this is on page 19, one of the things that it says is that -- and I have it highlighted: "The discharge of the Muddy River Springs, the lowest of the three principal spring groups, is shown to be highly uniform, which is consistent with they're being supplied from a large regional groundwater system." So the point there being that this has been known for a long time that there's a connection between the groundwater system and the Muddy River.

So fast-forward to 1983 when one of the first major water rights was issued in the Lower White River Flow System, groundwater rights by the State Engineer. So, Nevada Power filed for a water right. It's currently owned by CSI and it's Permit 46777. It was protested then based on concerns for the Muddy River rights and for the Moapa dace. And when it was approved in 1997 in Ruling 4542, the State Engineer said it was approved with the understanding that groundwater pumping would be stopped should the project adversely affect the water table in the Muddy River Springs Area.

Then in 1995, MVWD was also granted groundwater rights with a monitoring plan required to monitor the changes in the river based upon their pumping. And then today over

40,000 acre feet of water has been granted in the Lower White River Flow System, all subject to existing rights, which means that if you get a water right it's subject to whoever got a water right before you because we're a prior appropriation state. Your priority is a date and who comes later comes subject to who was there first. That's like our original water law and it was common law and now it's in the statutes.

So all water rights were issued that way. But that -- and you'll hear different numbers, 38,000, 41,000. Somewhere in there is the block of water that exists as water permits that were issued by the State Engineer. And I think it's always important to understand, 40,000 acre feet of water permits doesn't mean there's 40,000 acre feet of pumping. So there's a lot of water rights that have been granted across Nevada where they're not actually being used, they're granted as a permit. They permit the user to go out and use the water and then it might take them 10 years, 20 years, 30 years -- it might take them some time to actually put the water to use. And then once they do that, they can file for a certificate with the State Engineer. But it's that unused water that I think we need to be aware of, too, as we talk through this.

THE COURT: So let me ask a question because what you're saying is all of the water in the Muddy River Decree is all appropriated, so then what would be the point of issuing a groundwater permit if -- you know, if it's subject to the

senior water rights and you're saying it's all appropriated, then what's the point?

MR. TAGGART: Well, on page 20 I think the State Engineer started asking that same question.

THE COURT: Okay.

MR. TAGGART: Because when you drill the well -- they drilled the well in Coyote Spring Valley and it was a massive producing well and there was all this water there. And so everybody thought, well, if they can drill a well and there's water coming out of the hole, then there must be a lot. You know, why can't I pump that well and take that water? And the Muddy River is, you know, twenty miles away or I think it's eleven. So in 2001 --

THE COURT: And I don't mean to throw you off track. That was just one of my questions.

MR. TAGGART: Right. Well, I think it's -- I think probably the answer is that they didn't think it would be so direct. And so in 2001, Coyote Springs Investment and the Water District, my client, had hearings in front of the State Engineer to appropriate tens of thousands of acre feet of water, more acre feet of water in Coyote Spring Valley. We thought there was water there, the Water District did.

And the State Engineer said I'm not going to grant any more water in these basins until I do a test of the system to understand what is going on when we pump water because

I've got 40,000 acre feet of water rights but only a small part of that is actually being pumped. Until I know what happens when a big amount of water is pumped, I don't really know how the system is going to react. And that's an engineering kind of principle is that, you know, there's a lot of reconnaissance level or, you know, estimates that can be made based upon snowpack on a mountain, but the way you really understand what happens in a hydrologic system is you pump the hell out of it and see what happens at distance and then you'll know.

And so in 2002, Order 1169 was issued and it required half of the existing water rights to be pumped for two consecutive years, and that was done to see what the effect of pumping existing water rights would be on the system. And so it took a long time to get this done. And part of what was being done -- so on page 22 we talk about that in order to do the pump test at that scale there needed to be a pipe built from where the pumping was happening because it's a lot of water to do something with if you're going to pump it out of the ground.

So my client invested and built a pipe to the Muddy River to pump that water, move that water, but we also worked on a Memorandum of Agreement to protect the dace in the event something happened to the dace during the pump test or after the pump test. And so that was -- like I think I've described

already, there was a lot of conservation efforts that we engaged in, that the District did with respect to the dace.

But at this time in this agreement the parties agreed that there's a series of triggers at Warm Springs West Gage that are really important to the fish from a habitat standpoint and habitat would lead to population. And so the parties agreed that 3.2 cfs at the Warm Springs West Gage was a significant trigger, and you'll see that that becomes a big deal -- that became a big deal in 1309.

THE COURT: Okay. Just in regular layman's terms, what does 3.2 cfs mean?

MR. TAGGART: It's cubic feet per second.

THE COURT: So that's the flow?

MR. TAGGART: Yes.

THE COURT: Okay.

MR. TAGGART: So, you know, a cubic foot, you know, is a three dimensional square; one foot by one foot by one foot of water. And, Your Honor, 3.2 cubic feet per second would be three of those passing a gage every second.

THE COURT: Okay. So that doesn't actually relate to the depth of the water as much as it does the flow of the water?

MR. TAGGART: Right.

THE COURT: Okay.

MR. TAGGART: Yeah, you'll see there's a correlation

between depth and flow --

THE COURT: Right.

MR. TAGGART: -- but cfs is strictly a measurement of flow.

THE COURT: Okay.

MR. TAGGART: Slide Number 23, that's a picture of the Warm Springs West Gage. So that's where the water is collected from all those individual little springs where the fish are. Then it all gathers together in a couple channels and those channels gather together and then it ends up here.

So after the pump test was done the State Engineer -- well, first of all, the pump test was fourteen thousand and a half -- fourteen and a half thousand acre feet of water pumped over a 25-1/2 month period.

THE COURT: I thought there was a 15,000 number. Was there not a 15,000 number? No, it was 14,000. Okay.

MR. TAGGART: Yeah. I mean, I took this out of their report.

THE COURT: Okay, sorry. Go ahead.

MR. TAGGART: So it's in that range. And after the test was done the State Engineer asked for information from all the parties about the results of the test. And then as a result of all of those reports, in 2014 he denied all the pending applications. So all those apps that the District and CSI had a hearing on in 2001 got denied in 2014. And he

entered a similar ruling in every one of the basins. Well, not every one but almost all of them that we're dealing with now what we're calling the Lower White River Flow System. And it was based on the impacts of pumping on the river and it said that the impacts of the aquifer test from pumping in Coyote Spring Valley was widespread, that the aquifer test pumping in Coyote Spring Valley was a significant contributor to the decline in the springs that are the headwaters of Muddy River the dace, and that additional pumping would result in significant regional water level decline.

So that was in 2014. The State Engineer denied all the pending applications. He's still got the problem with the 40,000 acre feet of permits, and so then in 2017 we get to what I kind of call season one of what we're doing here now. I'm not sure what season we're in now, but season one was when my client asked the State Engineer, hey, we're getting asked by CSI to approve infrastructure plans for a subdivision and we want to know from you if you are going to approve the subdivision. The State Engineer has to, under State law, has to sign subdivision maps to say that there's water available for that subdivision.

And so CSI as asking the District to approve improvement plans. The District asked the State Engineer, you know, what are you going to do with the subdivision map before we put a bunch of time into approving these plans,

these infrastructure plans? And the State Engineer came back and said that he would not approve subdivision maps based on CSI's groundwater rights in the Coyote Spring Valley. And as a result of that letter, CSI filed a petition for judicial review and ultimately that case settled and part of the settlement was to do -- was to have a hearing. And so part of what arose out of that settlement was the 1309 -- well, what came next. So this on page 26 is the letter that the State Engineer sent back to the District regarding that question.

So after that, after that case settled, the State Engineer issued Order 1303. 1303 said we're going to collect fact evidence first, that we want fact evidence on the geographic boundary of the Lower White River Flow System, on aquifer recovery since the pump test, and how much water can be pumped in the area and what would occur if you moved water from the alluvial to the carbonate aquifers. I'm not going to get into the alluvial to carbonate aquifers at this point, but those were the fact questions.

And the State Engineer indicated that he wanted to determine how much water could be sustainably pumped in the Lower White River Flow System without impacting senior rights or the dace. And then in the second phase, based on the pumping limit, the State Engineer would determine which water right holders can pump and how much they can pump. And in that second phase, and this is important for this morning,

he would address conflicts between junior groundwater right holders and senior water right holders and potentially through mitigation plans.

So that was in Order 1303. Substantively, 1303 created a joint administrative unit among a group of the basins that are in the Lower White River Flow System. Kane Springs was not in this and Muddy River -- or Black Mountain Area, a different part of Black Mountain was in this, so that comes up significantly in what we're arguing about, too. And then change apps were held in abeyance and there was a moratorium on subdivision maps within Order 1303.

CSI appealed that order as well, but then that appeal was withdrawn pending the evidentiary hearing that we ended up having. So we went to an evidentiary hearing. The District and everyone submitted expert reports, had expert testimony. And my client's position was on what the boundary of the Lower White River Flow System should be, what groundwater area should be included in it. Our position was you don't need to change it right now; you can look at that at Phase 2. But you should take into account pumping around the boundary. Like, there might be people that are right over the boundary that that still -- just because they're right on the other side of a boundary doesn't mean it might not have an effect, so you should keep that in mind when you're going forward in Phase 2.

We thought that four to six thousand acre feet should be the cap on pumping, but at any level of pumping the District and the Authority indicated that the State Engineer had to deal with the capture of Muddy River rights and the conflicts with those rights, and that current pumping should not be allowed to increase while the State Engineer did Phase 2. So those are the positions we took there. And I'll skip over that slide.

So now I'm on Slide Number 32. And in Order 1309 the State Engineer made findings. And again, so let me back up a little bit. So that's a trial. I've never done a jury trial, but I've done, you know, I don't know how many hearings. And I don't know -- I mean, I have friends who do lots of jury trials and I don't know what's harder. We end up having 20 experts and we've had hearings where we've had 15 different expert disciplines, you know, testifying. And in this particular hearing we had at least 15 or at least 12 parties, all with experts, and the State Engineer heard all of that testimony.

What the State law says is that when a court reviews those fact findings, it is not de novo; right? So the Court should not re-weigh the evidence. You don't need to read the transcripts and decide which expert was right and which expert was wrong. The State Engineer did that. And so as long as the State Engineer's decision is supported by substantial

evidence, then the Court must uphold his decision. And substantial evidence is what a reasonable person looking at the evidence would say, you know what, based on -- when I look at this evidence, this is a reasonable conclusion given the evidence. I mean, there might be more than one reasonable conclusion from the evidence, but if the State Engineer is reasonable, you have to uphold it.

So that's why the State Engineer did that huge hearing, so the Court -- you know, in one way so the Court didn't have to. But because of the State Engineer's expertise in water and everything else, that's the whole notion of having that done at an administrative panel.

So after the State Engineer found that nearly all the witnesses agreed that pumping was impacting flows to the Muddy River, then he issued 1309. He found in that that the primary source of water for the Muddy River is spring flow, that the Muddy River is fully appropriated by senior decreed rights, that pumping Lower White River Flow System groundwater has captured and reduced spring flow, and that since reduction of pumping after the pump test or the aquifer test, flows did not and will not return to pretest levels.

So what that means is that when we did the pump test water levels were drawn down, and we expected them to come back up and they didn't come up the way that people anticipated. So that all looked really good. We liked that

part of the order. But if water levels are declined and they're not going to come back, that's a permanent capture. That system has changed and there's a permanent capture of flow.

So the State Engineer then in 1309, and now I'm on page 33, he delineated the Lower White River Flow System. He established the 8,000 acre foot cap. But then, and this is where we disagree, he concluded that existing capture of Muddy River water does not conflict with senior Muddy River water rights. That's what we're challenging.

So with that, I'll get into three reasons why we think the State Engineer was wrong, and they're really simple. We think his decision was outside the scope of the hearing. We think that it was unlawful. There's a series of -- there's four specific legal principles that we think it violates, and then we think it's factually incorrect. So we'll go through those three.

But before I do, I wanted to talk about what -- I did this a little bit already. What is a conflicts analysis? It determines whether one water right holder's use of water conflicts with another person's use. I tried to think of things to compare this to. I was thinking, like, a simple trespass. A fact question would be did the defendant go onto the plaintiff's property? That would be a fact question. But a legal question might be, Did the plaintiff have the right

to exclude people from his property? Did the defendant have a license or some kind of an easement to go onto the property? You know, was there an emergency?

Those are the types of legal questions that might, you know -- and I kind of think -- I mean, I also have never done criminal law, either, but it seems like -- it's like it's one thing to prove that there was a death and sometimes you have to prove that, but it's a different thing to prove that there was a murder. And so --

THE COURT: Whether or not self-defense are available, you know, defenses, that kind of thing.

MR. TAGGART: Right. Right.

So that's the difference between -- that's the difference between an impact and a conflict. So we think that an impact is just factually when you pump here you capture here. That's the question we thought the 1303 and the 1309 hearing was about and is there an impact. Whether that impact constitutes a conflict, a legal conflict with a water right, we think requires a whole new type of analysis than simply that factual question.

Okay. So, but first we don't even really need to get into some of those slides. I'm just going to jump to Slide Number --

THE COURT: 39?

MR. TAGGART: Slide Number 39. So the State Engineer

when he issued 1303, he specified the four areas that he wanted fact questions on. That's on page 39. Then page 40 just shows you a picture of the order that he issued that listed those four areas. And he also listed (e), any other matter believed to be relevant to the State Engineer.

Then we went to a pre-hearing conference and at the pre-hearing conference the hearing officer or the State Engineer's office clarified what the hearing was about. And we asked or questions were asked specifically about (e). And, you know, my client and myself were asking questions about, Are we going to talk about conflicts in this proceeding?

So then on Slide 41, at the pre-hearing conference the State Engineer's office clarified that management of the Lower White River Flow System would be in Phase 2; that the 1303 hearing was to address technical issues. Legal conflicts would not be decided at this phase. And if the parties had already admitted conflicts evidence, because this pre-hearing conference occurred after the first evidence exchange, he stated he would not consider that.

So after the pre-hearing conference, all the parties understood that conflicts would not be part of the hearing. Page 42 is a page from the transcript in the record. And then the next three slides are highlights of that, or the next four slides are highlights of that.

So one of the questions that was being discussed

is what does this -- any other factors the State Engineer considers relevant mean? Hearing Officer Fairbank said that "We've spoken about this before, is that really -- this is a threshold reporting aspect, that this is part of a multi-tiered process in terms of determining the appropriate management strategy for the Lower White River Flow System."

Then on Slide 43 --

THE COURT: 44.

MR. TAGGART: 44. On Slide 44: "And that is those four components that we've solicited in the Order 1303. This larger substantive policy determinations is not part of this particular hearing. That's part of later proceedings, but this is what has to occur in order to inform those future policy determinations and decisions."

And then on Slide 46 --

THE COURT: 45 or 46?

MR. TAGGART: Yeah, I'm going to skip to 46.

THE COURT: Oh, okay, 46. Okay.

MR. TAGGART: The State Engineer said, "And the purpose of this hearing is not to resolve or address allegations of conflict between groundwater pumping within the Lower White River Flow System and Muddy River decreed rights. That is not the purpose of this hearing and that's not what we are going to be deciding at this point in time."

And that we took for the instruction of the State

Engineer, but despite the fact that that was stated, the State Engineer did just the opposite and then found in Order 1309 -- and so I'm on Slide 47 in the second large bullet there: "The reductions in flow that have occurred because of groundwater pumping in the headwaters (Lower White River Flow System) basins is not conflicting with decreed rights in the Muddy River."

Basically what the State Engineer said is the 8,000 acre feet that's being pumped now, that can continue to be pumped without conflicting with Muddy River water rights, and so that was the conclusion that he made.

So I think it's obvious, but our argument is that that's fundamentally unfair and cannot stand. And the reason is is that in Nevada water law all parties have a fundamental right to have -- to be heard, to have notice and an opportunity to be heard. And the supreme court has been clear about this and the statutes are clear about this; 533.450, sub (2) and *Revert* is the case that says it. And these apply to every party who appears in front of the State Engineer.

And here on Slide 49, none of the parties had notice that conflicts would be addressed, so they were denied an opportunity to be heard on that issue. Even -- and, you know, Vidler and Lincoln County have argued that, well, SNWA put in conflicts evidence so they're not prejudiced. Well, like I said, we put in evidence at the initial evidence exchange

and then we had the pre-hearing conference and then that's when -- well, it became clear we weren't going to be able to use that evidence the way we had anticipated. But we were very clear that any pumping was a conflict and needed to be addressed.

No party also had an opportunity to rebut the State Engineer's analysis. So he came up with a brand new method of how to look at senior rights and he used evidence that no one had seen. And still -- we're still kind of scratching our heads trying to decide exactly what the method was that he used. The four main things are that there is a technical report that he relied upon that wasn't put into evidence. He calculated the average water requirement on the river differently than what the decree says. And he calculated the amount of acreage differently than what the decree says. And no one was able to review, support or challenge those findings.

So because of that, we ask the Court to reverse the conflicts determination. And in response to our argument on this point, the State Engineer in their answering brief said that the Court may merely strike the conflicts paragraph and affirm the remaining portions of Order 1309 because the conflicts conclusion was an incidental finding. My point here isn't to say that they agree with me. I wish, you know, everyone did. But my point is to say that if the Court finds

that the conflicts determination was incorrectly made, then the rest of 1309 can stand; that it was an incidental -- their point that it's an incidental finding. And so you can do that and allow the remainder of 1309 to stand. And I think that's what they were saying. So, beyond the scope, that's the first reason -- I think the easiest reason that you should reverse the conflicts determination.

Next is four violations of Nevada water law, and I'll go through those one at a time. First, it should be easily understood that the State Engineer cannot do any action that would violate a court decree. And if it wasn't obvious, it's in statute, and so the statute says the State Engineer has to follow court decrees. And I've listed here on Slide 54 a number of the cases that we all -- well, *Nevada v. U.S.* in particular where this principle was established by the United States Supreme Court that once a decree is entered, it's final. It's final forever. It really reiterated the res judicata aspect of a court decree.

And at that time the Pyramid Lake Paiute Tribe was trying to get more water out of the Truckee River and trying to open up a decree on the Truckee River. It went all the way to the United State Supreme Court. Justice Brennan wrote the opinion and said no. Even as desperate as you might need water for endangered fish at Pyramid Lake, we can't open a decree, and so it's that strong.

And then in 2020 we get the Nevada Supreme Court in *Mineral County v. Lyon County*, which also reiterates this notion that decrees are final. So whatever the decree says is the law of the matter. The State Engineer should only be able to listen to the decree.

Earlier I told you about what's on Slide 55, which is the provisions of the decree that say the entire river -- the entirety of the river has consumed and exhausted all of the available flow by water rights. At the time that the decree was entered there was between 33,600 and 37,000 acre feet of flowing. The State Engineer concluded that the water rights on the Muddy River are only entitled to receive 28,300 acre feet. So since 28,300 is less than the full flow of the river, then he took water away from MVIC and the other water right users on the Muddy River.

THE COURT: And that's based on the alfalfa growing analysis?

MR. TAGGART: Right. That's right.

So this is the provision in the decree on Slide Number 56 and it talks about the total available flow of the river that's consumed and exhausted by rights. So the State Engineer was incorrect in clipping that to 28,300.

This on Slide Number 57 is a hydrograph that was put together by the expert for the District and the Authority. And I won't get into the details of this, but the blue line

is the old flow. It's how much water flowed on average, according to this expert's opinion, on average in the river before any groundwater development occurred. The red area is what is no longer in the river because it's being pumped. And so he calculated that as the impact to the river from the groundwater pumping. So that's the first point.

THE COURT: Let me ask you, if I -- and I'm not saying that I am, but if I determine that that part of the hearing or that part of the ruling was outside of the scope and it violated due process, would I even need to go into his analysis or any of that other stuff?

MR. TAGGART: No. No. Yeah, you would not, and there's a question of where are we going to debate conflicts; right? Where is that evidentiary hearing going to happen? We think that requires an evidentiary hearing. It would either happen in front of the State Engineer or in front of the decree court, so it's happened two different ways. I mean, after being with us for a week you'll probably, you know, want us to go let the State Engineer decide. But that is a large evidentiary hearing, we think, that would occur on remand.

So first he reduced the amount of water in total and then he changed, in our view, the duty of water that a water right holder in MVIC or in the Muddy River area can receive. So the duty of water is the amount of water in

acre feet, and an acre foot is if you covered an acre with one foot of water. So the duty is how many acre feet of water that acre is entitled to. And the decree has a number and the State Engineer came up with a number. And the decree's number is 8.54 and it's a blended number because there's winter water and there's summer water, but it's 8.54. And the State Engineer said that 4.7 would be enough for those fields to grow a crop. And so right there was a change in the duty and we think that was improper. Again, we're talking about violations of the decree now and legal problems with the decision.

So the State Engineer, when he did that, he relied on what's called the Net Irrigation Water Requirement. We also call that net consumptive use. What it means is probably for an expert to say and not for me, but it's the amount of water that the crops need to grow. It doesn't include the water it takes to get water to the crops. And so the decree was based on actual use of water and it found that the entire river was fully consumptively used and all of that was a valid beneficial use, and so the State Engineer should not have limited it based upon this Net Irrigation Water Requirement.

So now the second legal principle that we're challenging this decision on is the impairment of vested rights. So, I mean, I could go on for hours but I won't, because I find this stuff really interesting. But when the

water law was originally enacted in 1905, it was challenged and it went to the supreme court. Justice McCarran was one of the justices at the time and he wrote an opinion in *Ormsby County* which said that the State Engineer cannot do what courts do. He can't determine what water rights existed before the statutes were enacted. Before the statutes were enacted, courts decided who owns what water under common law. And all the water right owners -- many water right owners in the state weren't happy about there becoming a state engineer who was going to make these decisions now.

And the supreme court said that, one, you can't adopt a statutory system that impairs vested rights, that impairs the rights that came before it. And, two, you have to keep the courts involved in finally determining vested rights. So nothing the State Engineer does can impair vested rights. Well, he granted groundwater rights that when they're pumped they capture Muddy River flow. That impairs vested rights. And so that's our simple point there. On Slide 61 we kind of talk about that a little more.

On Slide 62 you'll see another figure from our expert's report and it shows pumping in the bar chart, so all those bars are different pumping amounts per year. And then the red line is the deficit in water in the Muddy River. I showed you that line before in a different figure. So the experts were able to look at as pumping increased, declines

in the river increased, and so that was the analysis that they did there. So reducing flows in the river by issuing groundwater permits leads to less water for water rights. That's an impairment. It also leads to less ICS for my client.

We also prepared this figure. So this is on page 64 of our PowerPoint, and this is a figure that the expert used to estimate the amount of ICS SNWA did not receive because of groundwater pumping. And this was presented at the hearing to show impacts. We showed impacts to our water rights in the form of ICS. This is not a conflicts determination. Some parties are arguing that, oh, well, you made a conflicts argument. We weren't allowed to do that. That wasn't what the State Engineer allowed us to do at the hearing.

Okay. So the third legal reason why the decision is wrong is that the State Engineer used this consumptive use approach. So that's this Net Irrigation Water Requirement. We call -- in the water community we call this a haircut, that the State Engineer will reduce a water right based on what the water -- what the crops consumed. And they had this report that we talked about before done to figure out what that was in each valley. So --

THE COURT: Let me just ask a quick question. Back on Slide 64 where you had your expert prepare to show the amount of ICS that your client would lose, was the purpose

of that to persuade the Nevada State Engineer that it should really be more in the four to six thousand range as opposed to the eight thousand range? What was the purpose of presenting that evidence?

MR. TAGGART: I think that this was presented to show that if it's four to six thousand, this is still happening --

THE COURT: I see.

MR. TAGGART: -- even with that amount of pumping and this needs to be addressed. And I'll show you -- maybe I'll just go to it right now. If you go to page 77, this is from his report and it kind of describes why a lot of this evidence was put in. Let's just look at the last sentence. It says, "If the conflicts with senior water right holders are adequately addressed, the annual groundwater production from the carbonate aquifer should be managed between 4,000 to 6,000 over the long term." So I think that's the point I was just making.

THE COURT: Okay.

MR. TAGGART: So back to this haircut.

THE COURT: Sorry. You are on Slide 65.

MR. TAGGART: On Slide 65. So a long time ago, like in the early 2000s, the State Engineer approved a change application that was only -- and he didn't -- so it was like a person had a water right to put water on a field to grow

alfalfa and it had X number of acre feet per acre, 4.5 or whatever. And then they wanted to take that water and move it to a subdivision of homes. And the State Engineer reduced the amount from 4-1/2 and he said I'm not going to give you 4-1/2 at the new place, I'm going to give you less. I'm going to give you the amount the plant actually used at the new place.

And it got litigated. I was involved in that. And it led to a settlement that put a new law into the statutes, and that law is 533.3703. And it gives the State Engineer the ability to do what I just described, except on the Muddy River and the Virgin River. So there's a specific exclusion in that statute which was required to get it passed that the Muddy River and the Virgin River would not be places where the State Engineer could do a consumptive use reduction. And so that's the first reason why we think it was improper to use a consumptive use reduction.

THE COURT: So let me just ask, was it -- I mean, I note that it's in the statute, but was it specifically included because -- I think there's Muddy River and one other one.

MR. TAGGART: Virgin.

THE COURT: Yeah, Virgin. Was that because those existed pre-statute?

MR. TAGGART: Yes. And I guess -- I can't speak for the legislators and why they voted for it that way, but yes.

And, I mean, ICS was in the wings at the time. I mean, I'd be speculating on exactly what led to it. But, yeah, they were excluded and that was a big part of why the bill was able to ultimately pass.

Now, then this consumptive use haircut is also inconsistent with other decisions that the State Engineer made on the Muddy River. So there's -- a number of change applications were filed on the Muddy River where the State Engineer did not do consumptive use reduction. We think that shows, you know, that he's been arbitrary in this case. And what is really important is that on an annual basis ICS is certified by the State Engineer and the Bureau of Reclamation and the calculation for the certification of ICS uses the full duty of the Muddy River water rights. And the State Engineer signs that. You know, he signs off on that report. And so this is a completely inconsistent methodology from how those water rights are treated in the ICS report. So it's arbitrary and capricious, I guess you'd say, because it's so different for no reason.

Okay. Then the fourth reason why this is unlawful is that it essentially reallocates water and gives it to juniors. So by saying that 8,000 acre feet is not being -- is not conflicting with the rights on the Muddy River, he's saying that juniors can continue to pump that water. And so he's taken 8,000 acre feet that used to be seniors' water and

giving it to juniors. The way a prior appropriation works is juniors get zero and seniors get 100 percent. And as Draconian as that might sound, that is the law in this state and it's been recently upheld by the supreme court. And so it's inappropriate to just take water from seniors and give it to juniors, you know, in that fashion.

So those are the four reasons why it's unlawful, in our view, for the State Engineer to make the conflicts determination that he did. It violates the decree. It's an impairment of vested rights. It's using consumptive use when you can't use consumptive use on the Muddy River. And it reallocates water in violation of the prior appropriation doctrine.

All right. So the last point is that factually the decision is not sound. And here we're going to shift over -- I should have said this. You know, what I just argued, that's de novo review. Those are legal determinations the Court can look at in the first instance. But on these fact questions I'm about to talk about, the State Engineer has to have substantial evidence in the record to support his decision, and I talked a little bit about what that means before.

So given all the evidence in the record, is it -- was it reasonable for the State Engineer to find that only 28,300 acre feet is required to serve Muddy River decreed rights? All the other evidence, what the decree says, what

people have been receiving, how ICS has been approved, when you look at all these things, is it reasonable for him to say 28,300 is enough and therefore existing pumping can continue without mitigation?

So, first of all, the first big problem he's got is that the evidence he relied on is not in the record. As Your Honor knows, the record was established at the evidentiary hearing. It came up to you and that's what you're restricted to look at. The Net Irrigation Water Requirement report wasn't in the record. The State Engineer's method where he calculated the 4.7 acre foot duty, that's not in the record. How he came up with 2,614 acres of land that gets water, that's not in the record. So -- and extra record evidence is necessary to look at to see whether his methodology was correct. So it's our view the Court can't even review this finding of fact because it doesn't have the evidence it needs.

Now, so factually speaking -- and I know we're getting tired and I want to finish this up, but this is really important -- Net Irrigation Water Requirement is the wrong way to look at how -- what water demands are on the Muddy River. And this is what experts would have testified about if this had been an issue to be heard. If an expert had come in and said, oh, we think it's 4.7, that's enough per acre, I would have brought in experts that would have said no, it's not, because you have to get water to the field before you can

irrigate. If at a field you're growing plants and the plants themselves require a certain amount of water, well, I get to deliver water to that field with water, and that has always been part of the water right.

The Muddy River is muddy because it has a lot of salts and soils in the water. Well, that has to be flushed out. You know, you can imagine how much that soil clogs up irrigation works. They have to flush out those systems every year. That water they have a right to. So flood irrigation, which is the standard in Nevada where you run water across a field and that's how you irrigate, not necessarily sprinklers and that sort of thing, that requires a lot more water than just what the plant requires. We talk in terms of irrigation efficiency. How much water does it take? How much do I put on the field versus how much does the plant use? And many times it's less than 50 percent efficient and that's an allowed use in flood irrigation in Nevada. So two to three times the Net Irrigation Water Requirement could in some cases be required to effectively irrigate a system.

All right. I said earlier the State Engineer ignored prior decisions where he determined that the river was fully appropriated and where he awarded water rights at full duty, so I'm not going to go into that, which is on page 71.

On 72, I mentioned this a little bit earlier, the State Engineer has continuously recognized that SNWA can use

the total duty of decreed Muddy River rights to create ICS, and that's always been the full decreed amount. And without any legal authority, he did not adhere to these past practices and did not recognize the fully duty in the decree.

Now, the duty calculation also ignores winter water use. I won't go into that anymore than just to say it. When that is a decreed use, the 4.7 doesn't give you enough water for that. It also assumed that everyone -- on Slide 74, we talked about this, it assumed that everybody in the area used water for irrigation, calculated the water that way, and that's not the facts on the ground.

On Slide 75, I'll just leave that to our briefs. It's not clear where the 4.7 came from because the river runs through multiple basins and different basins have different NIWR numbers. And so somehow he had to come up with an aggregate. He had to add an average in these four areas. None of that math is in the record; none of that.

And so then the last point is that the acreage, the 5,614 is not readily repeatable. I mean, normally whenever someone testifies as an expert, you've got to be able to repeat their work. Otherwise, you know, that's something that you'd ask them about on cross-examination. The parties, particularly Lincoln and Vidler, have made an effort to reconstruct the numbers that the State Engineer must have used to get to 5,614, but it's still unclear whether those are the

right methods. And it also requires a lot of analysis of outside record information. So that's -- we think that's improper.

So those are the factual reasons. I went through that quick, why the State Engineer doesn't have substantial evidence to support his decision there's no conflicts because his numbers just don't make sense.

So I said one hour and fifteen minutes; right?

MR. ROBISON: You are way over.

MR. TAGGART: Okay. Now, what I've got here on this slide is what was said in SNWA's submittal to the State Engineer. And an argument was made by the State Engineer that SNWA and the District waived or conceded to conflicts from existing pumping, and we didn't. I mean, the fact that we're not -- again, we thought it should be four to six. The State Engineer selected eight. I'll tell you in a couple days why we didn't challenge and say, no, it shouldn't be eight, it should be four to six. We felt like we could live with the eight as long as there were conditions, and those are in that rule. But we never said that we're waiving any claim of conflicts. I mean, we said it right here, that that has to be addressed.

So to finish, Your Honor, we think the conflicts determination should be reversed. We think 1309 can be upheld without it. We think mainly that it's outside the scope.

I think that's so clear that this was not something that any of us anticipated would be done. And then if you wanted to go beyond that, then you would look at these four problems legally that I've said exist with the conflicts determination. And then if that's -- you know, and then beyond that, there's factual problems with it and I went through those three things.

So for those reasons, Your Honor, I appreciate your time, and we ask that this part of the decision be reversed.

THE COURT: Thank you.

Donna, what's the time?

THE MARSHAL: 2:45 and 25 seconds.

THE COURT: Okay. And then I will give you an extra five minutes, since you were trying to figure that out, so we'll put it at 2:50 and 25 seconds. Okay.

Should we take a five minute break or do you guys want to proceed through? How do you feel?

MR. ROBISON: Five minutes would be perfect for us, Your Honor. Thank you.

THE COURT: Okay. So let's take a quick five minute break and then we'll come back.

(Court recessed from 11:20 a.m. until 11:28 a.m.)

THE COURT: Are we ready?

MR. ROBISON: Ready to go.

THE COURT: Okay. You may proceed.

MR. ROBISON: Is the Court ready?

THE COURT: I am.

ARGUMENT BY COYOTE SPRINGS INVESTMENT, LLC

MR. ROBISON: May it please, Your Honor. Kent Robison again for Coyote Springs Investment, LLC. I'm here to argue, Your Honor, on behalf of my client, but I will concede that I probably won't be as good as our briefs. I probably won't be as good as our petition. And most importantly, I won't be as concise and precise and persuasive as our proposed findings of fact and conclusion of law. They say probably everything I'm going to say today, Your Honor, but I feel compelled to embellish.

I'm going to divide my argument into four different areas. Overview. I want to go through a timeline of chronology to explain to the Court really the history of how we got here. This is my fifth year of litigating with the State Engineer's Office and there's some history to talk about in this case.

I want to talk about the statutory authority, most importantly, or more correctly stated, I want to talk about the lack of statutory authority. I want to talk about prior appropriation. I agree with Mr. Taggart how that concept, which has been in effect in Nevada since the 1980s, has been obliterated in this case. And I also want to talk a little bit more in depth and with more specificity with the due

process violations that occurred at the hearing and tell you what has been the ramifications of what has occurred throughout the preparation and entry of Order 1309.

First, Your Honor, for a basic overview, I'd like to go to Slide 1, just to orient the Court as to where we are. Can I have Slide 1, please.

THE COURT: It's actually Slide 2. Slide 1 was the cover sheet.

MR. ROBISON: Oh, I'm sorry, Slide 2. Got it. All right. We put on Slide 2, actually, a little rectangle. Highway 93 going north, that's where the Coyote Springs development is. Coyote Springs has been endowed with water in this case since the 1980s. It has done everything the State Engineer has required it to do to preserve its water rights. It has gone through immense expenses to get subdivision maps approved. It's installed water treatment facilities. It's installed infrastructure. It's installed electrical below ground, wiring throughout. It's constructed a $40 million Jack Nicholas signature golf course.

It has done so not without substantial reliance on the position that's been afforded us by the State Engineer's Office. We started this process a very long time ago and every step of the way we were getting approvals from various regulatory agencies throughout Clark County and indeed in Lincoln County, including those of the State Engineer.

And so we stand here realizing that there's substantial equities involved in this case. Justice Pickering said it best in the *Happy Creek* case, in which she said equities are an important part of the water management in this state.

If I could show Slide 3, please. This is how the project looks on paper. This is what's been shown to the State Engineer. This is what's been approved and shown to the various regulatory agencies in Clark County and the State of Nevada, and that represents about $300 million acquiring property rights and developing those rights. That's where we are in this scenario.

We put on Slide 4, Your Honor, a quote from Justice Pickering in the *Happy Creek* case. And the reason we're talking about the massive investment that my client has made on this project is in line with what Justice Pickering has said should be considered by this Honorable Court in analyzing this case. Fairness and equity are cardinal principles underlying ever enduring water management systems. And we don't dispute that until November of 2017. The State Engineer honored that proposition that's articulated by Justice Pickering in the *Happy Creek* case.

So what we're now taking is basically a position, Your Honor, that there's been more or less of a bait and switch in this case. And Coyote Springs Number 2, the large

chart, I also have an 8 by 11 for the Court's record -- if you could raise that up, Mark -- these are the 232 basins depicted in the state of Nevada by the State Engineer since 1968 when it and the United States Geological Survey mapped out 232 basins. And we're talking about one. We're talking about Basin 210. We're not talking about a mega basin. We're not talking about a bathtub. We're not talking about obliterating the lines and boundaries of the basins designated by the State Engineer himself. We're talking about Basin 210. And it should not be confused with a mega basin which has now become a mega mess because of obliteration of specific basins.

So, Your Honor, we know that the State Engineer has put itself in a position where it giveth and it taketh. And the process by which it taketh has brought us here today. But I want to stress right now, Your Honor, in reaction to page 34 of the State Engineer's brief that seldom do we see a party to a lawsuit so dismissive of the judiciary. They have indicated in their brief that perhaps this Court should not delve into science, because it is far more equipped to do so. Perhaps.

But seriously, 24 briefs, 10,000 pages of exhibits, experts, the findings of fact that we've all submitted, the arguments that you're going to hear for a week, and they have the audacity to say that you should defer to their analysis of everything in this case. What I'm here to say, Your Honor, adamantly as I possibly can, nobody can stand at this lectern

and tell this Honorable Court that it's not a judge's duty to interpret these statutes.

There are four branches of government. There's the State Engineer and three subsidiary branches of government. The State Engineer says we don't have to interpret the statutes by the plain meaning in the statutes. We get to take liberty. We get to read into those statutes and you should show us deference and give us preference in our interpretation of statutes. Those are questions of law, Your Honor. They're not entitled to deference. They're not entitled to preference.

This Honorable Court is the one that interprets the statutes that apply to this proceeding. And this Honorable Court is the one that makes the findings with respect to whether or not the proposition, Order 1309, is arbitrary, in violation of existing procedures and law. This Honorable Court is the only one, based upon the evidence, the briefs and the arguments, that determines whether this is a capricious act. And this Honorable Court is the only one, not the State Engineer, that determines whether or not its findings are supported by substantial evidence. Those are judicial determinations and no one should stand here and tell you that you don't have enough knowledge or information so that you would have to yield to some interpretation from a party in a lawsuit.

So with that, Your Honor, I'd like to go to Slide 11. This is the timeline. And it gets a bit confusing, but I want to walk through it. It goes like a clock.

THE COURT: Okay.

MR. ROBISON: And the bewitching hour that started this thing, at least for this, Your Honor, is not on there, but it's the 1800s when the prior appropriation doctrine was adopted by the State of Nevada, like most western states.

But the 1983-84 time frame, according to the 1169 Order, the understanding about the hydrology and the area of Basin Number 210 was unknown. It was chaos.

Next slide please. Your Honor, on this particular slide, this is a page out of 1169 and it's an articulation of how much information was missing, how much confusion there was, how much inaccuracies there was. And at this time, Your Honor, there were approximately 100, maybe 102 applications pending for approval. And 1169 said because there's such essentially chaos and lack of understanding about the hydrology with respect to these applications, we're going to do a pump test.

But those applications, Your Honor, they were filed on a basin-by-basin basis. They were filed, some in Coyote Spring Valley, and they were filed in Garnet Valley and they were filed in Hidden Valley, but they were filed on a basin-by-basin basis. And that's required by statute. If you're

going to apply to pump groundwater or with a well, you have to apply with respect to that particular basin.

So the State Engineer took these individual basins and said we're going to analyze this and we're going to order a pump test back in 19 -- excuse me, 2002. Can I go back to 11, please.

In 2001 there was a hearing that led to the issuance of 1169. So what happened after 2002 with respect to this order? You've got five parties pay for pumping these various wells to see what effect that might have. There was nothing in there to determine whether faults exist. There was nothing in there to determine the geochemistry of the water to see whether the isotropic characteristics of the water in Kane Springs were anywhere consistent with the geochemistry of the water in Warm Springs. There was no ask or order to analyze what water came off the Sheep Mountains in the east -- excuse me, the west to see whether or not there was water that came out of those mountains that wasn't accounted for in north-south flow of the hydrological system. There was just go pump and let's take a look at the pump. No science, just pump.

And so we go forward. In 2006, Your Honor, my client, based upon a biological opinion, entered into the MOA. And what we did, Your Honor, based upon the desires of the United States Fish and Wildlife, is we gave $200,000 to help promote protection of the Moapa dace. We gave 460 acre feet

from our 460 that the State Engineer had permitted us to use. We gave that up so that the dace had a habitat. Now, like Mr. Taggart said, one acre, 46 stories tall, per year, for months for the habitat for the Moapa dace. And we actually thought that was benevolent. Well, I thought we were doing a good thing, a good environmental thing, and we did.

Well, after that, Your Honor, in 2007, Ruling 5712 came out. And oddly enough, Your Honor, what it said is that there's not substantial evidence to include Kane Springs in the 1169 pump test. They talked about a fault. They talked about the hydrological connection. But the finding in that order, that ruling is that there is not substantial evidence to justify including Kane Springs in what now is referred to as a mega basin, a super basin, but putting specific basins into one what they now call administrative unit. But that was a basin-by-basin determination when 5712 came out; very specific.

We then start the pump test in 2010. And I think you're absolutely right, Your Honor, I think it was about 14,000, maybe 16,000 -- 14,000 acre feet pumped for a 25-month period of time. And only from pumping were determinations to be made. So after the pump tests were completed, what happened? What happened was that the State Engineer asked for input and that input was then put into the State Engineer's analysis of what it was going to do as a result of the test.

So in 2014, out came the rulings. Your Honor, the rulings didn't come out for one bathtub. The rulings came out on a basin-by-basin analysis. And the one that affects us, of course, was the Coyote Springs applications. And if you go through, Your Honor, the rulings, and the rulings are very important. First of all, they say we don't have much information. We don't have significant information. But what we have on each application, over 100 applications in these various distinct and separate basins, is the reoccurring statement that this order denying all 100 or 102 applications for water is made to protect existing water rights. There's not one word in those 12 rulings that say you can't have what we've already permitted you to have. There's not one ruling that says your water rights are going to be restricted or limited or reduced or curtailed.

Each and every one of those rulings for each one of these distinct basins say that we are denying the water applications to protect existing rights. We had existing rights. At that time, Your Honor, because we had already given the 460 to the dace habitat, we were left with 4,100 acre feet. More importantly, we have rights to 1,000 acre feet in Kane Springs. So, you know, silly us, we actually thought that was a green light, let's go, and we turned on the faucet.

THE COURT: Let me ask you a question, then. Is it

your position that if you have an existing water right, it can never be curtailed --

MR. ROBISON: No.

THE COURT: -- by the Nevada State Engineer?

MR. ROBISON: No. But I'm saying there's a process for that.

THE COURT: Okay.

MR. ROBISON: You know, Your Honor, that's a very astute question. Everybody has treated this -- Mr. Taggart just mentioned it's a curtailment. They didn't follow the curtailment process articulated by the statute. Everybody knows we've lost our water rights, in effect, but this wasn't processed as a curtailment proceeding.

But do I agree that there can be a reduction? Yes. And the statute that says that, Your Honor, says within the basin. It doesn't say within a mega mess created for a mega basin. It does isolate that curtailment process to a basin. And it's a very good point Your Honor brought up. We agree.

THE COURT: Let me ask you, because, you know, the Nevada State Engineer and other parties argued that your position has a very narrow reading of the word basin.

MR. ROBISON: Well --

THE COURT: So are there -- is there other support that you have that shows that basin can only mean one basin, as opposed to a whole management district?

MR. ROBISON: Well, first of all, let's go to this Exhibit 2 for CSI. That's on the website of the State Engineer. That tells the entire world what it's a basin-by-basin analysis. It identifies 232 basins. And right down in the lower half corner it articulates each single basin. Now, Your Honor, I understand that the State Engineer has taken this position in this case, well, a basin is a basin. A basin is anything that we say a basin is. That's what they're saying. That's what they're saying here.

We've showed you what they've said in previous litigation. One. It is undisputed that groundwater is managed on a perennial yield basis for the entire hydrographic basin. The system contemplated by the statutes allows the Nevada State Engineer to take various acts on a basin-wide basis. A permit is required before a well may be drilled in a designated groundwater basin. There are 232 designated groundwater basins on CSI 2. 534.035 allows establishment of groundwater boards for individual basins. The State Engineer has identified 232 administrative groundwater basins. Patently reasonable to manage the basins on the basis of its perennial yield to ensure the basin will remain in balance. That's important that a distinct basis remain in balance based upon perennial yield.

We didn't say this. These are the words of the State Engineer in a prior case, Your Honor. They argued this

to the court. And now they go, forget what we said in the past, we didn't mean it. What we meant to say is that a basin means what we say a basin means.

Here's the challenge. There's more than 14 statutes in Chapter 533 and 534 that use the term basin. A basin. Within the basin. Think back, Your Honor, what the reliance factor is. How many people, how many water users, how many courts, the legislature has relied on the distinct basins being the operative unit for water management? We've all relied on that. Everything we've done at Coyote Springs is predicated on our rights and our seniority in Basin 210.

So they say, well, contrary to what we said in previous cases, we can now obscure the lines. And here's how that happened. I was involved in these proceedings before there was a Lower White River Flow System. Now what we have instead, Your Honor, is this is going to be an administrative unit, so we are not bound by the statutory reference to basins. We're not bound by the distinct basins that have been set up by the Nevada State Engineer for decades.

What we all know, Your Honor, is what they put on your lap, it's a case of first impression. It's the first time any judge has heard mega basin. This is the first time any court has been confronted with a newly-created excuse to abolish rights by creating a super basin. This is the first time a court has been asked to look at all the positions taken

by the State Engineer in various cases where it's a basin-by-basin analysis and change that at the convenience of the State Engineer's wishes so that it can effectually reduce our senior rights to junior rights and thereby take our rights.

They cite four statutes in essence, Your Honor, that they rely on to say that they have the right to create this administrative unit that is no longer a basin. What they're saying, Your Honor, is that by creating the mega basin we become a sub-basin. A sub-basin is not addressed in the statutes. It's not addressed in any cases.

And so what it does is creates legislation. The Legislature makes the laws. This Honorable Court as the judiciary interprets those statutes without deference to anyone. And the State Engineer, the executive branch enforces the law. This is a pretty simple equation because they can't find a supreme court decision. They can't find any case authority that justifies this obliteration of boundaries. They can't find a statute. So they say, well, we get preference in interpreting these statutes. Not true.

So they say we're going to look at four statutes that says we can do this. And basically the philosophy, Your Honor, is novel. It offends Justice Scalia's article on how to interpret statutes. They say, surprisingly, if not astonishingly, if a statute doesn't say we can't, we can. But that's contrary to very fundamental, rudimentary statutory

interpretation. We are obligated when we interpret or argue interpretation to follow the plain language, the plain meaning of the words used in the statute. And the case law says that which is not permitted is expressly and implicitly rejected. So they can't say because a statute doesn't say we can -- excuse me, that we can't, we therefore can create a mega basin.

The first statute that they rely on, Your Honor, is the policy statute, 533.024. And it says the court should show deference to the State Engineer; they know water. They do. They're not consistent about how they know water and sometimes they know water and sometimes they don't in prior cases. And you'll see in later arguments that they have reversed themselves from this case to a more recent case, completely reversed themselves, and I'll let Vidler argue that or Lincoln County. But the policy does not mention anything about being able to simply disregard the plain language of these statutes. It doesn't say that.

In fact, Your Honor, I want to point out this. The policy statute, 533.024, reads as though it gives power to the State Engineer, and indeed it does. The very next statute, 533.0241: Duty of State Engineer to reserve certain amount of groundwater. Important statute. It follows the policy statute. The first three words are dispositive. "For each basin" is how the next statute starts with regard to the

State Engineer's duty to manage each basin with regard to the 10 percent hold. Each basin. How easy is it for the State Engineer to say those words don't mean anything to this Honorable Court because they've already determined what the basins are. The Legislature has referred to these basins. The courts have referred to these basins. And we are referring to our basin, Number 210, the one where we were permitted to pump groundwater. 4,100 acre feet of groundwater has now basically been curtailed and taken as a result of 1309.

The other statute that they rely on, and this is about as big a stretch as we're going to be confronted with in this case, they rely on 533.045. And that says State Engineer, you cannot manage water to violate a decree, a compact, a statute or an agreement. Unbelievably, the State Engineer says, well, therefore we can create a mega basin, based upon the language of that statute. Again, the statute says what the State Engineer cannot do. And they say because this statute doesn't say we can't create a mega basin for joint administration, we therefore can. A simple reading of this statute cannot in any way be interpreted, given the plain language of the statute, to say you can do something else when we're telling you what you can't do.

They rely, too, on what I call the investigation statute in 534, that the State Engineer is permitted to

conduct investigations. That's what they want the Court to understand that statute says, but that statute goes on to say within -- the investigations may occur within a basin. The State Engineer would have you ignore that very crucial language and say that you read these all together, all of these statutes jointly; therefore, we can do whatever we want to do without any judicial scrutiny whatsoever.

That is not what this case is about, Your Honor. We're relying very faithfully and adamantly on the statutes and as they read word for word, and ask this Court to interpret those statutes with respect to whether or not the State Engineer has statutory authority to change the course of history and therefore extinguish and give a death sentence to Coyote Springs because they're the ones that set us up for this situation.

Your Honor, I have about another half hour. Can we take our lunch break at this time? No?

THE COURT: I don't actually care. How does everyone else feel? Would you like to take the lunch break now or would you like to go through? How are you feeling? Would you like to take the break now?

MR. ROBISON: Oh, I feel like I missed the Super Bowl, Valentine's Day. Other than that, I feel great, Your Honor, but I would like to recess.

THE COURT: All right, that's fine. So we'll take

an hour recess.

MR. ROBISON: That would be fine.

THE COURT: All right. And then we'll be back at one o'clock. Thank you.

(Court recessed from 12:00 p.m. until 1:00 p.m.)

THE COURT: Let me know when you're ready.

MR. ROBISON: I'm ready, Your Honor.

THE COURT: Okay, go ahead.

MR. ROBISON: Your Honor, I want to step back, without being redundant. I cannot stand acronyms, but I want to go back to what I referred to as the MOA where the 460 acre feet were dedicated back in 2006. I want to point out that at that time we also entered into a contract, a multi-party contract with Las Vegas Valley Water District, and that resulted in the creation of the GID. The GID became in place. It was going to be the entity managed by Las Vegas Valley Water District to provide the hookups, the water to our facility.

The reason that's important is because that was a component of the development that had been approved here in Clark County, which basically becomes an ordinance; that our rights and our position in Coyote Springs becomes an ordinance pursuant to an approved development agreement.

Now let me move back to where I was before the lunch break, Your Honor. I was talking about the impact of the

rulings and the fact that the rulings state very specifically, each and every one of them, and 6511, which is page -- the rulings please, Mark. No, those are not the rulings. Let me move on.

Once the findings were made by the State Engineer in 2014 that the applications would be denied to protect existing water rights, money started pouring into the development. A wastewater facility was constructed; approved by the State Engineer. A retention dam was constructed, about twenty million dollars worth; approved by the State Engineer. We were cooking, as they say. We were going forward. We're optimistic. We're pouring money into the project. And the State Engineer in 2014 to 2015 was our ally. And bear in mind, Your Honor, that there had been no science, there had been no technical data developed between 1169A -- excuse me, the rulings in 2014 until 1309.

So there we are proceeding in 2014, in no small part because of those rulings and the language of the rulings. We didn't get our applications granted, nobody did, but we got the green light.

In 2017, things changed inexplicably. A letter was sent to the State Engineer by our contracting party, Las Vegas Valley Water District, saying we don't think CSI has water. We want you to make that determination. Out of the clear blue. No scientific data to prove that or represent that.

Now, at this point in time, Your Honor, I want to take just a brief look at senior rights. Sixteen thousand, approximately, give or take, acre feet a year were permitted at that time for Coyote Springs Valley. Nine of that was purchased from us by SNWA, who was therefore junior. So of the remaining 7,000 acre feet, we had senior rights in 4,600 acre feet. We were in a really good position in terms of seniority in Coyote Springs Valley where we got those permits and where we put them to beneficial use and we honored all the demands of the State Engineer. We were in great shape in terms of senior rights.

So in 2017, a letter from Las Vegas Valley Water District goes to the State Engineer. The State Engineer then, on May 16th, 2018, based on that one letter with no technical, no scientific backup, shut us down. Entered a moratorium on subdivision maps, a moratorium on construction permits out of the clear blue sky in a letter sent to us saying you're shut down. Unless you can find water from another source, no subdivision maps will be signed off on by the State Engineer.

Your Honor, as harmful and as financially painful that was, it's more important in this hearing to show the total lack of scientific justification for certain decisions that have been made for decades by the State Engineer.

THE COURT: So let me ask you, then, Mr. Robison.

MR. ROBISON: Yep.

THE COURT: If you're saying that there was a lack of scientific evidence in shutting you down, are you also then saying there was a lack of scientific evidence in granting you the permit?

MR. ROBISON: Yes.

THE COURT: So --

MR. ROBISON: You would think there would be scientific evidence to justify the permit.

THE COURT: Okay.

MR. ROBISON: Remember, there's 40,000 acre feet that was permitted by the State Engineer over the years.

THE COURT: And I assume that the actual Nevada State Engineer, the person, changes as, you know, one retires and the next one does -- and maybe one may be more detail oriented than the other. But then is it your contention that if there's a prior order by one stage engineer that a subsequent stage engineer cannot touch that prior order or adjust it?

MR. ROBISON: That is not our position.

THE COURT: Okay.

MR. ROBISON: Pete Morros, Hugh Ricci over the years has been the state engineer and has given permits. Your Honor, quite candidly, the permit itself says that the water can be restricted or limited. In fact, some of our water permits as they got transferred and assigned specifically

refer to 1169. So, yes, every water user is aware of the fact that the State --

THE COURT: That it's subject to change.

MR. ROBISON: The State giveth and the State can take it.

THE COURT: Okay.

MR. ROBISON: Provided the State taketh properly and in accordance with legislative authority. We don't dispute that, Your Honor. I don't think anybody that holds a water permit would dispute that.

But getting back to 2017, Las Vegas Valley Water District apparently had made a decision that the water wasn't there, based on what, we don't know.

But, May 2018, there was a letter written that says basically you're shut down. The development agreement that became an ordinance is immaterial. You're not going forward unless you find water outside of the basin. We challenged that. We filed a petition for judicial review. It was not fully litigated. We went to a settlement conference and the record shows that we settled. Part of that settlement was that the State Engineer agreed in good faith to process our applications.

Well, looking back, it looks like the plan was, in fact, to do just the opposite. We were then told that whatever water we found would have to be there for perpetuity,

somewhere between the Big Bang and when Mars collides with Jupiter. No one knew what perpetuity meant.

Then 1303 comes out, Your Honor, Order 1303. And it was an interim order and it said -- I'm going to paraphrase and condense what I believe it says. We still don't know what's going on out there. It has admissions throughout that interim order that substantially more investigation and data is necessary to determine what the hydrological aspects of this area of Nevada are. But even though we don't know, we formally impose through that interim order a moratorium. No building permits, no subdivision maps, no construction. Acknowledging that no scientific data has been done since a pump test, you're shut down.

Well, not surprising to you, I'm sure, that we filed another petition for judicial review and we call them on it. We said, How can this be? How can you be issuing moratoriums when, in fact, you're saying that we have to do investigation and technical inquiries into the actual propensities of the hydrological consequences going on in those valleys?

Again, after that we had so much invested in this project. So Order 1303 comes out. We get procedurally bogged down and we were set for the hearing on 1309, so that action is stayed. So 1309 then, Your Honor, as I've argued, violates the statutes that are in place and we argue that there are no statutes to authenticate or to allow what they've done.

A decision --

THE COURT: Let me play devil's advocate for just a minute. So you're saying that there are no statutes that allows them to create a mega basin?

MR. ROBISON: I'm saying there's no statute that even makes mention of a mega basin.

THE COURT: I understand that. But if I go to NRS 534.120, which has to do with the State Engineer authorized to make rules, regulations and orders when groundwater is being depleted in designated areas; preferred uses of water; temporary permits to appropriate water; revocation of temporary permits; restrictions placed on certain wells, it doesn't say within a basin. It says within an area that has been designated by the State Engineer, blah, blah, blah, you know, may make the rules, regulations and orders. I should say it says, "Within an area that has been designated by the State Engineer, as provided for in this chapter, where, in the judgment of the State Engineer, the groundwater basin is being depleted." Now, it says --

MR. ROBISON: I'm sorry. The groundwater basin?

THE COURT: It says where the groundwater basis is being depleted.

MR. ROBISON: Right.

THE COURT: But area can be outside of that basin and he could be considering other basins.

MR. ROBISON: Your Honor, that --

THE COURT: What is your position?

MR. ROBISON: It says basin.

THE COURT: Well, it says, "Within an area that has been designated by the State Engineer, as provided for in this chapter, where, in the judgment of the State Engineer, the groundwater basin is being depleted." Now --

MR. ROBISON: The groundwater basin in that context refers to Basin 210. We're entitled to that. Everything we've ever done is based upon that particular basin. And, Your Honor, if you look at the difference between area, and statutory interpretation principles tell us that if it's further defined by basin, then that's the way you interpret the statute. You don't just --

THE COURT: So your position is area has to be within a basin, not that the area could actually extend outside of the basin?

MR. ROBISON: Every -- Yes. Yes.

THE COURT: Okay.

MR. ROBISON: Why? Because not only that statute that refers to basin, it is supported by all the other statutes that refer to a basin.

Your Honor, the State Engineer has a presence in Carson City. That happens to be where the Nevada Legislature meets every two years. And we know that they have a presence

in the creation of legislation. Why is it then, given the legislative presence of the State Engineer, why isn't there a legislation, a piece of legislation that says more clearly, more succinctly, more precisely in plain words, yes, the State Engineer can expand the creation of basins to include several basins; it can combine basins. Your Honor, the word combine is so easy to have the Legislature -- if I was sitting in front of the judiciary committee it would be very easy to say we just need that one word, senators, and that is combine. Why is that not there? Because there's no legislative intent to do that.

And this is all hindsight because, again, this is the first time in history they've done this and now they're trying to reach back in and scrutinize the statutes, Your Honor, that were used forever on a basin-by-basin basis and saying where can we find some language that might justify what we've done. Oh, area. And there's others that they've tried to say, well, within the basin means within a bathtub that we create the basin. It still gets down to this fundamental proposition.

THE COURT: So then let me ask, then, as to the -- what is it, 533.024, the legislative declaration; right?

MR. ROBISON: Yep. The policy.

THE COURT: It's the legislative declaration that -- you know, "It is the policy of this State to manage

conjunctively the appropriation, use and administration of all waters." Are you saying that that really has no teeth?

MR. ROBISON: All waters in the state of Nevada.

THE COURT: Right.

MR. ROBISON: The next statute. A basin can be managed by the State Engineer. They go hand in hand, Your Honor. Just because they have a legislative articulated policy that they manage all waters in the state of Nevada, which we agree --

THE COURT: Right.

MR. ROBISON: -- of course they do. I think the management is very hard.

THE COURT: But you're saying that there's no statute that gives them the authority, then, to expand outside of the basin-by-basin designation?

MR. ROBISON: Yes, Your Honor. On the other hand, there a multitude of statutes that say a basin, within the basin.

THE COURT: Right.

MR. ROBISON: And we cited a case where the State Engineer specifically refuted an ability to consider the hydrology of an adjoining basin when the State Engineer was considering the management of a part of another basin. And I said you can't do that. They can't do that. But everything they couldn't do and they have agreed that they can't do over

the years has suddenly changed with 1309. Suddenly changed with 1309.

If there is a violation of established rules of law, and we argue, as you know, these statutes are rules of law, that these statutes are interpreted solely and exclusively by this Honorable Court, if there's violations of the law or it's contrary to evidence or established rules of law, that decision is capricious. The burden, then, on CSI is to say the mega basin is contrary to the statutes that have been in place and upon which we relied and they have relied for decades. If a decision is made without regard to the facts, and in this case I'm saying facts is the application of the applicable statutes to a proceeding like the 1309 hearing, not the 1303 hearing, or if it's without consideration of circumstances fixed by rules or procedures, it's arbitrary.

Think for a moment, Your Honor, the procedures that we have followed so long in these various basins to get our permits, to get rulings, to get orders, all basically a basin-by-basin situation, a basin-by-basin analysis. This 1309 decision, then, has been made without consideration of those procedures, and that's the very definition of arbitrary. And obviously we're asking that you impose that kind of reasoning in this case.

It wouldn't have taken that much to say to the Legislature we need the legislative authority to combine

basins for conjunctive management. The fact that it's not there suggests that it's not there for a reason; that there is not mega basin expressed authority. There is not combining basins for administrative units in the statutes. And therefore, it fits right on all fours with the definition of both capricious and arbitrary.

Your Honor, I'd like to move, if I could -- but let me back up a moment. What's most problematic about this is the reliance factor.

THE COURT: I think you've made that clear.

MR. ROBISON: Yeah.

THE COURT: You've talked about your client spending millions of dollars, relying on the fact that it would be on a basin-by-basin situation and that you had senior water rights in the basins that you --

MR. ROBISON: I want to expand that.

THE COURT: Okay.

MR. ROBISON: The reliance is not just CSI. The reliance is on every single party that is part of the supreme court decisions that you've read. The reliance is on behalf of regulatory agencies. The reliance is on behalf of all water users. This system has been in place and been relied upon until 1309. 1309 has turned that history on its head.

The prior appropriation, Your Honor, is very simple. I want to do some math to illustrate how 1309 violates the

prior appropriation doctrine. I need a map and 34 will do, or 33 even better.

THE COURT: Oh, wow, that's fancy.

MR. ROBISON: We have 33 up --

THE COURT: We do.

MR. ROBISON: -- correct; Mark?

I.T. TECHNICIAN: Yes, we do.

MR. ROBISON: So, Your Honor, in Coyote Springs Valley, Basin 210, there's about 16,000 acre feet per year appropriated. And as I said, we have very high priority there. There's one user, Bedroc, that had a higher priority than us, four hundred and some sixty feet they had because of their vested rights, but right under that is Coyote Springs, 4,600 acre feet priority -- priority in Basin 210. And go south to either Garnet Valley, California Wash, Garnet or the Black Mountains, once we combine these basins and there is a right in Garnet Valley that was acquired prior to us, we become junior. That's a taking. The cases that we've cited to you, Your Honor, the most important component of a water right is the seniority. That gives water rights its value.

Moreover, priority is a property right acknowledged by the decisions we've cited. Priority is very valuable. As Mr. Taggart pointed out, juniors are gone if there's a drought because of the importance and the significance of being senior. Obliteration of the boundary lines in this

mega basin context absolutely jeopardizes and destroys prior appropriation doctrine because we have become junior to someone who we never thought we were going to be junior to, and our rights are then jeopardized and taken because of the creation of a mega basin, which is an absolute clear violation, Your Honor, of the prior appropriation. And no one disputes in this case that our state is a prior appropriation state, as it should be. First in time, first in line. First in time, you've got your rights. We're there until you obliterate the boundary lines.

And if that would have gone to legislation, if they would have been in a position where they're asking for a bill to combine basins for conjunctive management, there would have been people lined up down the hall of that judiciary committee hearing saying, hey, what about my senior rights? You can't do that, Legislature. You will be abolishing the long-adopted prior appropriation. And they wouldn't have been able to do that unless there was a mechanism involved in that process to protect. There isn't in this case, which makes it further arbitrary and as much capricious as my previous argument because they have not protected valuable property rights. In fact, 1309 was implemented; within days after that our subdivision maps were denied for no water.

THE COURT: Let me ask you, then. So, you know, if in a situation like this where there's testing that's been

done that shows that there are -- I'll speak up a little bit -- that there are multiple basins that are interconnected and the water is being depleted, what would be the proper process for the Nevada State Engineer?

MR. ROBISON: Well, one, you could legislate. You could try to get the legislation to do what they've done, but they didn't think about that. Your Honor, these basins going up to Ely, that is what's called the Lower White River Flow System. That flow system goes up to Ely. It goes up ten basins. We know where the water comes from. And, yes, the basins are hydrologically connected, but they draw the line at the northern end of Coyote Springs Valley, knowing that water comes into that basin from the northern Delamar and Pahranagat basins. We know there's hydrological connections to some extent. We know that.

Well, then why aren't they involved in the mega basin? Why doesn't the mega basin extend up to Ely so we can track all the hydrology and make sure that the dace are protected because we're not over-pumping and Pahranagat Valley? The reason is is they haven't undone their perennial yield. But we know there's hydrological connections. That doesn't justify the exclusion of our rights in a particular basin when the statutes say that it should be managed by a basin-by-basin basis. We don't say that. That's what the State Engineer said in prior litigation. So we believe that,

Your Honor, the prior appropriation is also a big part of the statutory interpretation. Those basin-by-basin analyses in these statutes are there to help protect prior appropriation.

And finally, Your Honor, I don't think there's a whole lot of disagreement in this case with respect to the petitioners, most if not all of them except for a small minority say we got surprised. We have a little due process issue. And in this case, in addition to not being notified about the abolition of our rights, particularly our senior rights in this case, we have an issue where they're going to subject our senior rights to more senior rights in a different basin, which constitutes a due process issue in terms of a taking.

So, Your Honor, unless the Court has questions, I'm going to yield the floor to my colleague, Brad Herrema, but I appreciate your patience and attention.

THE COURT: Thank you.

MR. ROBISON: Thank you.

THE COURT: So I think this is still part of CSI's argument.

MR. HERREMA: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. HERREMA: Can you hear me okay?

THE COURT: I can.

MR. HERREMA: Okay. Brad Herrema on behalf of CSI.

Mr. Robison talked about the lack of authority for the State Engineer to enter the order that he did, and so accordingly, we think the Court need not even reach the issue of whether substantial evidence supports the State Engineer's factual conclusions. But in the event that the Court does find that the State Engineer had authority to enter the order, the State Engineer's conclusions are arbitrary and capricious and they're not supported by substantial evidence.

Now, I can tell already today that you've read our briefs and you've spent time with this, so I'm not going to just repeat what we have in our briefing on substantial evidence. There are a few topics that I do want to explore this afternoon. And in thinking about Order 1309, I think it's helpful to me to think about the questions that we teach -- it's like my 7-year-old, you know, who, what, why, where, how. And so the what is 1309. One thing I've been struggling with as I've been getting ready for this trial is why. So why is it that the State Engineer has entered 1309 at this time as a final order in regards to these factual findings?

Mr. Taggart said earlier going into the 1303 hearing he knew that there was a two phase approach to this process and that we're going to do a factual finding in the first phase and then we're going to leave the management structure to another phase. And while I think maybe it's true that that approach developed or evolved as we got into things,

there was never any indication by the State Engineer that there was going to be an order like 1309, which is sort of halfway through the process. If you look at --

THE COURT: So are you saying that you were expecting then you would actually have a two phase process where they also -- where you also presented evidence about the claims before that order came out?

MR. HERREMA: I think if you look at Order 1303, ordering -- paragraph 1, page 13, it identifies what at that time was, I would say, the putative Lower White River Flow System. I know the State Engineer says they finalized it there. I don't think that was what everyone thought was happening in terms of the process. But what it says is: "All water rights within the Lower White River Flow System will be administered based upon their respective dates of priorities in relation to other rights within the regional groundwater unit." Now, that's a pretty clear idea of how they're going to manage water rights within the Lower White River Flow System. That's 1303. It's teeing up the 1303 hearing that we had September-October of '19.

But then we get Order 1309 and we get into the 1309 process a little bit. Well, I guess we get the Order 1309, which is a final order, but it doesn't have any management in it. And so the question is why is it that the State Engineer is looking to enter an order now, 1309, that only talks about

these factual findings and doesn't take the next step to what the management will look like? You asked Mr. Robison, well, what should the State Engineer have done in regard to 8,000 acre feet being allocated among all these basins? Well, what he should have done is gone basin-by-basin and found within that cap that there is this much available for appropriation in each of the individual basins, within what they now want to administer as this larger flow system.

THE COURT: Is that practical?

MR. HERREMA: It can be done and it is done. Determining how much water contributes -- you know, each basin -- it comes into each basin and goes out of each basin. That's something the State Engineer has done for a long time in terms of water budgets. Definitely practical, yes.

THE COURT: Okay.

MR. HERREMA: So getting back to 1309 and the question of why not. Why are we having these factual findings which the State Engineer had to know we would end up here on petitions or on a petition or petitions for a judicial review. So effectively there's a validation attempt at these factual findings now. Why is it being done that way?

Now, I spend a lot of time practicing in California as well. There's a statute in California called the California Environmental Quality Act. Environmental review. I'm sure folks in Nevada are glad they don't have to deal

with it. Attorneys in California might feel otherwise. But there's a concept under what we call CEQA that you can't segment the review of the impacts of a particular project by splitting it up into smaller pieces because what it risks is that you don't have review of the entirety of the impacts when you combine all the pieces together.

And so where we are now is we have sort of segmented this process and we didn't know going into the 1309 hearing that we were going to have an order that was just a final order based on the facts, but we've got it now. And so we have this segmented process where potentially the facts as the State Engineer sees them will be validated. And then if those are validated, the Court upholds those findings, then we go into a management phase, and the only thing left to do then would be vacate a future management plan. But we can't look at the management plan really in light of those factual findings because we don't see the whole picture together. It's been broken up into little bite-sized pieces, and so we can't see it all together.

And so why am I bringing this up at this point? Well, in regard to substantial evidence, this concept of why we have 1309 focused on just the facts, why is it segmented the way it is, well, we can't determine whether there's substantial evidence to support Order 1309 because of the lack of a definition about how it's going to be used. And it

begs the question that the Court might ask, that I asked, is there substantial evidence for something that we don't know what it's going to be?

And so thinking about the substantial evidence review, I want to talk a little bit about the way the State Engineer approached it and I was struck reading the State Engineer's brief where he told the Court that this is a situation where the State Engineer is entitled to something called peak deference. I've never heard of that term before this. But the State Engineer is telling the Court this is a place where you have to defer to the State Engineer's interpretation of what his powers are and then you also have to defer to his scientific expertise in determining whether there's support for his factual findings.

So the Court might have asked itself, well, what exactly is my role here if I'm just -- this is a peak deference situation? The State Engineer also reminded the Court that the State Engineer's decision is prima facie correct under the statute and characterized in his brief the petitioner's burden as extremely onerous. But that prima facie correctness is really just something that has to do with who bears the burden of proof in this case, which we do and we know we do.

And finally, the State Engineer characterized petitioner's arguments as simply asking the Court to violate

the standard of review basically by conducting any review at all of the State Engineer's support for his conclusions. But meaningful review of the State Engineer's determinations must take place. The process of judicial review of the State Engineer's decisions is absolutely necessary as it's fundamental to due process and to ensure that the State Engineer does not act in excess of his limited statutory authority.

So what is the standard of review for substantial evidence? Courts have said where the issues involve technical or complex scientific issues, the State Engineer's orders must be sufficiently explained and supported to allow for judicial review. Even under deferential substantial evidence review, courts must not merely rubber stamp agency action, but they must determine that the agency articulated a rational connection between the facts presented and the decision.

This Court reviews the State Engineer's findings for abuse of discretion, and abuse of discretion exists where the State Engineer's decision is arbitrary and capricious, as it's baseless or there's an apparent absence of ground or reason for the decision.

Now, what does substantial evidence mean? The State Engineer in his brief downplays what a substantial evidence requirement is. He says it's merely the amount of evidence a reasonable mind would accept as adequate. So this is not

a very high burden, apparently, in the State Engineer's estimation. Courts have said, though, that substantial evidence is that quantity and quality of evidence which a reasonable person could accept as adequate to support a conclusion. So it's not just that there be something in the record that supports the finding, which is absolutely necessary and we'll talk about that in regard to the 8,000 acre foot cap, but it's also that the evidence in the record be of the quality that a reasonable mind would accept it could be relied on to support the conclusion. So in this case what that means is the quality of evidence is informed by whether the evidence is suitable for the purpose for which it's used.

And finally, in rendering decisions regarding available surface and underground water in Nevada, NRS 533.024 states that it's the policy of the State that the State Engineer consider the best available science.

THE COURT: So on that point, it says that it encourages; right? It doesn't necessarily mandate the best available science. Correct?

MR. HERREMA: I don't have the full statute in front of me, but I'll take your word for it.

THE COURT: I have it. Hold on. So, 533.024, subsection (c) says, "To encourage the State Engineer to consider the best available science in rendering decisions concerning the available surface and underground sources of

water in Nevada." So to me that means they're telling the State Engineer we really want you to use the best available science, but it doesn't necessarily mandate that if there is other better available science that that has to be used.

MR. HERREMA: I think it's clear that the encouragement is to use it to the extent it can be used.

THE COURT: Okay.

MR. HERREMA: So, CSI has thoroughly briefed that at a high level the central problem with Order 1309 is that the State Engineer over-emphasizes and unreasonably relies on the 1169 pump test results. So not only does this narrow focus on the pump test results demonstrate that 1309 is not based on substantial evidence, but it also makes clear that the State Engineer didn't heed that instruction about using the best available science for decision making.

It's important to bear in mind that the purpose of the 1169 pump test was to determine not how to set boundaries for what some have called the mega basin or the super basin, not how to set a cap on the existing rights, but it was to determine how much water was available for applications that had been filed for additional appropriations.

The pump test was designed, as I said, to determine how much water was available for new appropriations. It was not designed to test the hydraulic connection or define any boundaries within the Lower White River Flow System, and the

parties were certainly not aware of the criteria that the State Engineer would use to later determine the closest of any hydraulic connection back when the 1169 pump test was developed. There's no mechanism in the pump test to allow parties to identify specific relationships among any of the wells or basins.

And it's fair to ask that if the water right holders had known at the time of the 1169 pump test that the data that they were gathering would be used for this purpose, whether they would have designed the test differently. Would they have put wells in different locations, included pumping in different locations in regard to geologic structures or alluvium versus carbonate rock?

And notably, there was no pumping in the Kane Springs Valley as part of the 1169 pump test. Mr. Taggart said earlier this morning the way to understand what happens in a system is to pump the hell out of it, but there wasn't any pumping in the Kane Springs Valley as part of the 1169 pump test.

So what do we -- what can we learn from the 1169 pump test results? Well, there's data from across multiple pumping zones located in six different basins. There's an average of almost 5,300 acre feet pumped from Coyote Spring Valley. Cumulative total of about fourteen and a half thousand acre feet. In total, 30 wells pumping at uncoordinated rates

and schedules throughout about 25-1/2 months. This results in a brief snapshot of time. It results in water level trends across a brief snapshot of time that don't reflect climate factors such as the period of wetness between 2004 and 2005, and they don't allow for a consideration of how structural barriers in the area impact pumping or the identification of specific relationships between either wells or basins.

Now, because those things were not included as design features in how the test was set up, the results can't pertain to those individual wells or individual basin relationships, either. And so interpreting the results as though all 30 wells have a similar affect on groundwater levels, spring flow or surface flow in the Muddy River springs area is incorrect.

When all the information about the existing flows in the -- before the 1169 pump test was done, there was information that had been gathered. Now, Mr. Robison showed that there was still a lot of information that wasn't understood, but there had been information developed previous to that. And so when we combine that information with natural and anthropogenic stresses such as evapotranspiration, spring flow, pumping, you can make an estimate of the water available for development.

But instead, the State Engineer myopically relied on the cause and effect analysis from the 1169 pump test, which

notably was interpreted differently by many different parties. At best, this 2-year aquifer test represents just a snapshot or a narrow glimpse of a groundwater system that may cycle between wet and dry cycles. At worst, these pump test results are unrepeatable and they suggest that all pumping in this 1,100 square mile area affects one set of springs in the Muddy River spring area the same.

THE COURT: So let me ask. You're saying that the pump tests are unrepeatable. Are you saying that those entities that had those wells didn't keep an accurate log of how much water was pumping at what rate from what wells?

MR. HERREMA: No. I'm just saying that if you look at the snapshot in time and that's all you look at, sort of absent -- so context is key. If you look at the snapshot in time and say, well, these wells pumped this much and the water levels over here moved up this much but you don't look at that snapshot in the broader context, such as what was happening in terms of the climate, what was happening in terms of a wet period or a dry period --

THE COURT: So you're talking about like dry years, wet years, that kind of thing.

MR. HERREMA: Right.

THE COURT: Okay.

MR. HERREMA: I won't get into the six individual criteria one by one, but the State Engineer did, after

receiving all the evidence in the 1303 hearing process, set these six individual criteria that he said he could use to determine hydraulic connections. And while Order 1309 attempts to address the fact that -- you've heard from many parties that these criteria were not developed and they weren't given to the parties ahead of time.

Now, the State Engineer says in Order 1309 that these are consistent with characteristics that were critical to the earlier rulings in 6254 through 6261 that Mr. Robison talked about. But that begs the question, if the State Engineer knew that these were the criteria and they were the criteria that were going to be used, why weren't they included in 1303, and why didn't they let the parties know that these were the criteria that were going to be used to evaluate the evidence that either they would be commenting on? Or in cases like CSI and Vidler and some of the other parties, they went out and gathered additional evidence.

THE COURT: So let me ask, you know, if you're talking about not letting the parties know what those six individual criteria were, how in your mind did that compromise your ability to present -- to have a full and fair hearing or to present evidence regarding that? Would that have been different in the hearing?

MR. HERREMA: Would which have been different?

THE COURT: Would what you had presented at the

hearing, the evidence that you had presented at the hearing, the arguments, would that have been changed somehow --

MR. HERREMA: I think we would have --

THE COURT: -- if you had known beforehand?

MR. HERREMA: I'm sorry. I think we would have gone back even further than the hearing itself to the reports that were submitted in advance and the work that parties like CSI and Vidler did where they went out and did things like geophysical evaluations. So one of the criteria talks about geological structures that have caused juxtaposition of carbonate rock aquifer with low permeability bedrock. If we had known that that was the sole criteria and that was going to focus on geological structures as opposed to some of the faulting evidence that CSI paid to have done, then we would have looked at that. We would have looked at the geological structure in light of that specific criterion and that language, as opposed to some more general faulting analysis that was done.

I think it was Georgia Pacific, in their reply brief they had what I thought was an apt analogy when they said it was as if there was an essay contest that was held. All of the essays were submitted and then the judges said this is -- we're only going to accept essays that are shorter than five pages. So if you knew what the criteria were before, you would have been able to provide better evidence, best

evidence, but also would have known what it was that the State Engineer was looking for.

Additionally troubling about these criteria is the fact that they don't necessarily lead to a unique result, so they're subjective in that they can be applied in multiple different ways. The State Engineer applied the criteria along a scale or a spectrum of what it calls weak connection to close connection, but the way it applied this estimation of what was close and what was weak or strong is arbitrary.

And even the State Engineer recognized the perils of using this subjective methodology. There was a proposal by the National Park Service that all adjacent hydrographic areas where any hydraulic interconnection exists, whether weak or strong, be included in the Lower White River Flow System. The State Engineer rejected that and said there has to be what they said was a reasonable and technically defensible limit to the geographic boundary. If the management were to be based on the entire spectrum of weak to strong hydraulic interconnection, then exclusion of an area from the flow system would require absolute isolation. As Mr. Robison talked about, we know that there are contributions from basins that are miles and miles north of the Lower White River Flow System that eventually reach the system.

But given the subjectivity of the State Engineer's labeling to describe things as either close or weak or strong

or direct, there is no reasonable or technically defensible limit to the boundary. Under the State Engineer's standards, every basin in the state could potentially be combined as long as there's some amount of contribution between the systems.

Determination of the boundary of the Lower White River Flow System, particularly where you have the State Engineer now looking to cap pumping, should not be so subjective or dependent on whoever it is that's applying those criteria.

In terms of the Kane Springs Valley, other parties will emphasize this, I think, further, but the primary reason the State Engineer includes the Kane Springs Valley is a subjective characterization of the hydraulic connection between Kane Springs Valley and Coyote Spring Valley as being close. And the State Engineer relied on results from the 1169 pump test to find what he characterized to be a cause and effect relationship between pumping and the Lower White River Flow System and the Kane Springs Valley.

But the 1169 pump tests, as I said earlier, were not designed to show individual relationship between basins. And again, there was no pumping at all in the Kane Springs Valley during the 1169 pump tests. And if the State Engineer were going to rely on the 1169 pump tests for determining -- so strongly for determining what should be included in the Lower

White River Flow System, it sort of begs the question of why the State Engineer solicited additional input through the Order 1303 process when it did disregard that geological data that Vidler and CSI went out and did field tests to obtain.

And the State Engineer also does not, in making his determination, articulate why he should deviate from his findings in Ruling 5712 that the Kane Springs Valley at that time should not be included in the Lower White River Flow System for purposes of the 1169 pump test. In that ruling the State Engineer relied on carbonate water levels near the boundary between the two basins, Kane Springs and Coyote Spring, being about a difference between 50 and 75 feet. The 1169 pump test did not refute that difference, a change in the water levels. But the State Engineer instead dismissed that difference in hydraulic ebb and found I think half a foot impact on water levels was enough to show that the two were closely related.

In regard to the aquifer recovery conclusions that the State Engineer included in Order 1309, these set the stage for his finding as to the long term annual quantity of water that could be pumped from the flow system. The State Engineer in evaluating what he calls aquifer recovery doesn't articulate why the recovery should be immediately prior. Why is it important to look for recovery to water levels immediately prior to the pump test?

THE COURT: You mean as opposed to the wetter years and that kind of thing?

MR. HERREMA: Right. Again, context is important. So if we're only looking at what happened in 25-1/2 months, it takes out of the equation other things that are happening in the system. It's not -- the pumping itself is not happening in a vacuum. There are other things going on. We know what's being pumped and we know the changes in water levels, but if we only look at that we don't take into account whether we're in a wet period or a dry period.

THE COURT: Well, I mean, so let me ask you this, because, you know, the recovery levels change, right, through time, don't they, depending on if it's been a wet year or if it's been a dry year, if there's been a long period of time where it's been dry? So wouldn't it make the most sense to have the recovery levels be more contemporaneous with the pump test?

MR. HERREMA: You can define a recovery level however you'd like. If you want to say it's immediately previous to when we started this pump test, that's fine, and you would know where to measure from. But what's lacking here is why is it necessary or why is it desired that water levels return to that particular level. If something else is happening in the system, like a drought, then on top of the pumping that's taking place you may have less water coming

into the system.

There could be other things that are going on, especially given the way these basins are all strung together. There could be other things going on up-gradient that might have an impact during that particular snapshot in time. So if we say, well, we have to get back to the point at which we started but we disregard other things besides just the pumping that took place during the 25-1/2 months, then that may not be appropriate to actually require or think that recovery itself is getting back to that same water level.

And I don't have the graph to present today, but we do have in -- in CSI's brief there is a -- it's Exhibit 19 to the opening brief. We have a chart that shows that there was a wet period those last couple --

THE COURT: It was I think 2004, 2005, something around there.

MR. HERREMA: I'm sorry. 2004, 2005 was the wet period. The last -- the 25-1/2 months of the pump test were in a dry period, the last -- the tail end of a dry period.

So as to the 8,000 acre foot cap, I do think it's important to understand the value of that, each of those acre feet. I think perhaps when we're talking about a quantity and we're throwing around numbers like 4,000 or 8,000 that maybe we lose the perspective of the value of each of those individual acre feet. And for parties like CSI trying to get

a subdivision map approved, each of those acre feet is very important. So having a range that varies by ten times, from 4,000 to 40,000, that's a very big difference when one acre foot is so important to each of these projects.

And I think it's also helpful to look at what the basis for that 8,000 acre foot number was. It's a number that is intended to represent the long term annual quantity of water that can be pumped without conflicting with the Muddy River rights that Mr. Taggart was talking about earlier.

THE COURT: Well, it's 8,000 or less; right?

MR. HERREMA: You make an even better point.

THE COURT: Okay.

MR. HERREMA: But the basis for it is not -- it is an impact-based analysis. It's not an analysis that's based on looking at how much water is available in different parts of the Lower White River Flow System. It doesn't look at what's happening in each of the individual hydrographic basins that the State Engineer now wants to call sub-basins to the larger basin. There isn't an analysis basin-by-basin of how water moves through the system.

This is a really sort of a crude or rough justice approach of we can say that once we hit 8,000 or less we're interfering with the Muddy River rights, which are senior rights, and so now we need to cap the total pumping in the flow system, what they're calling a tributary flow system,

based on that. It's not -- I'm sorry, go ahead.

THE COURT: I was going to say, so then are you suggesting with your position that the basins need to be analyzed basin-by-basin that additional testing would need to be done before they actually impose or restrict the -- you know, restrict it to 8,000 afa for the entire area?

MR. HERREMA: Certainly additional analysis needs to be done. Additional testing would definitely be helpful. There hasn't been any pump test at all or there wasn't pump testing as part of 1169 in Kane Springs Valley. I think 1309 itself indicates that additional data gathering will be helpful in understanding things, yes.

So as I mentioned earlier, you asked Mr. Robison what the State Engineer should have done. It should have done this basin-by-basin analysis. So how much water comes into each of the basins, how much water goes out of each of the basins, that means the difference is how much is available for appropriation in those basins.

Now, the State Engineer --

THE COURT: Well, let me ask a question.

MR. HERREMA: Sure.

THE COURT: I mean, maybe I'm outside of the house on this, but when you're talking about how much water flow between the basins or on a basin-by-basin analysis, so is -- does each basin have a definitive this is where the water

flows in and out? I mean, that I don't know the answer to.

MR. HERREMA: These basins initially were identified based on in some cases assumptions, but some information that could be seen by going out into the field and understanding where there are geological differences between here. And so if we define them the way that they are defined in terms of the borders there, you can do that calculation, yes.

THE COURT: Okay.

MR. HERREMA: In terms of this analysis that we're talking about right now, it's something you might call a water budget. So what comes in --

THE COURT: The water budget. Uh-huh.

MR. HERREMA: I apologize for my voice.

THE COURT: That's okay.

MR. HERREMA: It's what you might call a water --

THE COURT: Would you like some water? Oh, you've got some. Okay.

MR. HERREMA: I've been trying.

THE COURT: All right.

MR. HERREMA: It's water comes in, water goes out. You know, evapotranspiration. All the different inputs and outputs of a basin, that's a water budget. Now, the State Engineer sort of scoffed at that idea and some of the other parties did, too. And it makes sense for parties like the Water Authority. They care only really about the Muddy River

flows; right? But this isn't a proceeding that's dealing with new appropriation. It's a proceeding now that we're dealing with the State Engineer attempting to limit pumping under rights that have already been either permitted or certificated. And so it is critically important that the amount of water available in each of these areas is determined by the State Engineer, not this rough justice gross quantity.

And again, we thought we knew, maybe, after 1303, how the State Engineer might propose to administer these water rights by putting them all together and then using their priority dates regardless of the sub-basin in which they had originated, what the State Engineer now calls a sub-basin, but we don't know now what the State Engineer is proposing to do in terms of how to manage pumping within that 8,000 acre foot cap. I'm not sure -- perhaps because they say that or he says that pumping is sort of declining to that amount anyway, he's hoping that that will just stay the case. I'm not sure.

In regard to the specific substantial evidence for the 8,000 acre foot number, no participant in the hearing provided evidence to support 8,000 acre feet as the long term annual quantity of water that can be pumped from the system, nor even argued that 8,000 was the appropriate amount of water to be pumped from the system. Each participant argued that evidence supported a different amount. The State Engineer selected the 8,000 because in the years following the 1169

pump test, 7,000 to 8,000 acre feet of water per year had been pumped without showing a decline in the groundwater levels or spring flows. But again, 7,000 to 8,000 acre feet is a wide range and here every acre foot is very important.

And so we don't see any support in 1309 for why it's 8,000, why it's not 7,000, why it's not some number within that 7,000 to 8,000 acre foot range.

THE COURT: Well, but the 8,000 is not an absolute. I mean, it's a cap. Correct?

MR. HERREMA: Right.

THE COURT: So it still can be reduced.

MR. HERREMA: But how and when and what's next? We don't know. And so, again, Mr. Robison talked about the importance of certainty for our client. I think every client -- or, I'm sorry, every party in this proceeding who has water rights, certainty of what's available is critical.

THE COURT: So your position, then, is that showing that the 7,000 to 8,000 that had been pumped without a substantial change in the water levels in the years following the pump test is not substantial evidence?

MR. HERREMA: It's not substantial evidence for the selection of that 8,000 acre foot number. There was no specific evidence that supported that number. And again, you know, to your point, if the finding of 7,000 to 8,000 is based on this is the amount that had been pumped just before

stabilization, then any number that was pumped just before stabilization could have been selected as a number. If we had been, you know, in a wet period over the last number of years, which I think everyone recognizes we haven't been, if we had been in a wetter period then perhaps the number could have been, 10,000, 12,000. Who knows?

There wasn't -- this number was sort of backed into by this effects analysis as opposed to being determined by what water should actually be available on a long-term basis. This is, again, looking at what happened over the last few years preceding recent stabilization.

One note. The State Engineer in his brief, in his answering brief argues that the way that CSI has argued this would impose a burden on the State Engineer to disprove every other number that any of the hearing participants said should be the cap. But CSI's point is just the opposite. If the State Engineer says that 8,000 is the number, then there needs to be substantial evidence that 8,000 acre feet per year is the maximum that can be pumped from the system, and that's not in the record.

One last point. On the movement of water within the Lower White River Flow System, the greatest factor affecting flow and movement of groundwater in the system is heterogeneity; the differences within the composition of the basin itself associated with geologic faults and structures

creating different flow paths. And while Order 1309 recognizes that these structures do exist, it sort of ignores their impact on the movement of water throughout the system.

There was evidence presented during the 1303 hearing, geophysical data from studies conducted by CSI, geophysical data from studies conducted by Vidler. You have the groundwater level changes. You've got water budgets that have been identified by the State Engineer back in Order 1169, CSI's proposed water budget, and lots of data and analysis from parties like -- not parties, but entities like USGS, the U.S. Geological Survey, Desert Research Institute and others.

These data combined represent the best available science for the State Engineer to assess groundwater movement within the system. The fact that you had fourteen and a half thousand acre feet of pumping during the 1169 pump test, almost 5,300 acre feet of that within Coyote Spring Valley, and there's only a 300 acre foot to 450 acre foot impact on the spring flow suggests that there's something else going on within the system other than just, you know, one-to-one or equal pumping impacts from all the wells in the system.

And Order 1309 didn't distinguish between the groundwater available in the alluvial aquifer compared to that of the carbonate aquifer. It doesn't distinguish between local recharge and regional recharge. It doesn't do this analysis that we've talked about in terms of basin-by-basin

what are the different components that make up the supply in each basin. And the State Engineer also disregarded isotope studies I think Mr. Robison mentioned earlier. These all suggest that there may be discrete local aquifers or flow paths within the system that don't have an equal connection to the Muddy River springs area.

So based on what Mr. Robison and I covered today, it's clear to us that the State Engineer lacked authority to issue 1309. 1309 violates CSI's constitutional rights because it constitutes a taking without due compensation. It violates CSI's due process rights because the State Engineer engaged in the post hoc rule making. And the State Engineer -- I'm sorry, CSI requests that the Court grant CSI's petition for judicial review and enter an order declaring the order void on that basis. As well, if the Court finds that the State Engineer had authority to enter the order, that the Court should determine that the State Engineer's action entering the order was arbitrary and capricious, as it wasn't supported by substantial evidence or best available science.

And I think we'd like to reserve the balance of our time for our intervenor's argument and our rebuttal.

THE COURT: Okay, thank you.

Okay. So it is now two o'clock. Do you all want a five minute break or can you power through? How do you -- how does everyone feel?

UNIDENTIFIED SPEAKER: I'd be a fan of a break.

THE COURT: Okay. All right, that's fine. We'll take a five minute break. We'll be back at 2:15.

(Court recessed from 2:08 p.m. until 2:17 p.m.)

THE COURT: All right. Mr. Balducci, whenever you are ready.

(Speaking to the marshal) Oh, yeah, you need to reset it. Sorry. Well, when we're ready. Donna, is it ready?

THE MARSHAL: Yes.

THE COURT: Okay. The floor is yours.

ARGUMENT BY DRY LAKE WATER, LLC AND APEX HOLDING COMPANY

MR. BALDUCCI: Thank you, Your Honor. Christian Balducci appearing on behalf of Dry Lake Water and Apex Holdings. I'm going to be very brief today. I think everyone in this case has briefed the issues very thoroughly. In fact, I'd be surprised if I took more ten minutes of your time. So if my time was sellable like a carbon credit, I'd be open for business.

THE COURT: I'm sure.

MR. BALDUCCI: I'm not going to repeat what my colleagues from Coyote Springs have said. I may try to emphasize a few points that they made or say it a different way just to justify my presence here today, but we'll see.

What we're dealing with in this case is the first

time the State Engineer has ever taken independently designated basins, designated, by the way, by the Engineer himself however long ago, and converted them into a mega basin. Sometimes I think the most obvious things are the hardest to see in that the State Engineer and the State of Nevada has been governing water law and water rights not just since the enactment of our statutory scheme, but by way of the common law as well going back to -- I'll let someone else comment, but at least the 1880s. The fact that this is the first time this has ever happened in 140 years sometimes is indicative of whether it's allowable to do so in the first place.

My clients own the land known as Apex. You go by, when you take the 15 to Utah, there's the Love's Gas Station out there. What many people don't know is the history behind Apex. Apex lands were carved out by the federal government out of federal land shortly after the PEPCON explosion in Henderson, which killed two workers and injured at least 200 others. Governor Bryan himself at the time was the one that formed a committee to investigate PEPCON and how to avoid mass casualties and mass injury due to chemical explosions near the city. They picked Apex for that. Governor Bryan, the committee and Nevada itself made the recommendation to the Federal Government to carve that land out, which it then did by way of Congressional Act.

At the time the Congressional Act was made, nobody ever questioned or thought of whether the Engineer would take away the water rights that Apex would be able to get by way of water permit applications, which, by the way, it and its predecessors were able to get. 1309 essentially eliminates my client and their land's right and their ability to have water rights. I put together -- actually, I didn't, my client did, just pages of when water rights had been issued post Muddy River Decree, up and through the most recent being I think 2014, ironically, by my client. And it's pages long. We've got charts like this.

There are a lot of people that will be affected by this and I think the theme you're going to hear is none of us knew the Engineer could do this. Had we known, we wouldn't have got the rights or made the decisions we made. And the reason that nobody knew is because not only is there an utter lack of authority in the chapter -- and I appreciate Your Honor's comments about subsection 120, the rule making statute, of which I'm sure everyone is going to be discussing a lot during this case.

But not only do we believe and assert there is a complete lack of authority that says they can do that, historically over the last 140 years the fact that the Engineer himself has not engaged in such conduct perhaps tells us what the Engineer was thinking himself, that he knew he

didn't have the authority.

As a government agency, what the Engineer can and cannot do previously was prescribed by the common law. And since the enactment of our water chapters, for lack of a better term -- I probably used an improper verbiage for it but that's okay -- I believe 532, 33 and 34, I mean, that's what governs. And when we evaluate what a government agency can do, we have to look at the law, the authority for them to do what they can do. If the statute says they can do it, they can do it. If the statute says they cannot, they cannot. When we have silence, we have to look to the rules of statutory construction and case law interpreting those to determine what they can do.

As Your Honor noted, there are a number of chapters or statutes, like roughly ten, that make reference to basins. We all know what a basin is because the Engineer has told us what a basin is. He's told us that by creating the roughly 230 or 40 or 50 or 60 -- my eyes are bad to begin with and that font would be small to me if I were three inches from it, so I'm not going to begin to try to guess how many there are. But the Engineer told us what the basins are, how may there are and what they look like. They're right there on the map that Coyote Springs has brought before us, taken directly from the Engineer's information himself. So we really don't need to do a deep dive to find out what it is because the Engineer

has told us. It's all done right there.

When we think about why the Legislature -- I think we like to call them the wise Legislature and I think all of us have opinions about how wise they are when they do the things they do, but unfortunately we have to live with what they do and what their statutes do and do not say. There's probably a reason why, and although we don't want to guess at what the Legislature was thinking, we can certainly make certain assumptions and reach logical ideas about why they did certain things or did not.

If we think about why the Legislature did not provide for a mega basin to be created from basins, it helps us understand why the Engineer has never done it and the Legislature didn't provide for it. Number one goes to the mixing of priorities. My clients are in Garnet Basin and Black Mountain. We are essentially on the outermost fringe, so we're different in that respect. And we're also different when it comes to priorities. Our Apex lands were carved out in roughly 1988, not 100 years after the Muddy Valley Decree but not too far from it.

There would have had to have been a way to evaluate how do we take seven basins, throw them in a grinder or a mishmash and evaluate what are their priority dates. There would have to be. It's almost property law 101; priority. It's something we all learned the first year of law school.

Certainly that would have been addressed by the Legislature. But because the Legislature omitted a provision or statute allowing the Engineer to do this tells us he cannot.

We also have to think about how the evaluation or investigation into the conjoinment of multiple basins would have to operate. We're not talking about just one bathtub here, nor are we talking about seven bathtubs that might possibly contribute to the spa at the JW Marriott. This is way different. We're talking about seven independent hydraulic basins, all with their own, unique characteristics that have to be taken into consideration where pumping is done to evaluate.

This large bathtub is important. Could the Engineer game the system by running pumps next to the Moapa dace? Perhaps. Could they game the system by running it in Garnet Valley, which would show no effect? Maybe. I'm not an engineer. I'm not a water construction person for that matter, either, but simple logic would dictate to me that if you ran the pumps very far away from the fish, the fish are probably okay. I don't know. I'm not a water person. That's something that should have been looked at. And it helps us understand why our Legislature didn't provide statutory authority to the Engineer to do what he did.

I told you I'd be a few minutes. I promised I'll be a few minutes and I'm nearly done here.

THE COURT: You have four hours, so however you want to use it is up to you.

MR. BALDUCCI: Well, you know what, if you want to make them like carbon credits, I'll be really short then, too.

THE COURT: I don't want you to feel like there's any pressure coming from me.

MR. BALDUCCI: No. I don't want to repeat what's been said. I'm cognizant of the Court's time and everyone else's time here.

The one thing I'll kind of close on is lawyers have been here in Nevada probably longer than Nevada has been Nevada, since we've been a state. There's a reason there was never a case on this. There's a reason no one has found a district court opinion or a decision talking about this. Conduct matters. The fact the Engineer has never done this says a lot. The fact that we've never seen this litigated in Nevada, even since before it was Nevada, tells us what the Engineer can and cannot do. The Engineer did not have the authority to take seven independently designated basins and combine them into one, basically turning the priority rights into some kind of weird Jenga game where everything is going to fall apart with the first piece you pull.

I'm happy to answer questions. The only thing I'd add about the subsection 120, the Engineer here isn't really saying I made a rule and I can do whatever I want. They're

backing themself in the statute, which tells us that the Engineer knows they couldn't have done this.

With that, I'll reserve my remaining three hours, ten minutes and fifteen seconds.

THE COURT: All right, thank you.

So, Center for Biological Diversity.

MR. LAKE: Yes, Your Honor.

THE COURT: If you need a minute, you know, to gather yourself.

MR. LAKE: I need a few minutes --

THE COURT: That's fine.

MR. LAKE: -- to just set up the presentation.

THE COURT: Absolutely. No problem.

MR. LAKE: I also don't want to interfere with the microphone, so let me know if I'm coming through all right.

(Pause in the proceedings)

MR. LAKE: Excuse me, Your Honor. I'm having a little bit of trouble with the technology.

THE COURT: No problem. Mr. Balducci, you know, didn't use three hours plus time, so I think you have a minute to set up.

MR. LAKE: I also don't plan on using a lot of time. I'm going to try to keep it under an hour. I know that we have covered a lot of ground today and I will do my best not to be redundant.

THE COURT: Let me know when you're ready.

MR. LAKE: Ready when you are.

THE COURT: Okay. You may proceed.

ARGUMENT BY CENTER FOR BIOLOGICAL DIVERSITY

MR. LAKE: All right. I'm Scott Lake and I represent the Center for Biological Diversity. Good afternoon, Your Honor. I'd like to start by just briefly summarizing the Center's position on appeal. We have five main points here. I aim to cover two today and the remaining three in our response argument and intervenor.

So, first of all, we believe the State Engineer does have statutory authority to jointly manage the Lower White River Flow System. We also support the State Engineer's consideration of the Endangered Species Act and finding that there is potential liability for a take attached to groundwater pumping in the system. We support the State Engineer's designation of the Lower White River Flow System, including the inclusion of Kane Springs Valley.

However, like the Authority and the District, we feel that there are two discrete issues here that need to be addressed. One is that the 8,000 acre foot pumping cap is not based on substantial evidence, and in particular the idea that the system is stabilizing or approaching a steady state is not established in the evidence in the record. And second, that the State Engineer's rationale for arriving at that 8,000

acre foot cap fails to consider the public's interest in the conservation of the Moapa dace. Essentially -- and I will elaborate on this later, but essentially what happened is the State Engineer looked at the apparent stabilization, which is not reflected in the data, and also looked to the conflicts analysis with the Muddy River Decree to arrive at that number, neither of which considers the long-term habitat needs for the dace.

So to start off, I'd just like to -- excuse me. I'm still on that slide. I'd just like to address the fact that the White River Flow System is a very unique hydrologic region. And we've heard a lot today about how this is the first time the State Engineer has ever done something like this. And that's true. And the reason that the State Engineer had to do something like this is because you have a lot of unique circumstances all coexisting in this one system. It's an extremely large system, so you have water originating in some cases as far north as the boundary between White Pine County and Elko County and traveling distances of over 200 miles to get down to the Muddy River Springs and, you know, what we're calling the Lower White River Flow System. It's a really extraordinary hydrological phenomenon.

The system is highly transmissive, meaning that changes in any one part of the system are going to radiate quickly throughout the system. And there are limits to that

and I'll be discussing these in more detail in later arguments, but one example of that is the Pahranagat Shear Zone where there is what they call a steady state inflow, meaning the water that flows into Coyote Springs Valley and Kane Springs Valley, because of the geology and hydrology it's basically staying no matter what happens lower down in the system.

There's a low amount of recharge in the system as well, and we've addressed this. Mr. Taggart spoke of something called permanent capture, and that reflects this idea that there is a very low level of recharging the system. This water was built up over a very long period of time. And stresses like the Order 1169 pump test, it basically reset the system. They draw it down and it's going to take a very long time for the system to recover. And, you know, as long as pumping stress continues, our position is that there is not going to be any recovery. And, in fact, the data reflects a declining trend in groundwater levels that's less than the sharp trend we saw during the pumping test but nevertheless apparent.

And finally, and this is where I'd like to spend the most time on today, you have the habitat of a very restricted endangered species at the end point of this flow system and that's the Moapa dace. And with that I'd like to discuss the dace and give some background basically to the Court and the

idea of why this species is important, why we're considering the fish here and why it's -- you know, what's necessary for its protection and its recovery.

So the dace is found only in the upper Muddy River system. It's the only member of its genus in the world. And concern about the dace goes back to the 1960s. It was listed under the precursor to the ESA, which is called the Endangered Species Preservation Act in 1967. Because it was listed under that act, it received the protection of the ESA when that act was passed in 1973. The U.S. Fish and Wildlife Service, which administers the Endangered Species Act, gives the dace its highest priority for recovery for a variety of reasons, some of them being the high degree of threat to its continued existence and also its high potential for recovery.

As I'll get into later, with habitat restoration and conservation efforts, the only limiting factor we're dealing with at this point really is spring flow, and as long as spring flows are maintained, the species has a good chance of recovery. As we'll get into later, it looks like to get to the point where the species is considered recovered and that it's delisted is going to require a lot more habitat than we have now. But it's still an accomplishable goal and that's more than you can say for a lot of species on the list.

So first I'd like to talk about the restricted range of the Moapa dace. This slide is showing a map of the

springs and stream systems where the dace is found. All of the graphics in this presentation come from the Southern Nevada Water Authority's expert reports. They reflect data that is found throughout the record. The reason I used SNWA's reports is because they had the clearest graphics.

But you can see that the dace is highly restricted to these upper tributary stream systems and about 95 percent of the population occurs within 1.78 stream miles. It's a very, very small range. The streams that contain the dace are the Apcar Jones spring. That's the one in the upper left-hand corner.

THE COURT: You know what I just realized? You've been -- you haven't been saying what pages that you're actually referring to.

MR. LAKE: I'm sorry. I'm sorry.

THE COURT: So will you please start.

MR. LAKE: Yeah. Let me -- okay, we're on Slide 5 right now.

THE COURT: Okay, thank you.

MR. LAKE: Okay. I'll be sure and mention that.

THE COURT: Thank you.

MR. LAKE: So you have the Apcar system and that's the green one on like the upper edge of that box. Pederson, that's the one that originates in the lower part of the box and flows roughly north. Little Springs and Plummer is the

one on the far right side. And Muddy Creek, there's some limited distribution in Muddy Creek and that's the tributary that's running approximately parallel to the Muddy River in the bottom of the channel. Almost all of the occupied dace habitat, with the exception of that Muddy Creek section and I'll talk about that later, occurs within either the Muddy Valley National Wildlife Refuge or the Warm Springs Natural Area. So you have those two, you know, designated areas and that essentially comprises that species entire habitat.

And moving on to Slide 6. The reason for this -- there are a lot of reasons for this. One big reason for this is that the dace is what we call thermophilic. It requires warm water and it reaches its greatest extent at around 82 to 86 degrees Fahrenheit. Research has shown that the dace will stop feeding at approximately 81. Spawning occurs at slightly higher temperatures, so we're talking about closer to the 86 range, so the warmer waters are absolutely necessary for reproduction.

On this map the 80 degrees, so about the approximate limit of the dace's range is represented by the light blue to light green parts on the map. So you can see there's a barrier to movement on that Apcar Stream. And that's one of the problems with the conversation of the species is that you have these very small, very isolated populations and that makes them vulnerable to unpredictable, catastrophic events.

That vulnerability only increases as habitat is decreased. And habitat generally is a function of spring flow.

I'm going to move on to Slide 7. The dace depends on unique hydraulic conditions, so that means that, you know, the pressure of the water in the spring actually creates certain flow patterns of riffles in still areas, and the dace is very specialized to that environment. So changes in that environment adversely affect the dace and that's reflected in the 2006 Programmatic Biological Opinion and all of the biological opinions in the record that also adhere to that 2006 biological opinion.

Another kind of interesting feature of the dace and another one that makes it vulnerable is that it's scaled to water volume. And this is the idea that, like, if you put a goldfish in bigger bowl it grows bigger. The dace works the same way. The catch is that you also get a reduction in fecundity, and that's the reproductive success of the species as it gets smaller. So as water levels decrease, size decreases and so does reproductive success. So there's a direct correlation there between the amount of water in the stream and the species long-term viability.

Slide 8. These are the threats to the dace, according to the Fish and Wildlife Service. You have habitat degradation and modification. This was a major factor when the dace was listed. You had a lot of streams being

channelized, a lot of diversions. A few of these springs were actually converted into soaking pools or swimming pools and that was a concern. And a lot of -- this has been addressed through some of the conservation efforts that the Fish and Wildlife Service and the authorities have undertaken.

Also, fire from invasive plants, primarily palm trees. You can have some catastrophic fire events due to species that aren't supposed to be there and that will adversely affect the stream system. Invasive fish species has been a historical threat to the dace, but that is also largely resolved and we'll talk about that in a minute. And habitat loss from reduced spring discharge. And that's the main reason we're here today and that's the main reason I'm talking about the dace in these proceedings.

I want to give a little bit of history. This is Slide 9, showing a timeline. You had relative abundance in the Muddy River system from 1933 to 1950. Declines beginning in the mid 20th Century with habitat modifications and water development. At this point you start to see changes in the water quantity and quality, the introduction of invasive species, changes to the habitat, various things that adversely affect the species.

By 1983, the dace has been restricted to a range that we're more familiar with today in only about two springs and two miles of stream. In 1994, there's an invasion of

tilapia. And this has been mentioned in briefing and I want to address it here because it's been suggested that tilapia might be a greater threat to the dace than pumping and that's just not true. Tilapia was recognized as a serious threat to the dace and you had numbers decline from almost 4,000 to a low of 907 in the 1990s. However, the Fish and Wildlife Service introduced a fish barrier and systematically removed tilapia from the stream.

And I'm going to switch slides now to Slide 10. And those efforts were successful. By 2013, the tilapia were eliminated, leaving the main limiting factor on the dace to be stream flow. So after the elimination of tilapia, the population increased over 2,000, but you see in 2016 continuing through 2019 there's a decline, and currently the species hovers around between 1,100 and 1,500 fish, at least according to the data that's in the record. Now, this is far short of the U.S. Fish and Wildlife Service's recovery goal of 6,000 fish for de-listing, so there is still a lot of work to do on this species before it can be considered recovered and no longer threatened.

With that, I'm going to turn to groundwater pumping impacts and how they affect the dace. Going to Slide 11. We've talked about some of this already, so I'll try to be brief. The regional carbonate aquifer is the source of the Muddy River Springs. I don't think for purposes of this

presentation it's necessary to distinguish between carbonate and alluvial. We don't need to get into that distinction. But we're talking about the aquifer that was tested in the pumping test and the aquifer that you see be discussed as having various water levels.

Those water levels correspond directly to the outflow from the springs, so I'd like to continue with Mr. Taggart's bathtub analogy here. You know, as the bathtub lowers, the amount of water spilling over decreases, and that's what we're seeing here. As the groundwater levels in the Lower White River Flow System decline, it leads directly to a decrease in spring flow. And the particular concern here are the higher elevation springs. The higher elevation springs are those springs that still have populations of the Moapa dace and they're also the springs that are most vulnerable to impacts from groundwater development.

Again with the bathtub analogy, what's actually going on here is a difference in pressure, so it's pressure that's driving the water to the surface and the pressure is lower at the higher elevation springs just due to physics. But it can be useful to think of it as like a lake or a tub in that if you have a spout in the tub that's like halfway up and a spout that's on top and the water level in the tub declines, the one at the top is going to stop flowing first and that's essentially what we're observing here.

So when you're talking about groundwater levels dropping, say, a foot or two feet, you know, in a system that wasn't this unique and didn't have these problems that might not be a source of concern. It might be something that just doesn't affect the ecology. It might be something that can be easily mitigated. But here with those high elevation springs being so important, those two foot drops in groundwater matter. And as we saw in the 1169 pump test, they can result in extremely sharp declines in flows from those higher elevation springs.

So spring flow is the primary limiting factor on the dace and this is reflected throughout the record. There were two parties that gave detailed analyses of the dace, actually, you know, its biological needs at the Order 1303 hearing, and those would be the U.S. Fish and Wildlife Service and Southern Nevada Water Authority. And they both pointed out that the distribution of the Moapa dace is directly related to flows from the springs and that any reduction in flow levels decreases the amount of habitat for the dace and in turn decreases the number of individual dace, leading to the conclusion that reductions in spring flow levels can result in a take.

So just to give an example, moving on to Slide 12, I believe. Okay, Slide 13. This is a summary of Fish and Wildlife Service modeling that was introduced at the Order

1303 hearing, and it showed that if Warm Springs West flows reached 2.7 cfs it would eliminate 6 percent of the dace's total habitat. And the really important part, 31 percent, so almost a third of the dace's spawning habitat. Flow reductions also impact habitat quality through hydraulic changes. Those riffles change and you get a weaker flow.

And the range is further restricted by temperature reduction. So as less water flows from the springs, it cools more quickly. A smaller volume water, it just doesn't hold heat as long as a larger volume of water. And what you see as spring flow reduces is that the amount of suitable habitat basically contracts upstream and that's what this chart is showing. With a 10 percent spring flow reduction, this is all based on flows at the Warm Springs West Gage, a 10 percent spring flow reduction you lose 66 stream feet of habitat. At 20 percent you lose 131 feet; 30 percent you lose almost 200 feet.

THE COURT: So when you're talking about 131 feet, do you mean --

MR. LAKE: Like linear.

THE COURT: -- in length?

MR. LAKE: Yes, linear. Yeah.

THE COURT: Okay. Not like --

MR. LAKE: Not like --

THE COURT: It's not like a square unit or anything

like that?

MR. LAKE: Yeah. So this leads to the conclusion that maintaining spring flows is necessary to protect the dace. And the evidence in the record, the State Engineer's analysis in Order 1309, the Fish and Wildlife Service's analysis in its various biological opinions indicates that 3.2 cubic feet per second is the flow that must be maintained to protect the dace. And again, that's 3.2 cubic feet per second passing -- or 3.2 cubic feet of water passing by the Warm Springs West Gage every second. And I think there's a lot of verbiage in this slide. This is just essentially demonstrating the various evidence supporting that conclusion that 3.2 csf is necessary.

If there are no further questions, I'm just going to move on.

THE COURT: Okay. Yeah, that's fine.

MR. LAKE: Okay. So I'm going to talk about the pumping test. You know, why -- what the pumping test showed about the relationship between groundwater pumping and the dace habitat and just a few basics. The pumping test demonstrated that the Warm Springs Area springs connected with the carbonate aquifer and that the spring flows rise and fall with groundwater levels over this 1,100 square mile area. Now, that doesn't necessarily mean -- I think there's been a distinction drawn here between whether it's actually like

a bathtub or whether it's heterogenous. So saying that the impacts occur over this broad area and in a short amount of time doesn't necessarily mean it's not heterogenous.

THE COURT: Meaning that the different levels at different areas could impact it differently?

MR. LAKE: It simply -- it means that -- I mean, what we saw in the pump test results was a uniform decrease in levels. There are some exceptions. I think the one obvious one is Bedroc's wells, which is just drawing from a different source than the carbonate aquifer. But in general when you're looking at the carbonate aquifer, you see this sort of universal decline over a broad area.

Now, it doesn't necessarily mean that, you know, were saying there's no faulting there, there is no changes in transmissivity within the system. It's just that the impacts do propagate throughout that area. So if you sink a well in Coyote Spring Valley or Kane Springs Valley, that's going to impact the springs and that's going to capture flow that would otherwise discharge from the springs. So during the pumping test you saw -- when those 14,000 acre feet were pumped, you saw sharp declines in both groundwater levels and the spring flows.

And I'm going to discuss -- since we've talked about the aquifer in general quite a bit today, I'm going to discuss -- move on to discuss the high elevation springs and what

happened there. The Pederson Spring flow decreased from about 0.22 cfs to 0.08 cfs. Pederson East decreased from 0.12 to 0.08. Now, I think these numbers demonstrate a few important points that we're dealing with. One is that the amount of water discharging from these springs is actually very small. Mr. Taggart's presentation included the photo of the springhead. Basically it's a tiny pool; it's almost a puddle.

So while at the Warm Springs West gage you might be dealing with a larger volume of water, it's the aggregate of all of those streams that come together at the Warm Springs West area. When it comes to individual springs, and these are -- this is where, you know, you're actually seeing the dace habitat occurring, you're dealing with much smaller volumes of water, leading to potentially much larger impacts on the population if those volumes decrease.

So again, like in a different system that didn't have these characteristics, some small decline in spring flow of this magnitude that we're seeing at Pederson Spring might not be that much of a concern, but here, you know, you're seeing that it's removing in the case of the Pederson Spring, you know, over half the amount of spring flow -- or sorry, I'm not good at math, so --

THE COURT: Neither am I. That's why I became an attorney.

MR. LAKE: I believe the percentage was 41 percent.

It's a lot. And, you know, further, you see a direct correlation between groundwater levels and spring flow. So, in particular, for every foot decline in EH-4, and that was the main monitoring well during the pumping test, the springs lose about 0.06 cubic feet per second. So the main takeaway here is that it's necessary to maintain groundwater levels in order to maintain spring flows. And in order to maintain groundwater levels, there has to be some kind of limit on the amount of groundwater pumped.

So defining that limit is what I'm going to get into next. I'm going to start with the Endangered Species Act. This hasn't really been discussed yet. You know, the Center's position is that this is, in addition to the Muddy River Decree one of the two main limiting factors on how much water can be pumped in the system. I'm going to give a brief overview today just so we have a working understanding of it. I feel like a lot of this discussion, a lot of the detail in this discussion is more appropriate for the intervenor argument; however, I'm happy to answer any questions.

So the intent of the ESA, and I think this is important to point out here, was to halt and reverse the trend toward species extinction at whatever the cost. The ESA is a uniquely uncompromising statute. And specifically, Section 9 of the ESA prohibits all, quote, "persons," and these are all terms of art, "persons" from "taking" any endangered fish or

wildlife species.

And what makes this relevant here is that take and person are broadly defined. Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to engage in any such conduct. One of those components of take is harm. Harm has been further defined in federal regulations to mean "an act which actually kills or injures wildlife, including significant habitat modification or degradation which kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." So this is essentially behavioral changes leading to death or injury of members of the species.

Person, meanwhile, includes "any officer, employee, agent, department or instrumentality of any state, municipality, political subdivision of a state, or any state -- you get the idea, state and local government.

A state or state agency could be liable under these provisions for authorizing conduct that takes a threatened or endangered species and a take can occur through significant habitat modification. We have covered that. And this is going to be --

THE COURT: Oh, you know what, can you tell us which slide?

MR. LAKE: Yeah. What was the last slide I named?

THE COURT: Let's see. I think the last slide you named off was Slide 13.

MR. LAKE: Okay.

THE COURT: And that was more about talking about the lowering the temperature.

MR. LAKE: Sorry, Your Honor.

THE COURT: Yeah. Sorry, I need to be a little bit better about policing you all to refer to your slides.

MR. LAKE: Okay. They really should have numbered these. Okay, I think we're at Slide 20 now.

THE COURT: 20? Okay.

MR. LAKE: Yeah.

THE COURT: And that has to do with the 2006 MOA?

MR. LAKE: Yes. So the 2006 MOA, I'd just like to clarify, you know, having discussed the liability for a take here, the mechanism for which a take occurs, the legal framework, what the 2006 Memorandum of Agreement does and does not do in this context.

The parties to the Memorandum of Agreement are Fish and Wildlife Service, CSI, the Moapa Band of Paiutes and the Muddy Valley Water District. So these are the only parties covered under the MOA's terms. They are also the only parties through whose participation the 2006 programmatic bi-op was prepared. The MOA, as we've heard, was prepared in anticipation of the Order 1169 pump test, reflecting concern,

especially from the U.S. Fish and Wildlife Service, that even before the pumping test that drawing down the carbonate aquifer would adversely affect the springs and the dace.

So the parties agreed in the Memorandum of Agreement that the Fish and Wildlife Service would prepare a biological opinion, and I'll get to that in a second. There are three additional components. One is the dedication of water rights, which you've heard about. Habitat restoration and recovery. This is -- these were habitat restoration efforts that were undertaken by the Authority and the Fish and Wildlife Service and have been relatively successful in limiting threats like diversions and tilapia invasion. And finally, spring flow triggers beginning at 3.2 cfs.

Now, the MOA itself doesn't protect against "take" liability, and I want to make that especially clear because there is a paragraph in Order 1309 that states that the MOA provides protection for take, and it simply can't do that. The only thing that can provide protection for take liability is an incidental take statement issued by the Fish and Wildlife Service under a very specific procedure that's conducted under the ESA. Parties just can't get together and agree that a take is not going to occur, even if one of those parties is the Fish and Wildlife Service.

So along with the MOA, the Fish and Wildlife Service did prepare a biological opinion. And a biological opinion

is a device that derives from ESA Section 7. Section 9 is the one that prohibits a take and Section 9 applies to everybody. It's simply unlawful to take an endangered species. Section 7 is both more specific and also more conservative in terms of preventing impacts to the species.

Section 7 provides that: "Each federal agency shall, in consultation with the assistance of the Secretary of the Interior, ensure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species." So the important parts, they are federal agencies. This applies only to federal agencies. And this is called the jeopardy mandate. And we're not just talking about killing or injuring individual specimens now, we're talking about jeopardizing the continued existence of the species, looking at both the short-term conservation and the long-term recovery of the species. It's a fundamentally different inquiry than take.

So the 2006 bi-op evaluates, as the proposed action by the federal agency in question, the execution of the MOA by the Fish and Wildlife Service. That's the action. It contemplates a certain level of groundwater pumping, but at the end of the day what the opinion is really evaluating is what are the consequences to the dace of the Fish and Wildlife Service entering into this agreement. And consistent with

that, it does not authorize any incidental take for activities, including the MOA, including groundwater pumping.

Slide 21. So this is stated in the biological opinion itself. It's also apparent from the fact that no incidental take statement was issued with the biological opinion. And that's procedurally the only way Fish and Wildlife Service can tell any party anywhere, okay, it's okay to take some of the species, and that just wasn't done in connection with the 2006 Programmatic Biological Opinion.

I should mention that there have been some additional biological opinions. One was issued to Lincoln County and Vidler, one was issued to Southern Nevada Water Authority and one was issued to Coyote Springs Investment that do authorize some level of incidental take. But those biological opinions apply only to the discrete actions analyzed and they apply only to those parties. It's not a blanket authorization for any groundwater pumping anywhere in the Lower White River Flow System to cause take of an endangered species.

So that leaves us with declining spring flows linked to declining groundwater levels and an imminent threat to this incredibly range-restricted and imperiled species which the State Engineer recognized in Order 1309. This is Slide 22. So this is just recapping Order 1309. And as I mentioned before, there are a number of findings made in that order,

some of which we agree with, some of which we don't. The important part for today's discussion is the maximum amount of water that can be pumped from the Lower White River Flow System and the State Engineer's conclusions regarding aquifer recovery. And those were that 8,000 acre feet can be pumped, in part because water levels in the Warm Springs Area may be approaching a steady state. The State Engineer noted, though, that the trend is of insufficient duration to make this determination, essentially admitting that there really wasn't enough evidence in the record to draw a conclusion on this, but nevertheless allowing up to 8,000 acre feet of pumping.

So I'm going to go -- start discussing the State Engineer's rationale for 8,000 acre feet from Order 1309. This is Slide 23. And this basically breaks down in two components. One is that aquifer recovery is approaching equilibrium or a steady state. This is reflected in a discussion at page 60 and page 63 on the slide, saying, one, that pumping of 8,000 or less has correlated with an apparent stabilizing trend and that the evidence and testimony projecting continual decline at current levels of pumping is compelling but not certain.

I'd like to stick on this language a little bit because what's essentially being said here is that we don't have enough evidence to really conclude that the system is stable, and there's compelling evidence that it's not. But

the order is going to reject that compelling evidence because it's not certain. And, you know, importantly, the substantial evidence standard does not demand certainty. And, indeed, in complex hydrological questions like this one, if certainty was the standard that was demanded, there would probably never be a decision made. There's always some grey area in this.

The second component of the decision is the conflicts decision. As long as senior rights are being served, there's no conflict with Muddy River Decree rights. That's been addressed today and I feel like other parties are also going to address that. I would like to note that the Center does agree that that position is incorrect and that it's arbitrary and capricious to base that no conflict finding on the irrigation of a hypothetical alfalfa crop. But that's not the focus of the discussion and I believe it will be covered adequately by other parties.

So discussing the steady state idea, this is Slide 24. And this is discussed in both the expert report submitted in response to Order 1303 and the testimony that was given at the hearing. Pumping after the pumping test, and particularly from 2015 to 2019, shows a slight but steady decline in both carbonate groundwater levels and spring flows. And these declines occurred in spite of decreases in carbonate pumping. So the carbonate pumping is going to decrease over this period from just under 8,000 to just over 7,000. And in that period

as well you have two higher than average precipitation events.

So I think there's also been some argument in this case that, you know, parties looking at the limits of the system and looking at sort of the unique way that this aquifer and these springs are reacting to pumping aren't taking into account climate, and that's simply not the case. You know, this shows that, you know, even when you do factor in climate and the idea that, you know, above average years you might see some recharge in the system, the fact that you're still seeing a decline demonstrates an ongoing impact. And that means that the system is not, as the State Engineer concluded, in equilibrium.

I'm going to move on to Slide 25. And here's some of that evidence. Again, you know, these are hydrographs that represent spring flow measurements before, during and after the Order 1169 pump test. Again, I'm using Southern Nevada Water Authority's graphics because they seem to be the most clear. There are similar representations throughout the record. Essentially what you see here is -- so carbonate groundwater pumping begins in the system around 1993. Following that period you see a steady decline trend in groundwater levels continuing through 2005.

Precipitation data is the third chart down on this slide. It's the red and blue bars. And we see a massive

recharge event, an anomalous recharge event, even, in 2005 and then we see the declining trend resume. After that, you see the impacts of the Order 1169 pump test with the curve increasing in slope substantially and essentially bottoming out shortly after the pump test. Following that you see a slight recovery beginning in 2013 and reaching its maximum around 2016. And then --

(Mr. Balducci confers with Mr. Lake)

MR. LAKE: So picking up again at 2016, you see, you know, a peak in both of these hydrographs around that time. And water levels decline, you know, not as dramatically as we've seen before, but nevertheless if you look at the 3.6 line -- or, sorry, the 0.18 line on the upper one and the 3.6 line on the second one down, you can see that it starts at around 0.08, 3.6, and by the time we get to the 1303 hearing in 2019 we're hovering around 0.12 and 3.3. Testimony reflects that the gage actually reached 3.2 during the hearing, so it's been approaching that trigger level even at current rates of pumping.

I'm going to move on. This is Slide 26 showing more hydrographs. The text of the last slide was testimony from or reports from Center's expert and Southern Nevada Water Authority's expert. This is more analysis from Southern Nevada Water Authority and I'm going to go through the various parties' positions on this, not to suggest that the State

Engineer should simply take a poll or, you know, that this is a process where everybody gets to vote on a number, but simply to show what the weight of the evidence was that was being presented.

So these graphs look similar but they're measuring something else. They're measuring the water levels in various wells. And I don't know if you can see the text, it's pretty small.

THE COURT: I can look over here and I've got my glasses, so.

MR. LAKE: Okay.

THE COURT: Just point me out to where I need to look.

MR. LAKE: Okay. Well, I'm looking at the top one. And, you know, essentially what I'm really trying to get across here is the similarity of these graphs to each other and to the spring flow graphs. The top one is CSVM-1 in Coyote Springs Valley. Again, you see that peak around 2016 and a steady declining trend toward 2019. EH-4 in Muddy River Springs Area, it appears to show the same trend, less pronounced than CSVM-1. Paiutes TH-2 in California Wash, and this is in the more southern part of the system, all showing a similar trend but a little bit more stable. Garnet Valley showing a steady decline and the Black Mountains Area also showing a slight decline.

THE COURT: Is there any significance to the yellow dots?

MR. LAKE: I believe the blue dots are like once in time measurements and the yellow or green ones are continuous measurements.

THE COURT: Okay.

MR. LAKE: It's two different ways of measuring the level of the well.

So looking at these graphs, you'll see on the side the various parties' interpretations of what these graphs mean. And one issue here is that, you know, we being in court are not -- you know, we're not presenting expert testimony here. This is the expert testimony that was presented.

So from Southern Nevada Water Authority, you know, estimating about 5,900 acre feet is the most that you can pump without continuing this groundwater decline. Muddy Valley Irrigation Company noting that pumping from the carbonate aquifer anywhere in the Lower White River Flow System captures Muddy Rivers flows, also reflecting that there is -- you know, with continuing pumping there is continuing capture. Nevada Energy noting both that full recovery to pretest levels did not occur and that water levels regionally were still declining due to existing pumping. Nevada Cogen also noting that recovery was maxed out in 2016 and that levels have been trending lower since then.

And the State Engineer actually acknowledged this evidence, and these are a few excerpts from Order 1309 demonstrating the State Engineer's analysis and how he got to that 8,000 acre foot figure.

THE COURT: And which slide is this?

MR. LAKE: This is 27.

THE COURT: Thank you.

MR. LAKE: Thanks, Rob. So the State Engineer agrees that the levels, and this is talking about spring flows, springs flows may be approaching a steady state, but the trend is of insufficient duration to make this determination. Again, you know, the evidence of continuing decline is compelling but not certain. And I think this relates to not the quality of the data but the duration. It's true that, you know, the system does have to be examined in context.

And, you know, with things like an increase in precipitation in -- I believe it was 2018 -- 2016, 2018 or 2017 and 2019, one of those two, you know, you could be seeing factors that could influence the readings. Say if we had a below average precipitation year and many parties here are arguing that we are in a drought, then it would have been even clearer that the system is not in equilibrium because you wouldn't have had that recharge effect buffering the pumping impacts.

THE COURT: So let me ask a question. So, you know, you're talking about that even the Nevada State Engineer concedes the fact that this may not be the full extent of the information that he would need, he or she would need to decide whether or not equilibrium was reached. At what point would it be enough time, then, to say definitively, okay, this is where we've reached equilibrium? Because, you know, if the argument is there needs to be more time to decide that, any time you have any sort of test, you know, at the very inception of it you would say that's not enough data, right, because it's not the quality but the duration, this needs to go on longer.

So at what point would it be appropriate for the State Engineer to say okay, now, now, is enough time for me to say I'm going to put the cap at this amount and then, you know, maybe make a decision later on to adjust that cap?

MR. LAKE: Your Honor, think that would be a question to be addressed on remand. I don't think we're in a position here to answer that question because we're not hydrologists. These are the kind of questions we were dealing with at the hearing below and I believe need to be dealt with again because it was found that there was insufficient data. How much data is sufficient I think is a technical matter that, you know, I certainly can't address standing at this podium.

THE COURT: Well, I mean, I guess maybe I'm saying this incorrectly because I'm really talking about the attack, saying that it's not really substantial evidence because there's not enough time that's passed in order to say that equilibrium has been reached. At what point would it be substantial evidence?

MR. LAKE: Well, Your Honor, I think this goes more to the purpose of the Order 1303 hearing, and that was determining the impact. And here the State Engineer is saying something kind of curious. The State Engineer is saying we don't have enough data yet but the impact is acceptable, which is kind of an odd conclusion. I think, you know, the answer to your question probably -- you have to go back to why we had the hearing in the first place, and that was to protect senior water rights and to protect the Moapa dace. And what I'm arguing is that based on the evidence presented, it just simply can't be said that 8,000 acre feet protects the Moapa dace and protects senior water rights.

THE COURT: Right, because what you're saying is there wasn't enough information, so that way his saying that it was 8,000 acre foot or whatever the measurement is, is capricious.

MR. LAKE: Yes, because it's based on -- it's not based on data. So I'm going to skip ahead and address this. I was going to --

THE COURT: No, that's okay. You can go however --

MR. LAKE: Oh, it's okay. I'm just going to have to count slides.

THE COURT: Okay.

MR. LAKE: All right. I think this gets to the crux of the matter. This is Slide 30. I'm showing a quote from *Eureka County v. State Engineer*. And the quote is, "The State Engineer's decision must be made upon presently known substantial evidence, rather than information to be determined in the future."

Now, the State Engineer could have -- probably could have said there's a level at which pumping will not continue this draw down trend. It certainly wasn't 8,000 because the data reflected that 8,000 was still causing a decline. So hypothetically, the State Engineer could have said something like 8,000 is causing a decline; therefore, conservatively, you know, based on the analysis a number, you know, like Southern Nevada Water Authority suggested 4,000 to 6,000 is appropriate. Hypothetically. And I don't think it's appropriate for -- you know, on appellate review for a party to be saying this specific number is correct.

But what the State Engineer did here and what makes the State Engineer's decision capricious is that the State Engineer said -- you know, acknowledged that we're still seeing impacts, but we're going to wait and see and we're

going to -- we might take steps in the future to mitigate those impacts, and that's the basis for the 8,000.

And that's exactly what the Nevada Supreme Court said the State Engineer can't do in *Eureka County*. And in that case what happened was he had a bunch of groundwater applications in support of a mining project and it was demonstrated that these -- you know, extracting all this water for the mine was going to impact springs in the valley where the applications were. It was going to impact senior water rights. And the State Engineer granted the applications with the understanding that they were going to come up with a plan to address the impacts at a later date.

Now, one of the questions presented in that case was whether, you know, that procedurally was proper, and the Nevada Supreme Court didn't reach it because what they ended up saying is, well, you know, regardless of whether this is a proper procedure in the abstract, the idea that -- you know, a promise to adjust and mitigate in the future is not substantial evidence and that's what the standard requires.

So basically I would say that a non-capricious answer to the question would be a figure that actually protects senior water rights and the environment, that stops capture of Muddy River Decree rights and that maintains spring flows above 3.2 cfs. And based on the data that I just discussed with continuing drawn down with those water levels

hovering around 3.2, even though we're seeing decreases in pumping and increase in precipitation it's not a level that maintains 3.2 cfs.

THE COURT: So if you're saying that, you know, figuring out what an appropriate level is needs to take into account the senior water rights, is that a decision that would be better done after the conflicts analysis?

MR. LAKE: I believe you can find that capture is occurring without conducting a conflicts analysis.

THE COURT: Okay.

MR. LAKE: I'm just going to try to see if there's anything else that we need to cover. I'm backtracking slides now. We're on 31. The remaining slides, I don't think it's necessary to really spend a lot of time on these. Basically, I just wanted to address the fact that certain parties below did argue in favor of the system approaching a steady state, but even these parties acknowledge that the system may be in decline; acknowledge that there were declining trends evident in the hydrographs and that more data was necessary to draw that conclusion.

You know, I think, also, one thing to consider is that the State Engineer does not have to base his decision on impacts, on the idea that the system is in equilibrium. That's not the only thing. I mean, this is a pretty open-ended process. And here we have, you know, essentially every

party arguing in favor of equilibrium, saying, you know, it may be headed that way but we don't know, we need more time, more data is necessary. And this came through in the expert reports of the U.S. Fish and Wildlife Service, Nevada CoGen, Nevada Energy, Muddy Valley Water District and the City of North Las Vegas, all essentially restating the conclusion that was drawn in 1303 that the system may be stabilizing but saying, you know, the data gathered in this proceeding really doesn't give us the ability to decide that.

And following up on that, I'd just like to address some statements that the State Engineer made in his briefing to this Court. And this is Slide 30, so I backtracked one slide for this. And this is -- so the State Engineer admitted that data from some wells cut against the conclusion that the system is in equilibrium, noted a downward trend in those wells, and again said that continued monitoring is necessary to determine essentially whether that maximum amount is correct.

So that's the evidentiary portion of our objection to the 8,000 figure. And there's also -- I'd also like to address the public interest component of that.

THE COURT: Which slide is this?

MR. LAKE: This is Slide 32. And again, I think a lot of the legal argument underpinning this is probably more appropriate for the response argument. The reason is is that

the State Engineer in 1309 essentially acknowledged his ongoing pubic interest duty correctly and said that it's clear that the spring flows must be maintained at 3.2csf. That was acknowledged. That it's against the public interest to allow groundwater pumping levels in the Lower White River Flow System that would reduce spring flow to a level that would impair the survival of the dace and could result in a take of the species.

The State Engineer also expressly acknowledged that he has an ongoing duty to protect the public interest. I'm moving on to Slide 33. Available ground water supply that can -- is limited to the amount that would not impair the public interest in overseeing the rights of the Muddy River. It's against the public interest to allow groundwater pumping that would reduce spring flow. And this is essentially grounded in the public ownership of water. The State Engineer's -- both the State Engineer's public trustee's and the State Engineer's statutory duty is to consider the public interest in administering water rights.

But after making these findings that the State Engineer does, in fact, have a duty to consider the public interest in this decision and that providing for the public -- that it's in the public interest to maintain those spring flows at 3.2, fails to make some pretty critical findings, and that also is grounds for this decision being arbitrary

and capricious.

This is Slide 34. Specifically, the State Engineer never actually makes a finding that pumping at 8,000 acre feet annually will maintain 3.2 cubic feet per second. And, indeed, acknowledging evidence that it might not and that we really don't know. And, you know, again, being unable to say this decision is going to do what the State Engineer just said the public interest requires. Also, you know, bases the decision on the conflicts analysis.

These being the two main pillers upholding the 8,000 afa figure, really entirely failing to consider what's necessary to maintain spring flows at 3.2 cfs and to maintain, you know, the habitat needs for the dace that we discussed throughout this presentation, the specific temperature range, the habitat characteristics, and entirely failing to consider the fact that, you know, recovery of the species is going to require a lot more suitable habitat than currently exists.

And that is the end of my presentation. I'm happy to answer any additional questions. If not, I'll sit down.

THE COURT: Yeah, I don't think I have any more right now.

MR. LAKE: Okay.

THE COURT: And let me ask, are you --

MR. LAKE: Your Honor --

THE COURT: So let me ask, do you have a copy of

your PowerPoint that you'll be presenting? I mean, it doesn't have to be today, but if you have a copy.

MR. LAKE: I can provide a copy tomorrow and I'll provide it to all the parties as well.

THE COURT: Yes, that would be great. Thank you.

MR. DOTSON: Do you want us just to email it to the Court and put it in the record that way as a Notice of PowerPoint? This is Rob Dotson speaking, for the record.

THE CLERK: I'm still going to have to print it out, though.

MR. DOTSON: Okay, so we'll bring it. Just one copy or do you want it for --

THE CLERK: I just need one to put in the file.

MR. DOTSON: Your Honor, I think I go next, by the way, on behalf of Muddy Valley Irrigation Company. A few minutes to set up would be appreciated.

THE COURT: Sure.

MR. DOTSON: It's probably time for a break.

THE COURT: Yeah, that's fine. We can take a five minute break, or do you want a longer break? I don't know. I mean, I know it's like --

MR. DOTSON: Well, and not to presume anything or to make any promises, but I do suspect I'll be about an hour.

THE COURT: Okay.

MR. DOTSON: But we have all this time, so who knows,

I might just, you know, chat on, but I don't think so.

THE COURT: Okay. Would you all like to have a five minute break or a ten minute break?

UNIDENTIFIED SPEAKER: The rest of the day.

THE COURT: Why don't I split the baby in half and do fifteen minutes? How's that? Fifteen minutes. So we'll see you at ten 'til.

MR. FLAHERTY: Your Honor.

THE COURT: Yes.

MR. FLAHERTY: This is Frank Flaherty on behalf of Nevada Cogen.

THE COURT: Yes.

MR. FLAHERTY: I believe Nevada Cogen is up next after Mr. Dotson. I just wanted to alert you things are moving much more quickly than I anticipated. In about a half hour I'm going to leave for the airport --

THE COURT: Oh.

MR. FLAHERTY: -- and I'll be here tomorrow morning. But I won't be able to go right after Mr. Dotson if we have time left today.

MR. DOTSON: Yeah, and I'm done. I mean, I think -- I'll conclude the day, I think is what he's saying.

THE COURT: Okay, that's fine. So, did you hear that?

MR. FLAHERTY: Yes. I just wanted to make sure you

weren't looking for me wondering where's Nevada Cogen. Nevada Cogen is on the airplane flying to Las Vegas shortly.

THE COURT: Okay. That's fine. So it looks like Muddy Valley will be going and closing out the day and then you can start the day tomorrow.

MR. FLAHERTY: Great. Thank you.

(Court recessed from 3:35 p.m. until 3:53 p.m.)

THE COURT: Whenever you're ready, let us know.

MR. DOTSON: Okay. If you are ready and everyone's here, I will -- let me make sure this is live, and it is. I'm on? All right. Well, it's in the nature of an appeal, so may it please the Court.

THE COURT: It's all yours.

ARGUMENT BY MUDDY VALLEY IRRIGATION COMPANY

MR. DOTSON: Your Honor, my name is Rob Dotson. Together with Steve King and Justin Vance, who had a large hand in the briefs and may be watching today, I represent or we represent the Muddy Valley Irrigation Company. This is not to be confused, as it is sometimes in brief with the Moapa Valley Water District or the probably non-existent Moapa Valley Irrigation Company. But, in fact, we believe that MVIC, the Muddy Valley Irrigation Company, is an incredibly important player and has a great deal at stake in this hearing.

Slide 2. What we are seeking on behalf of MVIC

is very easy. It's an easy ask for me. I'm asking you to enforce the law and protect the decreed rights that were decreed in this court. And that has been and continues to be our position. It is not MVIC's position that no pumping can occur in the Lower White River Flow System. It doesn't know that. It didn't think it had to present any expert reports or anything of that nature, and so that simply is not its position. But what is its position is that its decreed rights should be protected.

Slide 3. There's been some discussion but actually as I talk today I'm going to try to draw us back to the standard of review because I don't know if it really would be of assistance to the Court, but because we do oral arguments that's what we're supposed to do. And there are factual findings. There are, you'll see, I think somewhat of a dearth of factual findings here. And those, indeed, you know, they deserve a little more deference to the State Engineer, but they still are reviewed to determine if they are arbitrary, capricious or an abuse of discretion. And it's amazing how many of the parties, even if they have polarized views on the results, do agree to that.

And then, and this is particularly interesting, I think, for my argument on behalf of my client, and that is the legal questions. The legal questions are determined without deference. They are de novo. And I think that's the argument

that MVIC makes that is unique and it's particularly easy for this Court to find and reverse on that basis, on a legal and de novo basis.

Now, of course, during the hearing itself there has to be due process. There has to be a full opportunity to be heard. There has to be a description of the sufficient findings that support it, so that substantial evidence has to be described. And today, Your Honor, I'm going to try not to repeat a lot of the things that have already been said. That's why all of the arguments are going a little faster. But there's going to be some repeat, so I'm not going to make any illusion about that.

Moving on to Slide 4. For me, for my client, where this starts is it starts, and really frankly ends at the Muddy River Decree. The decreed rights, and you've heard this I think from almost every speaker today, they are the oldest and they are the most senior in the Lower White River -- what we now call the Lower White River Flow System. But maybe it doesn't matter; right?

You asked a question earlier about, well, the statute says area at -- what is it, 124. Well, the State Engineer eventually divided the state with the help of the federal government into basins. But you know what? At the time of the decree there were no designated basins. There was no artificially created or legally created construct in which

the administration was occurring. There was water that was being put to use and that's the water that is in the decree and that's the water that my client owns or has the right to use and which we ask you today to protect.

Importantly, that water didn't just represent a fraction of the water that was flowing down the Muddy River in 1905 and again still at the time when the decree was entered in 1920, it was all of the available flow. Now, in our briefs, which I'm not going to try to repeat here, we make a big deal, because we think it is a big deal, about the finding of the State Engineer, which is why we're not asking it all to be reversed. At the end, by the way, Your Honor, today I'm going to describe to you exactly what we're seeking, at least in bullet points. As others have said, we have already submitted a proposed order.

But the State Engineer recognizes and factually supports, largely through that same SNWA document which is found starting at the ROA at 41930. And, Your Honor, if you have not read it, I would encourage you to read that entire piece of the record. But the State Engineer made what we think is a correct and probably conservative, but we're willing to live with it, determination that the predevelopment flows were 33,900 acre feet annually, and that that was all of the water -- and this is important -- all of the water of the Muddy River, its head waters, sources of supply and

tributaries. This is out of the decree from this court. And it doesn't say sources of supply that came from Basin 210 or -- it doesn't name a basin because there weren't basins that were numbered there. It's wherever that water comes from, that's the water that's protected in the decree.

Through that decree, MVIC holds most of the decreed rights in the Muddy River, but they don't own all of them. We just happen to be the only party that is in this proceeding. So what are those rights? Well, they're the rights from the decree. They're grounded in the prior appropriation doctrine. In other words, and I think, again, every party who so far has talked today and I think everyone is going to agree that is the bedrock -- pun intended -- of water law in the west. The first person to use the right has the right to continue to use that right within limitations, so long as they don't stop using it and things like that, none of which, by the way, is in play here.

MVIC's rights, though, aren't just described in the decree. They're also specifically, and you've heard some of it and you're going to hear all of it from me, they're specifically protected in some of the statutes. And we have the right to divert a specific sum, which I'm going to talk about and I make a big deal about in my brief, as well as all the other water that doesn't happen to be used that year.

And lastly, and I think this really gets to the

heart of it and why this decision has to be remanded, 1309 really is a modification of the decree, which is why, yes, I agree, this is the court to discuss this and reverse and remand back because the time to do so expired, well, 100 -- like 99 years ago, I guess. In 2023 would be 100 years after the time to revisit it under the current statute.

Now, this comes right from the decree and these are the specific allotment of what we refer to as 36,000 -- or, excuse me, 36.2588 cubit feet per second. We've been talking about that a little bit already when we were talking about the particular springs; that particular spring which is the trigger spring for the MOU. And my client, even though I think there was some misstatement, my client is not a signatory to the MOU.

THE COURT: And this is slide number?

MR. DOTSON: This is Slide Number 5. Thank you, Your Honor. And this shows you both the summer and the winter allotments to MVIC. The summer is 36.25 cubic feet per second and the winter, 35.6. You can do the math, actually, with a calculator. But close to the same, but a slightly lower amount.

Switching now to Slide 7, this is more regarding the quantification of the rights. But this is again that section of all of the water that's coming from the river and its sources. And they have the right to put to beneficial

use upon their lands all waters of said Muddy River, its headwaters, sources of supply and tributaries. And that is at the Decree at page 20 and it's in your record at 33790, and that was on page 7.

This, Your Honor, should have been the starting point of the hearing for the State Engineer. This is what MVIC thought was the starting point for the State Engineer, that we were going to protect all of those sources of water that were decreed and were coming out of the river. What we know now is that was not what was actually the starting point.

And again, we note that it was all of the water that was decreed because we have this language in the decree, which is found -- it runs over from page 22 to 23 and you can find it in your record at 33792 to 33793. This is page 5 to my slide. And this is the "total available flow of the Muddy River and it consumes and exhausts" -- this is the quote -- "all of the available flow of the said Muddy River, its headwaters, sources of supply and tributaries," using that same language again, Your Honor. So it wasn't just a mistake that Judge Orr made 100 years ago when he used this language of all of the sources of supply. This language is purposefully in here and it is in here multiple times. This means that the decreed water was all of the water.

Now, the protection for MVIC comes from the common law and the statutory law and it protects all of those decreed

rights. And because 1309 essentially is a curtailment, a reduction of those rights, as we're about to see and as you already know because you've read the briefs, it violates the decree and it violates the law.

First, it violates the prior appropriation doctrine; first in time, first in right. All water -- and counsel for every party, I think, that has spoken so far, including SNWA that's going to lose water, has acknowledged the fact that all these 40,000 paper rights or certificated rights that were granted afterwards contain the critical language that those rights are granted subject to the existing rights. Well, what were those existing rights? Those existing rights were the rights of MVIC. They were the decreed rights. Now, there might have been some other groundwater rights as well that are junior to them, but it at least was acknowledged and understood at the time that you've got to protect the decreed rights. The decreed rights come first.

The State Engineer acknowledges the duty to protect those existing rights. This is in their answering brief on page 35. And now, by the way, I'm on Slide Number 10, for the record. So the prior appropriation doctrine is the law in virtually every western state, every state where there is a lack or a value in water, especially in the driest state in the union, Nevada.

There should have been no limit to the extent to

which the State Engineer went to protect these rights. And, indeed, there's four statutes, and I'm going to go through each of these in particular, that set forth exactly why the State Engineer, if he's following the statute, if he's following the common law or if he's following the decree should not have entered the order that he did in 1309.

In 533.0245, this prohibits -- specifically prohibits the State Engineer from carrying out duties in a manner which conflicts with a decree. 533.210 prohibits MVIC's rights under the decree from being altered. 533.085 protects against the reallocation of MVIC's decreed rights. And 533.3703 prohibits consumptive use analysis with respect to any decreed rights originating in the Muddy River. And this is, of course, the alfalfa determination, that consumptive use analysis that occurred, but we'll talk some more about that.

The next slide is Slide 12, and I want to look at, as I said, each of these statutes with some detail. In this instance I put up the whole statute on this slide, Your Honor, because it is just so patently clear that the State Engineer statutorily can't do anything that conflicts -- and I know we've got this word conflict multiple times in multiple ways in this case -- with decreed rights, orders, compacts or agreements. And in this case obviously I care about the decreed rights. "The State Engineer shall not carry out his

or her duties pursuant to this chapter in a manner that conflicts with any applicable provision of a decree or order issued by a state or federal court, an interstate compact or an agreement to which this State is a party for an interstate allocation of water pursuant to an act of Congress."

Based upon this statute alone, since this was the only thing that existed was this statute and the decree, MVIC shouldn't really have had to have shown up at all at this hearing; right? And yet, we have an order that we're here today about which curtails them 3,300 acre feet. They didn't think -- my client didn't believe and should have had to have thought that they had to do anything to protect their rights, or it, since it's a corporation. Rather, the order, 1309, says, "capture or potential capture of flows of the waters of a decreed system do not constitute a conflict." No, they do constitute a conflict. It has to be a conflict. If the amount of water that is decreed is no longer being received, how can the plain language not be that that is a conflict?

Turning now, Your Honor, to Slide 13 out of 29, and I want to look at 533.210. And this particular statute, Your Honor, is the finality. This kind of provides the statute of limitations, if you will, for the modification of the decree. It allows an interested party, allows the State Engineer if they realize, okay, there was an error, we need to go back and we need to modify the decree. Well, in the

case of this decree from this court, that period of time ended in 1923 under this statute, which I don't even think was in place yet. But no matter what, we are not within a period of time where this decree should be subject to modification. Yet, that is especially and particularly the effect of what 1309 did. It modified the decree.

Turning to Slide 14, the non-impairment doctrine. In NRS 533.085, vested rights to water are not to be impaired. And again, this is just yet another example of a statute, in this case they picked 1913 because that's when we brought up the water law, that water -- there was some discussion about this or argument about this earlier today. Water right users that were in existence at the time were worried. Well, is there anything that's going to modify us? Oh, no, it's not. Now, these aren't necessarily decreed rights, it could just be vested rights because they're prior to 1913, but in this instance we have the decreed rights. But certainly here, again, MVIC understood and the statute requires that the State Engineer was obligated to protect its rights.

The inconvenient truth is that this statutory scheme and this decree makes it impossible for the State Engineer to do what he is trying to do in 1309. And I appreciate compromise. I'm a civil litigator. I live on compromise. But sometimes there is no compromise. Sometimes, whether you are a judge, whether you're the State Engineer, you have to

simply follow the law. And these statues and this decree required that the State Engineer protect the decreed rights, and that was all of those waters that were in that river. The predevelopment flows are the decreed rights.

Lastly of these statutes that I wanted to discuss in detail is NRS 533.3703, and this simply should not have been applied. I think that Mr. Taggart may have talked about this as well, but this is the consideration of consumptive use of a water right and the proposed beneficial use of the water. And as you can see in Section 2(b) of the provision, they eliminate any question of this. Yeah, we can complain about the Legislature, but here they use -- we don't have to look at legislative history to know what they meant. They use this decree, this river by name. And so we know that this sort of an analysis was statutorily improper here.

I want to talk now about the role of the public trust doctrine.

THE COURT: What's the slide number?

MR. DOTSON: This is Slide Number 16. Thank you, Your Honor. Some might argue, well, wait a second, in the spirt of compromise and equity is this really fair? Is it really okay that these people have had this water for 100 years? Yes. And that's in fact the finality and the importance that the decrees have, so we can know that this water is owned by this entity. This entity has the right

to use this much of that water and that entity, government, everyone can plan based upon it. Whereas, those who come separate or come later know that, well, I've got this water, but only if that water is really there, only if that water continues to flow, only if that water continues to be available to me.

And notably, and I'll say it again, MVIC is not saying that there is no water that can be pumped. That's not what they're saying. What we are saying is based upon the evidence that we saw at 1309, it seems like that 8,000 isn't right. It's not to say that there isn't a number, but it looks like from the evidence it's got to be less than that. And this pubic trust, this protects the public interest to allow the enforcement of decrees and the enforcement of the law.

Up to Slide 17, Your Honor. It's our position that 1309 is illegal with respect to MVIC because of just what we were talking about just now. The determination that 8,000 acre feet can be pumped in the Lower White River Flow System and the determination that the loss of 3,300 acre feet of water a year is not a conflict with the decree, those concepts don't seem to reconcile. And the determination of 8,000 acre feet, as the Center for Biological Diversity just pointed out, doesn't seem to be supported by substantial evidence. I'm going to review in particular the evidence that the State

Engineer does set forth, which is why to my client the order seems internally inconsistent.

And clearly, based on the evidence he does say in his order, the pumping of 8,000 acre feet will not protect the decreed rights. It might protect the decreed rights that are left, but it won't protect all of the decreed rights, and this is where we part ways with SNWA on that issue. We believe that the pumping should be less than 8,000 acre feet. It does not protect predevelopment flows of 33,900 acre feet annually and therefore it's a violation of MVIC's property rights when you take the water away.

Turning now to Slide 18. And this is a discussion -- I want to discuss now the substantial evidence. I have already talked about the de novo basis for a review and those multiple statutes and now I want to discuss the factual issues.

So there's an admission, and this is where I say there's an internal inconsistency in this language. There's an admission by the State Engineer here that 8,000 acre feet is the maximum amount that may be pumped without causing further declines, and that number may be less. In fact, 8,000 acre feet a year, it is clear from the facts that are in the decree, does not allow the Muddy River to return to predevelopment flows. There's not even like a -- lip service I think is the term you use -- in the 1309 order that suggests

that that might happen some day in the future. It's apparently laughable. It's not laughable to my client.

Mitigation is not my client's first selection. My client's first selection is to have the water that they were decreed. It seems to be a universal agreement that additional study and observation is required even to figure out if the 8,000 will hold us at steady state or equilibrium. So steady state and equilibrium, what that means -- and I'm not here testifying, I'm testifying to my understanding -- is that the water level generally stays about where it's at. It no longer keeps going down. It may not quite be there, but it generally stays where it's at. But nobody is saying, oh, yeah, and then we're going to go back up to a water level where the flow is going to increase back to 33,600 acre feet annually. That's not in the record. It's not in the order.

And how is it that it can be substantial evidence when what your suggesting doesn't even match the standard that you're proposing to measure it to? It just -- it seems internally inconsistent. And again, I know what I'm saying may not be popular to most of the humans in this room, okay. I get that. And as I say, I appreciate, generally, compromise. But sometimes the law is the law and you have to follow the law. And in this instance the State Engineer did not and that's why we have this review.

Let's look at the evidence that did exist. Now I'm

on page 19 or Slide 19. The State Engineer in his brief cites to pages 58 through 63 of the order in support of the 8,000 afa. So let's look at those pages. But there's no analysis there that's adequate to meet the standard of review. It's the beginning of the analysis. If you look at what was determined, a sum was reasonably anticipated.

This goes to the scope of the hearing and, again, my client's expectations. And this will kind of -- we'll talk about this again when I get to due process, which will be a brief discussion. But this is frequently cited in the brief's language that told us what we thought was going to be decided. "The purpose of this hearing is not to resolve or address allegations of conflict between groundwater pumping within the Lower White River Flow System and the Muddy River decreed rights." Everybody seems to have agreed. Okay. Then we're not going to figure out which rights are doing what. That is not the purpose of the hearing. That's not what we are going to decide. "The purpose of this hearing is to determine what the sustainability is, what the impact is on the decreed rights, and then address resolving the allegations of conflict should that be a determination that will be addressed at a future time."

In other words, here we're trying to figure out the impact. Is pumping actually even affecting the flows of the Muddy River? You know, my client shows up thinking, well,

I guess it's possible that we find out that this is all due to climate change or something else; right? That wasn't the factual determination. In fact, the factual determination was that it wasn't due to climate change and it was due to pumping.

And so there was an impact. The answer to the second question was in the affirmative. There was an impact. And that impact was quantified; going back to that back slide for a second because these kind of flow together. This is 19 again. It was, as my client understood, to determine what the sum of the impact was. Ironically, what the State Engineer here did is they did figure out the sum and then ignored it and found it not to be a conflict.

Moving to Slide 21. So this continues on. This is actually, I guess, a continuation, but on the record it will be Slide 21. The State Engineer argues three locations for its support for this evidence. One is the report submitted by NVE at 41876. One is the SNWA report at 41992-993. And lastly is the testimony of Rick Felling, which was the Nevada -- the NVE expert that the system is approaching equilibrium.

The thing is that this evidence does not address what is necessary to return the Muddy River to its decreed flows. Again, that seems to have been entirely ignored in 1309. This evidence, to the extent it proves anything, proves that they're trying to figure out what the steady state is

or what will keep up at, or are we at a steady state, even. And I guess it's useful, this is what we're going to do now, to look at what that evidence actually shows. And certainly, though, what is clear is if we're not even sure it's at a steady state yet at 8,000, and I think Mr. Felling's testimony was actually 7,000 to 8,000, how is it possible that it could be more than 8,000 and still return the Muddy River to its flows? It doesn't. As I said in one of my briefs, I think, my high school physics class told me that wasn't going to happen, so I don't have to be an expert to know that.

So what really is happening? There is an acknowledgment in 1309 that there's a curtailment, which is just fancy water lawyer for you're taking our water. We're no longer getting the water we're supposed to get. And the decree was based on 33,900 acre feet annually. The State Engineer acknowledges in 1309 that the Muddy River after the pump test has not returned to those flows and that, in fact, since 2015 the flows have averaged 30,600 acre feet annually. And so that's where I just do the math and say, okay, well then my client is missing 3,300 acre feet and that's why we're here.

And the State Engineer makes the determination it's not due to drought, it's not due to climate change, it's due to pumping. And then, stunningly, we jump to but that's not a conflict and so we're going to allow pumping to continue

at 8,000 acre feet, even though there's no reference or suggestion that it's going to return to predevelopment flows. So the result being the loss of 3,300 acre feet. That was Slide 22.

Slide 23. Well, I guess this kind of already becomes pretty obvious but we'll go through this slide anyway. How does 1309 violate the decree? Well, we're supposed to have 33,900 acre fee. 1309 says the current flow is 30,600 and the pumping is causing the reduction and at best we're getting equilibrium or steady state. 1309 then allows pumping levels to continue by saying that reduction of 3,300 does not conflict with the decree and has no suggestion as to how or if -- apparently abandoning the mere possibility that the river could ever return to 33,900.

So that's a violation and then in order to authorize it or circumvent this court's decree, there is an illegal application of a consumptive use analysis 100 years after the decree became final. It's improper and it's violative of Nevada law.

Not that you need -- to kind of answer a question you asked earlier, I think of Mr. Taggart, I don't think you need to necessarily get to the due process. What we're going to ask you to do, as you're going to see at the end of my PowerPoint here, is to remand with specific instructions to the State Engineer. Now, one of those instructions should

probably relate to due process because I think everybody agrees there was an issue there. But MVIC also feels that its due process rights were violated.

There's no question everyone in this room or everyone who has talked so far and I bet you everybody who is going to talk is going to agree that there are property rights. And there's no question that due process demands notice and a reasonable opportunity to be heard. Now, some have said, well, MVIC had notice. They were there. They presented a witness. Yes, we had notice that there was going to be a hearing and we were the only person holding or entity holding water on the Muddy River that showed up, to my knowledge.

But it should have been more of a curiosity than a need to actually participate because the notice that was received -- and that is indeed the importance of notice is what were you told -- was that the impacts on those water rights would be determined. In other words, there was already a recognition in the notice that this is your water right. Everybody knows what the water right is. It's in a decree. Everyone has known for 100 years. And we're going to figure out if it's being impacted by pumping, and if so, how much it was.

Turning to Slide 25, this is that same quote with a little bit different emphasis, though, but I think at this

point you've seen it enough. But the point is that -- and I've bolded in the second paragraph -- my client understood and it was reasonable notice for them to understand this because it was, you know, coming from the dais, that they were going to have a hearing to determine what the impact is. My client can therefore show up and sit in the back row if it wants and say, geez, I can't wait to see what my impact was and how much water I'm going to give back, or if it's for something else and I've got nobody to blame, and that should have been all they would need.

And had they known that, in fact, what was actually going to be determined was a consumptive use analysis, what was actually going to be determined was how much water they needed, then the case that we would have presented would have been entirely different because that would have been obviously wrong. It would have been wrong legally. So the briefs would have been different and probably the evidence would have been different, too. My client should never have to incur the expense -- should not have incurred the expense of hiring me. You should never have to incur the expense of hiring an expert to re-prove any rights or protect its rights. But at least if they had had appropriate notice that that's what the State Engineer was considering, then they could have made the decision as to whether to protect those valuable rights.

That was Slide 25. Slide 26 is probably a rehash

of what I just said. MVIC's due process rights were violated because the notice, it was very informed. They had a very informed notice because the State Engineer went out of his way to explain that this was going to be a bifurcated process. This was going to be a multi-phase process. And by the way, in this first phase we're going to start from the premise that we're protecting the decree. And that's simply not what happened. The Muddy Valley Irrigation company believed that the State Engineer was going to protect its rights and it did not.

The starting point in this next phase that they thought was going to occur, that it thought was going to occur was going to be to figure out, okay, if it is pumping, what pumping is it that is causing the interference and how do we get us back to as good as we can get at least. And if we're not that far, well, then what else do we do? Mitigation. But that conflict analysis should have been focused, in my client's mind, on what pumping is impacting the flow of the Muddy River, the most senior rights, and then returning those rights.

Turning to Slide 27. The State Engineer did, in fact, make a determination, unfortunately. The capture or potential capture of flows of the -- excuse me. Let me read it. It's in quotes, so I'm going to say this right for the record. "Capture or potential capture of flows of the waters

of a decreed system does not constitute a conflict." That's the order, 1309 on page 60, Record on Appeal 61. That's weird. Oh, page 60 of the order, okay. There must be a cover page.

That statement should have sent not just ripples but waves -- again, pun intended -- throughout the water law establishment of this state because what does this mean? It means that every decreed system in this state, my clients, my other clients that have waters on other decreed systems, they're all in jeopardy because none of those decrees are now necessarily solid. None of those water rights are necessarily solid.

Maybe they're all subject to an analysis of how much do you actually need because, remember, even though there's a statute that prohibits the consideration of consumptive use, this whole thing wasn't started because MVIC came in and said, hey, we're going to change a use or change a point of diversion or any change that was initiated by MVIC. That wasn't how this started. I mean, I guess, arguably, I'm not sure when it started. Maybe it started when Paul Taggart was born in 1966 and Eakin decided, hey, this water is all connected. Or maybe it started when Hugh Ricci decided to issue 1169 and said, hey, maybe we've got too much water permits out there. But the point is it wasn't started because of any analysis or request by my client. My client's rights

should have just been protected.

And this particular language in this particular order, if it became established law in this state, it does jeopardize the public trust doctrine because now you don't know that those decreed rights can be relied upon in the future. That's the impact of this. And so by using that language, which I'm not quite sure but I'm hoping to hear from the State Engineer's counsel tomorrow that they are stipulating to strike that language. But that was -- I saw something in their briefs that sounded like maybe that's it.

THE COURT: Well, they kind of suggested, like, if you think that this --

MR. DOTSON: Right.

THE COURT: Then, you know, strike that and affirm everything else; right?

MR. DOTSON: You know, it kind of reminds me when Justice Becker once stopped the argument, stopped the clock during an appellate argument for me and tried to get the other side to agree to something. Maybe it will happen tomorrow; just a little foreshadowing.

But no matter what, we know that the State Engineer failed to protect these decreed rights. In fact, they struck a portion of those rights by allowing that reduction. At least that's the view my client has. I know others disagree. And it resulted in the loss of 3,300 acre feet annually.

That was Slide 27.

All right. Slide 28. This is what we're asking you to do, Your Honor. We're asking you to affirm that there is indeed substantial evidence that supports Order 1309's determination that the predevelopment base flow of the river is approximately 33,900 acre feet annually. If you read that SNWA report and you look at the evidence in the record, there is a lot of evidence that it's higher than that. But, okay, this was in the order. Like I said, I'm a guy that's based on compromise. My client wants to be reasonable. That could be a determination that you could remand this with. That is your base flow. We'll support that.

We'll also support and you can direct that, yes, there is substantial evidence that the river has flowed approximately 30,600 acre feet since 2015. Thus, leading to the curtailment of 3,300 acre feet of my client's water.

And by the way, I should speak to that. If you looked at that chart way back on -- well, that early slide where it showed everybody's water rights, I'm going to go to it in a second. I'll just stay with what slide this is. I've got plenty of time. Slide 6. Let me just fly back to that quickly. So this shows everybody's -- this comes from the record at 33798 and this is -- you can tell from the type this is from the original decree documents. And I focused and highlighted in here on the Muddy Valley Irrigation Company's

rights, but you see the other right holders, which are much smaller, admittedly, in cubic feet per second. But -- and I don't have this map, but I think both Mr. Taggart and Mr. Lake have maps that show where the Muddy Valley Irrigation Company's rights are. And I think the Vidler brief mentions this as well.

The point of diversion for the Muddy Valley Irrigation Company is at the end of this stream system where the water is put to use, which is probably why the decree says, oh, and Muddy Valley Irrigation Company gets all the water that's left, in that second grant. In our view there's two specific grants. There's this specific grant and there's language here; right? Well, that's great and I guess it was probably great for my client for the last -- for the 100 years -- you know, it's the 100-year anniversary or a little less than that. But it's not great when the flow is not what it is supposed to be, when the flow is not the same as what the decree says because, then, you know who gets shorted? The guy who goes last.

And so in a very real sense, which is probably why you see MVIC up here, not only the fact that they have the largest quantity of rights, that's who has been impacted by this because they get the water at the end. Not only did they get -- not only because of the separate grants that they would have gotten any water that was left had that pumping

not occurred, but also because of their physical position at the end of the river and end of the flow system.

All right. So going back to my last slide. I'm sure there was a way for me to -- all right. So what else are we asking you to do? To reverse and remand 1309 with these instructions. And these are abbreviated versions of what we have in our proposed order.

THE COURT: Proposed findings.

MR. DOTSON: Let's make it clear, Your Honor, that the State Engineer -- it shouldn't have to be clear. I know the statute says so, the law says so, but let's make it clear on remand you don't have any authority to modify a decree; not after three years after the decree was entered. And you don't have any authority to modify the Muddy River Decree.

Let's remand with a specific instruction that this should be -- your starting point, your foundation point should have been, as it implied that it was, to return the Muddy River flows to 33,900. This goes back to, you know, this last page where I said let's start with 33,900 that you found. You found that, State Engineer. We agree. This Court agrees. At least that's what we hope the Court will do. Recognize that therefore approximately 3,300 acre feet of water is being unlawfully intercepted someplace, somehow, on an annual basis. And it's up to the State Engineer to do his job or her job if we have a female State Engineer at the time and determine the

sum of water that can be pumped and where it can be pumped, I guess -- that could probably be fine-tuned a little bit -- while allowing the Muddy River to return to predevelopment flows.

Now, I acknowledge on behalf of my client it may be that the State Engineer determines, well, you've got to pump this much for awhile and then we can pump more after that. It may be that you have to have further study after you stop pumping. So instead of saying no more than 8,000, it has to be some lower number and then we see if we start to gain flow in the river. But you don't have to make that determination. I know you've asked from the bench a couple times today, well, wait a second, what if we do this or do that? And counsel has generally shied away from answering that.

THE COURT: Sure. Right.

MR. DOTSON: But I'm not going to be quite so shy, I guess. I'm not going to -- I don't know the specific number. I'm not that smart and I'm not a hydrologist. I don't even play one on TV. But others can figure it out and that's the State Engineer's job. And what you can do, you don't have to figure it out, either. That's the great thing about -- the answer to your question is you don't need to know because what you can do is you can order the State Engineer, because you're the Court, to make that determination. You make the determination, State Engineer. You're supposed to be the

expert. You've got hydrologists on staff and you can take all this evidence. So what is that sum? Where is that water that can be pumped that will return it to the predevelopment flows?

And lastly, Your Honor, we would ask that you make it very clear that a consumptive use analysis is improper. It cannot be applied to the Muddy River, not only statutorily but for all the other reasons that we've set forth as well in this argument. It just -- there should be no hypothetical alfalfa fields. It's not a question of how much water is needed. You know, it's not a question of, well, if we -- I think one of the briefs suggests something like, you know, 17-18,000 acre feet annually. Well, there's no science to know that the river will even flow if you pump that much more water out of this.

And we don't have to make that decision. You don't have to -- you can just say, well, listen, you follow the decree. This is the decreed waters. And, by the way, it is improper to make any analysis that is an attempt to circumvent the holding of the decree, because that's simply what it was. And I'm sure it was an effort to compromise and be reasonable, but in that compromise it violated the decree.

And that's all I have for you today, Your Honor. Thank you.

THE COURT: All right, thank you.

MR. DOTSON: Do you have any questions?

THE COURT: I don't think I do right now.

MR. DOTSON: All right. Thank you.

THE COURT: Thank you.

All right. So with that, I guess we will see everyone tomorrow at 8:30. And then I think we're going to be starting with Nevada Cogeneration Associates 1 and 2, and then we'll go to Georgia Pacific and then Lincoln and Vidler, and then I think we go to the State Engineer. Correct?

UNIDENTIFIED SPEAKER: Yes.

THE COURT: Okay. And then the subsequent. Are there any other housekeeping matters that need to be addressed today? No? All right, we'll see everyone tomorrow.

(Court recessed at 4:45 p.m. until the following day, Tuesday, February 15, 2022, at 8:30 a.m.)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Liz Garcia

Liz Garcia, Transcriber
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

SOUTHERN NEVADA WATER AUTHORITY, Plaintiff, vs. NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, Defendant. AND RELATED CASES & PARTIES	)	CASE NO. A-20-816761-C DEPT NO. I **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE BITA YEAGER, DISTRICT COURT JUDGE

TUESDAY, FEBRUARY 15, 2022

PETITION FOR JUDICIAL REVIEW - DAY 2

SEE NEXT PAGE FOR APPEARANCES

RECORDED BY: LISA LIZOTTE, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

Case Number: A-20-816761-C

A P P E A R A N C E S

FOR LAS VEGAS VALLEY WATER DISTRICT, AND SOUTHERN NEVADA WATER AUTHORITY:	PAUL G. TAGGART, ESQ.
FOR NV STATE ENGINEER, DIVISION OF WATER RESOURCES:	JAMES N. BOLOTIN, ESQ. Sr. Deputy Attorney General MICHELINE N. FAIRBANK, ESQ.
FOR LINCOLN COUNTY WATER:	WAYNE O. KLOMP, ESQ.
FOR VIDLER WATER COMPANY:	KAREN A. PETERSON, ESQ.
FOR NV COGENERATION ASSOCIATES NOS. 1 AND 2:	FRANCIS C. FLAHERTY, ESQ.
FOR MUDDY VALLEY IRRIGATION:	ROBERT A. DOTSON, ESQ. STEVEN D. KING, ESQ. SCOTT MIDDLETON, ESQ.
FOR CENTER FOR BIOLOGICAL DIVERSITY:	SCOTT LAKE, ESQ. LISA T. BELENKY, ESQ.
FOR REPUBLIC ENVIRONMENTAL TECH., AND GEORGIA-PACIFIC GYPSUM:	LUCAS M. FOLETTA, ESQ. SYLVIA L. HARRISON, ESQ.
FOR DRY LAKE WATER, LLC, AND APEX HOLDING COMPANY:	CHRISTIAN T. BALDUCCI, ESQ.
FOR BEDROC LIMITED, LLC, WESTERN ELITE ENVIRONMENTAL, AND CITY OF NORTH LAS VEGAS:	NO APPEARANCES NOTED
FOR MOAPA VALLEY WATER DISTRICT:	GREGORY H. MORRISON, ESQ.

FOR COYOTE SPRINGS INVESTMENT:	WILLIAM L. COULTHARD, ESQ. KENT R. ROBISON, ESQ. EMILIA K. CARGILL, ESQ. BRADLEY J. HERREMA, ESQ. HANNAH E. WINSTON, ESQ.
FOR SIERRA PACIFIC POWER CO., AND NEVADA POWER COMPANY:	JUSTINA A. CAVIGLIA, ESQ.
FOR THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS:	SEVERIN A. CARLSON, ESQ.
ALSO PRESENT:	JOHN LEE

I N D E X

LAS VEGAS, CLARK COUNTY, NEVADA, FEBRUARY 15, 2022, 8:29 A.M.

*** * * * ***

THE COURT: Southern Nevada Water Authority versus Nevada State Engineer and all of the other cases that it has been consolidated with.

Here on behalf of Las Vegas Valley Water District and Southern Nevada Water Authority?

MR. TAGGART: I'm here, Your Honor. Good morning. Paul Taggart.

THE COURT: All right. Thank you.

Here on behalf of the Nevada State Engineer?

MR. BOLOTIN: Good morning, Your Honor. James Bolotin. Once again I have Micheline Fairbanks, deputy administrator. And the State Engineer will be here once his flight lands.

THE COURT: Sometime in the afternoon hopefully.

MR. BOLOTIN: Yeah.

THE COURT: Okay. Let's see. Lincoln County Water District.

MR. KLOMP: Good morning, Your Honor. Wayne Klomp on behalf of Lincoln County Water District. And with me is the general manager, Wade Poulsen.

THE COURT: Okay. Great. Thank you.

Here on behalf of Vidler?

MS. PETERSON: Good morning, Your Honor. Karen

Peterson. And also I have the Vidler representatives here, Ms. Palmer, Mr. Bushner, and Mr. Hartman.

THE COURT: Okay. Great. Thank you.

And here on behalf of Nevada Cogeneration Associates Nos. 1 and 2?

MR. FLAHERTY: Good morning, Your Honor. Frank Flaherty, Dyer Lawrence, LLP.

THE COURT: Okay. Thank you.

Here on behalf of Muddy Valley Irrigation Company.

MR. DOTSON: Good morning, Your Honor. Rob Dotson. I have with me Steve King and Scott Middleton and maybe members of the board who I think are BlueJeans. Thank you.

THE COURT: Okay. Great. Thank you.

Here on behalf of the Center for Biological Diversity?

MR. LAKE: Good morning, Your Honor. Scott Lake. I have John Lee (phonetic) and Ms. Belenky on BlueJeans.

THE COURT: All right. Thank you.

Here on behalf of Republic Environmental Technologies?

MR. FOLETTA: We're Lucas Foletta, and Ms. Sylvia Harrison is on BlueJeans.

THE COURT: Okay. Here on behalf of -- oh, and you're also here on behalf of Georgia-Pacific; is that correct?

MR. FOLETTA: That's correct.

THE COURT: All right. And then here on behalf of Dry Lake Water and Apex?

MR. BALDUCCI: Your Honor, Christian Balducci on behalf of Apex and Dry Lake. On BlueJeans I believe is Lisa Cole. She's a client representative and consultant.

THE COURT: Okay. Thank you.

Here on behalf of Bedroc Limited, LLC? I think she was on BlueJeans yesterday; right?

(Pause in the proceedings.)

THE COURT: All right. It looks like they're missing for today.

All right. Moapa Valley Water District? Is Mr. Morrison --

MR. TAGGART: I think Mr. Morrison is en route.

THE COURT: Okay. Coyote Springs.

MR. HERREMA: Good morning, Your Honor. Brad Herrema on behalf of Coyote Springs. I have Emilia Cargill with me. We have Kent Robison, Hannah Winston and Bill Coulthard on BlueJeans.

THE COURT: Okay. Great. Thank you.

Then here on behalf of Sierra Pacific Power and Nevada Power?

No one. Okay.

UNIDENTIFIED SPEAKER: I think she's also en route too.

THE COURT: En route.

Okay. And then here on behalf of the Church of Jesus Christ of Latter-day Saints?

MR. CARLSON: Good morning, Your Honor. Sev Carlson on behalf of the Church.

THE COURT: Okay. Thank you.

Have I missed anyone?

No. All right. So I guess I will just see.

Mr. Flaherty, are you able to -- is your tech working, or are you still trying to figure it out?

MR. FLAHERTY: It's not, Your Honor. I plugged it in, and it's just flashing light.

THE COURT: Oh, shoot. Okay. Can you call IT?

Have you already called IT?

UNIDENTIFIED SPEAKER: No, I need to.

THE COURT: Yeah. Can you call IT.

All right. I don't want to deprive you of your full presentation.

MS. CAVIGLIA: Your Honor, I apologize. This is Justina Caviglia from NV Energy.

THE COURT: Okay. Great.

MS. CAVIGLIA: I just got into Las Vegas.

THE COURT: Thank you, Ms. Caviglia. And you're also here on behalf of Sierra Pacific Power Company?

MS. CAVIGLIA: That is correct.

THE COURT: Thank you.

MR. ROBISON: Your Honor, I don't know. I just got on as well. This is Kent Robison for CSI on BlueJeans.

THE COURT: Oh, yes. Your colleague let us know that you were on BlueJeans. Thank you.

MR. ROBISON: Thank you, Your Honor.

(Pause in the proceedings.)

MR. MORRISON: Your Honor, also this is Greg Morrison. I just arrived in Las Vegas, and I should be in the courtroom shortly.

THE COURT: Okay. All right. Thank you. And you're on behalf of Moapa Valley Water District?

MR. MORRISON: That's correct, Your Honor.

THE COURT: Thank you.

(Pause in the proceedings.)

THE COURT: Are you ready?

MR. FLAHERTY: I am. Thank you, Your Honor, for your patience.

THE COURT: Oh, no worries.

Can you call IT and let them know we got it figured out. Thank you.

(Pause in the proceedings.)

THE COURT: Okay. Are we ready?

MR. FLAHERTY: Yes, Your Honor.

THE COURT: All right. You may proceed.

MR. FLAHERTY: Well, I said I was ready, Your Honor, but I --

THE COURT: That's okay.

(Pause in the proceedings.)

MR. FLAHERTY: Thank you.

THE COURT: All right.

ARGUMENT FOR NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2

MR. FLAHERTY: Good morning, Your Honor. I'm Frank Flaherty. I'm here on behalf of Nevada Cogeneration Associates Nos. 1 and 2. I may refer to them as Nevada Cogen, and CA 1, and CA 2 or just NCA.

I want to start by just giving you some -- a little bit of background about NCA, and this could be found in the record of appeal Number 580 at page 39732.

NCA 1 and 2 commenced commercial operation about 29 years ago, and they've been in continuous operation using the full amount of their fully certificated water right that entire time. NCA sells 100 percent of the 170 megawatts of electricity that it generates to NV Energy under a long-term power purchase agreement to supply electricity to folks right here in Nevada.

NCA is on environmentally efficient operation. The waste heat and waste water from the two generation plants are sent to other factories, facilities that manufacture sheet rock right there in the area.

THE COURT: Hang on just a second.

Whoever is on BlueJeans, can you please mute yourselves. Thank you.

MR. FLAHERTY: And on wrapping up this point, NCA has been part of the economic engine of Southern Nevada for 29 years, and if it's going to continue in that fashion, it's vital that it continue to be able to use its fully certificated water rights.

The State Engineer's decision was arbitrary and capricious because basically it's a fundamental property -- a fundamental proposition he lacked the authority to create what I'm calling a superbasin.

The State Engineer's authority is limited to that which the legislature explicitly or implicitly delegates to him.

Now, this isn't the first time you've heard this this week, Your Honor, probably not the last, but I think we want to talk a little bit about what that means. Because what we're talking about here is separation of powers; right? We all learned about that in middle school, high school, college. Hopefully we all know what it is by now, okay, but a case like this really brings separation of powers to life. Because in this case, the State Engineer has put himself in a box. He's created a situation where the irresistible force is colliding with the immovable object. And I'll explain that a little bit,

okay. A primary facet of Nevada water law is first in time, first in right. That's not the first time you've heard that either, okay.

And there can't be any serious dispute that for decades, for decades, the State Engineer has administered groundwater and surface water separately, okay. So on one silo or maybe bucket is a better analogy since we're dealing with water, in one bucket, he manages surface water rights. In another bucket he manages groundwater rights.

And actually, within those two big buckets there's lots of smaller buckets; right? So there's a bucket for the Muddy River system; right? There's a bucket for the Humboldt River; right? All these surface water systems have their own separate bucket.

Over in the groundwater bucket, you have 200 plus. I think it's 232 different buckets for the groundwater basins that the State Engineer has delineated over the years. So he's always managed these buckets separately.

THE COURT: Let me ask you a question. So in talking about, you know, managing these rights separately and now there is the conductive management. Is that what it's --

MR. FLAHERTY: Yes, that's what it's called.

THE COURT: Yeah. The managing them together, has there ever been a consideration of how the groundwater rights and surface water rights interact before?

MR. FLAHERTY: Well, that's all new, and I think you've been hearing some about that from the other parties, right. The other parties have talked about Order 1169, you know, because it's mysterious. This water just pops up, right, in -- in Arrow Canyon, right, and suddenly we have a river. And so that was a head scratcher for years, and then slowly, I guess scientists are still trying to put the pieces together.

But to my knowledge, Your Honor, you know, this is the first case where it's been presented squarely, okay. And we're going to talk about that a little, but I think you've already heard about that from some of the other parties, and I'm going to give you some legislative insight on that, I hope.

Now, going back to the separate nature of these two big buckets, right, relying on that, right, parties, individuals, companies like Nevada Cogeneration Associates, they've acquired senior groundwater rights, okay, in their hydrographic basins at significant expense, right. So Nevada Cogen, they acquired the most senior water rights in Black Mountains Area hydrographic basin. All right.

In relying on that, they spent hundreds of millions of dollars building these two power plants, operating for 29 years, supplying -- excuse me, supplying electricity to Nevadans. So they've relied on that. Nevadans are relying on that. And those Nevadans they're the owners of the water ultimately, okay, and this is a good use of their water, right,

generating electricity.

But now the State Engineer, with the stroke of a pen alleges that he has the authority to just merge these two separate systems, okay. Oh, you know what, right here by the Muddy River and these surrounding basins, we're going to go ahead and just do conjunctive management. That is the irresistible force in the immovable object. One of them is senior groundwater rights, and the other one is senior surface water rights.

So we've got this collision now.

The State Engineer would have you believe that the legislature delegated to him, an unelected official, the authority to both first create this conflict. I think Mr. Robison called it a mega mess, right.

THE COURT: I think so.

MR. FLAHERTY: Right. And also, the authority to resolve it. And, Your Honor, if you think about that, if you think about what's at stake here, that's really a preposterous proposition, the idea that the legislature is just going to hand this time bomb or this bomb off to the State Engineer.

The administrative state in Nevada, like any other state here really in the United States, it's a fundamental political compromise between the legislative and executive branches.

The legislature delegates authority, sometimes

begrudgingly, to the administrative agency, and then, of course, the executive, the governor signs off.

So the State Engineer is asking you to believe that when the legislature passed and the Governor signed SB47 in 2017, that's the bill that created 533.024, sub (1), sub (e). That's the part that says it's the policy of the State of Nevada to engage in conjunctive management, right. He's asking you to believe that when they passed that policy statement they gave him the authority to engage in conjunctive management and create this massive conflict that we're talking about.

But the reality is, Your Honor, even he knows better than that. And how do we know that? We know that from this first slide. This first slide is actually from my reply brief, but the block quote in the first slide is from minutes before a meeting of the assembly committee on natural resources, agriculture and mining, 2019, February. And this is the State Engineer talking. And he says,

> While the legislative declaration, NRS 533.024 helpfully recognizes the hydrological connection that often exists between groundwater and surface water sources, existing statute does not provide the framework necessary to effectively implement the legislature's policy direction.

He goes on and he says,

Assembly Bill 51 seeks to incorporate conjunctive management into Nevada law while balancing the interest of these formerly separately administered water sources in a legally defensible manner.

THE COURT: So let me ask you, Mr. Flaherty, because I know that a lot of your brief touched on this issue, the fact that they had brought forward this proposed Bill and that it was within that testimony that they acknowledge that they didn't actually have that authority.

Is that something that this Court can consider when it's not actually in the record below on this case?

MR. FLAHERTY: Well, it is, Your Honor. I mean, I think you can take judicial notice certainly of the minutes from the legislature's committee meetings. I think you're entitled to do that, certainly, and it's appropriate.

And it speaks to -- it speaks to what the State Engineer's authority is.

I mean, it's interesting. On the one hand, the State Engineer I think made an argument somewhere in their brief that you want to defer to my own interpretation of my own authority, which I think is a pretty slippery slope, but if you're inclined to go there, go ahead and defer to this interpretation right here, where he says he doesn't have the authority, respectfully, Your Honor. Okay.

And this quote illustrates a couple of things. The first one, the little one I wanted to point out, you see there at the very last -- the second-to-last line, the State Engineer himself has acknowledged that historically these sources have been administered separately, okay. So again, in his own words, he's acknowledge this, okay. This is the way it's been.

And what he's talking about existing statute up here starting on line 3, he's talking about 533.024, and he says that's not enough. He says it's a policy direction that's helpful, but I don't have the tools I need to move forward with conjunctive management, okay.

And that was Slide 1 by the way if I didn't state that for the record, Your Honor.

THE COURT: Oh, yes. Please do, yes, thank you.

MR. FLAHERTY: So it was plain to the State Engineer in 2019 that 533.024 did not confer authority upon him to move forward with conjunctive management, and that lack of authority is even more acute in this situation where he's supposedly forming this super basin. He's not just putting together one groundwater basin in the surface source. He's putting together six plus seven groundwater basins in the Muddy River streams.

THE COURT: So it's really conjunctive management and then joint management of the separate basins?

MR. FLAHERTY: Yes. Yes. I guess really, Your Honor, if we're going to try to get scientific about it, I

guess it would all be considered an exercise in conjunctive management, but I guess my point is that he didn't have the authority to engage in conjunctive management, and I think this situation is even more egregious because it expanded to several different hydrographic basins simultaneously.

THE COURT: Right. Well, so, yeah, and I'm sure that you've seen that there are other petitioners that have argued the other point that he doesn't have the -- he or she, the Nevada State Engineer doesn't have the authority to jointly manage those basins either.

So I think were talking about two separate things. Is that --

MR. FLAHERTY: Your Honor, I think you're right. That's two, and I'm not sure if that -- well, I guess if other parties have raised that second issue, the joint management of the basins, that is before you as well.

And I keep on referring to him as him.

THE COURT: I guess at that time it was a him. So I --

MR. FLAHERTY: Because it's been him for a while now, and it still is him, whoever him is; right?

THE COURT: Okay. Yes.

MR. FLAHERTY: So that's why I am doing that, Your Honor.

THE COURT: Sure.

MR. FLAHERTY: So in his briefing, the State Engineer has not provided any persuasive explanation to you or to me at least of what has changed since he made this statement to the legislature in early 2019. What has changed that somehow gives him the authority he told the legislature he lacked?

In fact, in an order he issued just a little over two months ago, Order Number 1329, the State Engineer again acknowledges lack of authority.

And I'm going to go ahead and go to Slide 2, Your Honor. And this is just the cover page or the first page rather of Order 1329. And I've highlighted the title there with my Crayon. And I'll go ahead and read that to you. Just the title is Establishing Interim Procedures for Managing Groundwater Appropriations to Prevent the Increase and Capture and Conflict with Rights Decreed Pursuant to the Humboldt River Adjudication.

So as the title of this order indicates, the State Engineer is confronting the same issues he confronted in Order 1309, the potential capture of senior surface water rights by pumping junior groundwater rights -- and for the record, I put air quotes around the word "junior" --

THE COURT: So are you going to be objecting as to something --

MR. BOLOTIN: On behalf of the State Engineer, I'm going to object to the introduction of orders that came out

after the issuance of Order 1309. That's not part of the record on appeal.

THE COURT: Okay. So I will -- I will actually grant that objection.

So since it's not part of the record on appeal, then -- I understand that you're --

Yes, Ms. Peterson.

MR. FLAHERTY: I've got friends, Your Honor.

THE COURT: I know. Everyone's got their own cliques. Yes.

MS. PETERSON: Would it be appropriate just to --

THE COURT: Sure. Sure.

MS. PETERSON: Just for the record.

THE COURT: So why don't we -- I know that you have the objection that it's not part of the record of the appeal. Why don't I ask --I should do this the proper way. What is your response?

UNIDENTIFIED SPEAKER: Do I --

THE COURT: What was that? Oh, yes, stop the clock.

MS. PETERSON: I guess for the record, Your Honor, on behalf of Vidler and Lincoln, what I would like to say is that when the State Engineer -- legal argument and legal reasoning doesn't have to be in the record before the State Engineer, the factual record before the State Engineer. The issue was brought up in front of the State Engineer at the hearing that

he didn't have authority. Then the State Engineer issued Order 1309 when he said he had the authority, and so now I think the argument is, it's legal argument. We don't have to cite and put in the record all the cases below that we are relying on for our --

THE COURT: So I guess the question is, is the introduction of the order itself proper or improper?

MS. PETERSON: The Court can take judicial notice of that document. It's a public document.

THE COURT: Okay.

MR. FLAHERTY: Yeah, Your Honor, I'd echo what she said. Me too.

THE COURT: Okay. So let me just ask, what is the response regarding the judicial notice of a public document? Because I --

MR. BOLOTIN: Your Honor, this is a subsequent order that deals with a very different water system in Northern Nevada related to the Humboldt River, which has its own problems related to completely different situations than carbonate aquifer that underlaid multiple basins like we're dealing with here.

And I understand parties are able to make legal arguments, but this is putting a document dealing with a different system that's also subject to a petition for judicial review right now that we haven't even filed the record with

yet, and it just seems inappropriate to be introducing yet another order that's come out I think years after 1309 to make a point after the fact.

THE COURT: Okay. So I know that you're saying that I can just take judicial notice. I know under the *Mack v. Mack* case it's that I'm pretty limited as far as what I can take judicial notice of.

For the purposes of this hearing, I am going to grant the objection and not have you argue regarding 1309 since it was subsequent -- actually, not introduce the order 1309.

MR. FLAHERTY: Do you mean 1329, Your Honor?

THE COURT: Sorry, 1329, yes. Since it was subsequent. Since it is an order that is subsequent to the proceedings at hand; however, as far as any argument regarding the lack of authority, I think you can still -- let me think about this. I think you can still make the argument that there have been subsequent situations where the authority has been challenged.

MR. FLAHERTY: And, Your Honor, I don't want to --

THE COURT: Just on the purely legal part.

MR. FLAHERTY: And I don't want to belabor it too much regarding the response, the last response from the State Engineer, but the facts don't really matter, okay. This is about do I, the State Engineer, have authority to engage in conjunctive management. I don't care if the Humboldt River

flows backwards. It doesn't matter. The question is authority.

And what I'll tell you is I won't read this, okay. I mean, I'm a little unclear on how I can talk about the law without really getting into it too much, but essentially in this order the State Engineer came right out and said, I can't engage in conjunctive management. He describes how he went through this three-year process. He put together a working group, stakeholders. They came up with a set of draft regulations, okay, on what would conjunctive management look like. How would we balance senior water rights with existing groundwater uses? Hard work, this working group, three years.

They come up with this set of draft regulations. He shows up in front of the legislature, as I already described, okay, and he says, hey, I need AB51. He's got his Humboldt River plan, so to speak, sitting in the wings, and then it never makes out of committee, okay. So he doesn't have the authority.

And here in Order 1329, maybe even apologetically to the working group, he explains everything I laid out. And then he says, but, you know.

MR. BOLOTIN: Your Honor, objection. He's going into the language of Order 1329, which by the way it doesn't say that the State Engineer doesn't have authority. It says they're waiting for the model to be finished to reach the next

step of managing the Humboldt River.

MR. FLAHERTY: Well, now that the State Engineer has stated on the record what the order says and doesn't say, Your Honor, I think it's appropriate we just take a look at the slide, and you can decide for yourself.

THE COURT: You know, I'm not going to consider 1329 as part of the argument.

MR. FLAHERTY: All right.

THE COURT: And then it looks like we've got --

Do you have an objection, sir?

MR. HERREMA: No. I -- Brad Herrema on behalf of CSI.

Just noting for the record, Mr. Flaherty included 1329 in his reply brief. He also said the Court could take judicial notice. The State Engineer didn't file an objection to that or oppose that as far as I know, and that was filed January 11, I believe.

MR. FLAHERTY: That's correct.

THE COURT: Okay.

MR. FLAHERTY: Well, Your Honor, I think --

MR. BOLOTIN: Your Honor, respectfully --

MR. FLAHERTY: Well, I'm not --

Excuse me, sir.

Just, I mean, me think he doth protest too much, okay. I mean, they really want to keep this out because it's

just a blunt acknowledgment of his lack of authority.

THE COURT: I think you can still make those arguments based on what -- I mean, I understand that you're looking to buttress your argument with this, but I think that there's enough there without even going into 1329 that you can make those arguments.

Yes. Oh, I've got lots of objections. So, yes, Mr. Taggart.

MR. TAGGART: Paul Taggart for the District and the authority, and I would just say that judicial notice is a slippery slope.

THE COURT: It is.

MR. TAGGART: I've been on both sides of arguing for Courts to consider things that aren't technically in the record.

Ms. Peterson is I think correct in saying that if it's a fact question, clearly you have to rely on the record. You can't let new things into the record. If it's legal argument, then that's a little -- that's different, but that still isn't a wide open door to let everything in because that would kind of defeat the rule.

So I think the fact that 1329 exists is one thing, but if we're going to get into detailed argument about what it did, what it -- and now we're in a whole different world of debating that.

So I think it's a slippery slope, and it's just, I think sometimes they come in, sometimes they don't. As legal authority, arguably it can make it in, but then other -- you know, the more we argue about it, the more it doesn't look like it's just there for that.

THE COURT: Well, and I'd like to really just keep a clean record, and I think that you have enough with everything else without having to argue the details of 1329.

So I'm just not going to allow you to argue the facts and details within 1329, but certainly you can argue the fact that it exists, like, you know, Mr. Taggart says, that that shows that there is a conflict as far as whether or not the Nevada State Engineer has the authority to conjunctively manage.

MR. BOLOTIN: And --

THE COURT: Yes.

MR. BOLOTIN: Can I just respond to something Mr. Herrema said?

THE COURT: Sure.

MR. BOLOTIN: Just respectfully, Your Honor, there hasn't been any other filing due dates since the reply briefs. There's 12 plus parties in this case. I think it's appropriate to preserve the objection now since it's being introduced. It's put in front of Your Honor, and that's about it, Your Honor.

THE COURT: Okay. Thank you, Mr. Bolotin.

Go ahead.

MR. FLAHERTY: Last word on this, Your Honor.

THE COURT: Sure.

MR. FLAHERTY: It just seems --

THE COURT: I understand that it's -- it kind of puts you in a weird spot.

MR. FLAHERTY: No -- right. It's strange that you can acknowledge the existence of Order 1329 -- excuse me, yeah, yeah, 1329.

THE COURT: Within the legal argument.

MR. FLAHERTY: Right, but that you can't -- you can't take judicial notice of what the State Engineer said. So I'll just state that for the record.

THE COURT: Well, so, I mean, here's the thing. You know, under the *Mack* case, it says I have to really look at things that are closely related. I don't know if the Humboldt order is really closely related enough that I can take judicial notice of the actual document. So that's the reason why I hesitate in allowing that in as part of the argument, the details regarding -- sorry, the details contained within the order.

MR. FLAHERTY: Okay. So despite all that, right, despite whatever it was he said in 1329, it doesn't help his case, Your Honor.

Despite what he told the legislature in 2019, that I don't have the authority to engage in conjunctive management, lo and behold, in Order 1309, the State Engineer purports to rule that seven separate hydrographic basins are now just one single superbasin lumped in with Muddy River surface rights.

And I have a slide here, Your Honor. I'll --

Okay. This is Slide 6, I believe -- excuse me, it's Slide 10. Or hold on. This is the first page of 1309.

Okay. So I know this is Slide 10 from my notes.

And what he says here, despite this lack of authority, he says,

> The maximum quantity of groundwater that may be pumped from the Lower White River Flow System Hydrographic Basin on an average annual basis without causing further declines in Warm Springs area spring flow and flow in the Muddy River cannot exceed 8,000 acre-feet annually and may be less.

Okay. "May be less."

Now, in his answering brief, the State Engineer alleges numerous items in Order 1309 that he supposedly didn't do. He says he didn't reprioritize any water rights. He didn't change any priority dates. He didn't curtail groundwater pumping, but the State Engineer's attempts at reassurance ring hollow, okay, because nowhere does the State

Engineer explain how Nevada Cogen is not severely prejudiced and damaged when its senior groundwater rights in the Black Mountains Area Hydrographic Basin are suddenly bumped down the line to some yet to be determined junior position. He's now -- they are now in the same basin with the surface water rights in the Muddy River.

Okay. Order 1309 is a per se exercise of conjunctive management. I mean, I've used, you know, this term bomb. You know, that's the real dynamite, so to speak, in Order 1309. That statement right there about the maximum groundwater that can be pumped, 8,000 acre-feet or maybe less. That's conjunctive management.

Now, assuming arguendo that the State Engineer even had the authority to engage in conjunctive management in Order 1309, his decision to include NCA's production wells in the new superbasin was arbitrary, capricious and not supported by substantial evidence.

And I'll start again with a little quote regarding the standard of review from *Pahrump Fair Water*. And the Supreme Court said the State Engineer's decision must be supported by substantial record evidence. Okay. But as acknowledged by the State Engineer in Order 1309 and previously in Interim Order Numer 1303, 533.024(1)(c) actually requires something more.

And I'd like to show you a couple of slides here,

Your Honor. This is Slide 12. This is just the cover page from 1303. And here's slide 13, Your Honor. And what he says here, you can see, is he says that NRS 533.024(1)(c) directs him, okay. It doesn't say it encourages him. It says it directs him to consider the best available science in rendering decisions concerning available surface and underground sources in Nevada, okay.

THE COURT: So let me ask a really dumb question. An interim order, is an interim order not appealable, directly appealable?

MR. FLAHERTY: You know, can I give you a dumb answer? No. I think it is not.

THE COURT: I mean, it seems to me like if the writing is on the wall, that's something that you would have had appealed if you have the ability to, but, you know --

MR. FLAHERTY: No. I've actually been on the wrong end of that, not in the case involving the State Engineer. It's I don't think it was a final order. I don't know if anybody tried to appeal it, but it's an interim order.

THE COURT: Okay. So --

MR. FLAHERTY: It's not a final agency action.

THE COURT: So an interim order is not a final appealable order. I understand that.

MR. FLAHERTY: Right. Right.

THE COURT: Okay.

MR. FLAHERTY: So he says here, Your Honor, that it directs him. And I know you had a question about this, I believe yesterday when I was listening on BlueJeans, okay. I mean, so it's -- you know, so it would be one thing for the legislature to encourage the governor to do something or to encourage the Nevada Supreme Court to do something. I mean, those are coequal branches of government, right.

Well, when the legislature quote, unquote, encourages the State Engineer to do something, it means a lot more. And certainly you can see here from this slide, Your Honor, this is the way he interpreted it. He interpreted it as a direction, okay.

THE COURT: Right. Well, I mean, I guess, yeah. I mean, to me there's a difference in encouraging someone to do something and directing someone to do something.

MR. FLAHERTY: There is.

THE COURT: And I understand that you're saying that he took this as direction.

MR. FLAHERTY: There is, and it's context.

THE COURT: But the word actually says encourage.

MR. FLAHERTY: So, you know, the legislature encourages you to do something. You know, the State Engineer, you show up every other year, you know, asking for money for your budget, right, and they say, what about that thing we encouraged you to do? Oh, I didn't feel like it, right.

That's not going to happen. So that's why it's a direction. At least he perceives it as a direction.

And you've already heard some complaints about surprises in Order 1309. This is something the parties were expecting, right. If you read 1303, the State Engineer is saying, oh, I have to use the best available science in the record, okay. So I think it's important, Your Honor. And I just want to show you a couple other slides. This is Slide 15. This was an addendum to Interim Order 1303. You see here he says the same thing again.

And now I'm going to scroll back up to 1309. I'm going to go up to Slides 6 and 7. So there's 6.

So that was 6, and now here's 7. Your Honor, here it is again right in -- right in 1309, okay. So taken together the standard review announced by the Nevada Supreme Court in *Pahrump Fair Water*, all right, substantial record evidence, and 533.024, requires the State Engineer's decision to be supported by a substantial evidence comprised of the best available science in the record, okay. I mean, that's fair. That's what the parties were expecting after they read Interim Order 1303.

Now, the State Engineer has argued peak deference, that this is a situation where your deference to him should be at its peak. There was no citation provided for that, Your Honor. And, you know, take that argument to its logical extreme. As applied to NCA's arguments, okay, and the State

Engineer's answering brief at page 23, lines 12 to 13, he makes the statement, that was an adequate basis to find that Nevada Cogeneration's well should be included. "Adequate"? "Adequate"? That doesn't sound like the best available science in the record. I mean, so as applied by the State Engineer, peak deference means any scrap of evidence in the record that supports a convenient, easy or desired conclusion on my part. That's not what the legislature expects when they tell him to use the best available science in the record, Your Honor.

Now, in determining the boundaries of the Lower White River Flow System, the State Engineer indicated that he considered six criteria. I have a slide or two for this, Your Honor. Okay. So this is Slide 8, and you see here he says that he considered the evidence and testimony and the basis of a common set of six criteria that are consistent with the original characteristics considered critical and demonstrating a close hydrological connection requiring joint management in Rulings 6254 through 6261.

And I just want to put in a pin in it right here, Your Honor. NCA was a party to Ruling 6260, okay. So it was within this group of rulings. They're a party to that one. And then you can see the first criterion is highlighted there on that page. I'm not going to go over every criterion, Your Honor.

And then continuing down to slide 9, you see the rest

of the criterion, and I have highlighted criteria 5 and 6, and I want to talk about those a little bit in a little bit. But before we do that, I already pointed out that NCA was a party to Ruling 6260, and that's actually Record on Appeal Number 85.

But nowhere in Ruling 6260, nowhere in Interim Order 1303 or in the addendum that I showed you, some excerpts from a minute ago, nowhere in that did the State Engineer provide notice to NCA or any other party as far as I can tell, that he was going to utilize these six criteria, okay.

Now, we were just talking a minute ago about what deference does the Court pay to the State Engineer's decision. They have this peak deference argument. But any deference any Court might afford to a decision of the State Engineer, open quotes,

> Presupposes the fullest and fairness of the administrative proceedings. All interested parties must have had a full opportunity to be heard.

So that's the Nevada Supreme Court in the *Revert* case, right. And the Court continued and said that,

> When procedures grounded in basic notions of fairness and due process are not followed, and the resulting administrative decision is arbitrary, oppressive or accompanied by a manifest abuse of discretion, this Court will

not hesitate to intervene.

The procedure leading to Order Number 1309 was not grounded in basic notions of fairness and due process. NCA was not afforded a full and fair opportunity to be heard because it was unaware of these six criteria. It didn't learn about these six criteria until order Number 1309 came out.

The approach the State Engineer took in this case is akin to a card game, right. Cards are dealt out by the State Engineer. All the cards are dealt out, and the State Engineer says, okay, everybody show me your cards. And the State Engineer looks at everybody's cards, takes a good look, and he says, okay, well, I think these are going to be the rules, okay. Then he goes ahead and applies the rules to everybody's cards, and then he announces winners and losers. That is not administrative due process. That is not what the Nevada Supreme Court said in *Revert versus Ray*.

And for that reason, we'd ask you to correct, if you've gotten by the authority to engage in this conjunctive management to begin with, if you got by that, Your Honor, we would ask you to remand it to the State Engineer on that basis.

So returning to Criteria 5 and 6. The State Engineer didn't even apply those criteria in the manner he announced in Order 1309 when it came to NCA. And that failure to do so was arbitrary and capricious.

At the hearing before the State Engineer, one of

NCA's experts Jay Dixon (phonetic) testified regarding mapped geology in the area of NCA's production wells near the southeast boundary of this new superbasin. Now, that testimony fits squarely within the rubric of Criteria 5 and 6 up here, Your Honor. Now, Mr. Dixon didn't know what the criteria were. But you can see in Number 5, the State Engineer is talking about geologic structures that have caused a juxtaposition of bedrock and the carbonate-rock aquifer, and he says that's consistent with the boundary.

And I'm trying not to turn my head too much, because I think when I do I turn away from the microphone.

But then in Number 6 he says basically when it's unclear, when it's unclear, you're not sure based on Criteria 1 through 5 above, they're going to go to the nearest mapped feature, okay. Or if I don't have a mapped feature, I'll go out to a hydrographic basin boundary, okay.

And so he uses the term mapped feature. Mr. Dixon testified about mapped geology. And what he was testifying about really were mapped geological features, okay.

So NCA presented and explained slides to the State Engineer that demonstrated the presence of the Dry Lake Regional Thrust Fault, and a strike-slip fault emanating from the Dry Lake regional thrust fault just west of NCA's productions wells, and you'll see that it's almost right on top of -- the well is right on top of this strike-slip fault.

And I have a slide, Your Honor. I'm going to go to Slide 17. Okay. So this is Record on Appeal Number 973, page 52605, and you'll see right there below the ROA and Bates Number it says Rowley 2017. Rowley is the individual who mapped the features, who mapped to the geology.

And now it's a little bit confusing. You can see here on the left there's a little box that says Dry Lake Regional Thrust Fault, and that arrow is actually pointing to a dotted black line that trends southwest to northeast.

Can you see that?

THE COURT: So are you talking right under the S and slip, that dotted line or the one above it that's kind of intersecting the arrow?

MR. FLAHERTY: So I'm looking at the Dry Lake Regional Thrust Fault box and the arrow coming from that.

THE COURT: Oh, sorry. Oh, yes. I see that.

MR. FLAHERTY: Okay. Do you see that dotted black line?

THE COURT: Yes.

MR. FLAHERTY: Okay. And that was a good warm-up, Your Honor, because the next one is trickier.

The strike-slip fault, it looks like it's pointing at that horizontal red line, the arrow, but that horizontal red line and all those squiggly red lines, those are actually the existing or conventional hydrographic -- those are actually the

existing or conventional hydrographic basin boundaries.

But as you may know now from the record, Your Honor, if not, I'll tell you, the State Engineer didn't include the entire Black Mountains Area Hydrographic Basin in the new superbasin. He only included the northwest portion of the basin, and that's why you have this kind of very artificial straight red line.

THE COURT: The EBM-5, that, is that what you're referring to?

MR. FLAHERTY: Yes. That EBM-5 is a well, I believe, but that red line goes right across that text, okay. So that's sort of this -- this working boundary, I guess, okay.

So now that red arrow isn't pointing to that line. But it's actually pointing to a dotted blue line that again angles from southwest to northeast.

THE COURT: Okay. I see that.

MR. FLAHERTY: Okay. So and then while we're looking at that slide, Your Honor, you see over to the right further there's a reference to the Muddy Mountain Regional Thrust Fault as well.

And Mr. Dixon briefly touched upon that, but he spent his time talking about this strike-slip fault emanating from that Dry Lake Regional Thrust Fault.

Now, the strike-slip fault identified by NCA is between NCA's production wells and the LWRFS superbasin. And

therefore, it is the nearest map geologic feature that engages in this -- or accomplishes this juxtaposition of bedrock and carbonate-rock aquifer.

THE COURT: So let me ask this: So can you tell me exactly what the significance of a fault or a slip fault or a thrust fault is. What does that actually mean?

MR. FLAHERTY: They can form -- I'm not a hydrologist, Your Honor, but I've read them in transcripts.

THE COURT: Right.

MR. FLAHERTY: Those form -- they can form barriers.

THE COURT: I see.

MR. FLAHERTY: Right. So, I mean, you've heard a lot of analogies --

THE COURT: I mean, that's what I assumed, but I, you know --

MR. FLAHERTY: Yeah. You've heard a lot of bathtub analogies I believe. A strike-slip fault or a fault could be --

THE COURT: The edge of the bathtub --

MR. FLAHERTY: It could be, yeah, it could be the wall of the tub, right.

So stated differently, this identified thrust fault, the one identified by NCA, it's a barrier, or it's between NCA's production wells and this new superbasin.

So Mr. Dixon explained to the State Engineer that

NCA's production wells had actually been deliberately sited by NCA's consultant when they were looking for water for these plants, right in the middle of those slip-strike faults or strike-slip faults. He walked the State Engineer through --

THE COURT: Sited, s-i-t-e-d?

MR. FLAHERTY: Strike, like when you're bowling, strike.

THE COURT: No, no. You said that they were sited in the -- do you mean that they were like situated there purposefully?

MR. FLAHERTY: Yes. Right. Not cited like a legal document. Yeah.

THE COURT: Right. Okay.

MR. FLAHERTY: Yeah. So he walked to the State Engineer through this geologic data that was obtained when they were drilling in the area. So he provided, you know, the well drills to keep track of this information they encounter when they're drilling, even for the failed wells. They kept all this geologic data they obtained.

And Mr. Dixon shared that with the State Engineer. He highlighted features that were terms of art for hydro geologists or hydrologists. He talked about high angle faults, a series of high angle fractures, collapsing blocks, large open solution structures, abundant limestone fractures, and he presented evidence confirming that NCA's production wells are

in the fault itself, okay. He also showed the State Engineer pictures from the actual well boreholes showing that NCA had drilled through large caverns right in that strike-slip fault area.

And I'm going to go to Slide 18 and just show you the pictures. So you can see them here, Your Honor. You can see them here on Slide 18. They put a camera down the well, and they took some pictures. This information was shared with the State Engineer as well.

After the hearing, in its posthearing brief, NCA supplied the State Engineer with additional analysis with another visual aid to assist him in a proper placement of the southeastern boundary of the Lower White River Flow System. And I'm going to go to Slide 19 and then Slide 20.

Slide 19 is just the cover page of NCA's argument. And then here is Slide 20, yes. Okay. And Slide 20 is from record on appeal Number 990, page 52-909. It's not a complete reproduction of that particular slide. It's one of the slides, Your Honor, where they show a map, and then it's got a little square --

THE COURT: And then there's a little, yeah.

MR. FLAHERTY: And then they blow up the square.

THE COURT: It's just a square. Okay.

MR. FLAHERTY: This is the blown-up square. And so again here you can see -- you can see that dotted blue line

better now. Right? You can see it better now?

THE COURT: Yep.

MR. FLAHERTY: And that little purple text box is a reference to Rowley. Mr. Dixon didn't map this geologic feature. This individual Rowley mapped it, okay. So in other words, you know, when something's been mapped, apparently engineers feel comfortable relying on it, okay.

So again, the dotted blue line is the mapped feature, the strike-slip fault, and that little red blob on top of it is NCA's well field. And so you can see it's sitting right in on the fault, right.

And then the purple dotted line was basically a proposed administrative adjustment to the boundary, right. So in other words, NCA is saying here, look, the strike-slip fault is the boundary, but you need to take, you know, your paper map. And you need to take it just a little bit to the west it looks like because our wells aren't properly included in this superbasin, okay.

Now, in Order 1309, the State Engineer says, hey, I find logic in NCA's argument to exclude these production wells, but he ignored all that testimony I just described to you, the slides, the pictures, and he instead utilized the Muddy Mountain Thrust fault to the east of NCA's production wells to establish the southeastern boundary of this new superbasin. And when he did that, he said, open quotes, "a more inclusive

approach was required," close quote.

Your Honor, NCA had zero notice that the State Engineer intended to utilize this vaguely stated more inclusive approach. Like the six criteria, it was first announced in Order Number 1309, apparently as the seventh criteria after the State Engineer looked at everyone's cards, right, after he had seen the evidence, okay.

Again, he's announcing the rules after the game is over. This is another instance of the State Engineer depriving NCA of administrative due process.

An additional deprivation of due process was that despite reassurances from the State Engineer, at the outset of the Order Number 1309 hearing, that the (indiscernible) to the hearing would not be an exercise in conjunctive management as discussed already it was.

And I'll go to my final slide, which is Slide 21. And again, this is from my reply brief, but the quote is lifted from the transcript, and there's a record on appeal number citation there if you want it, Your Honor.

And this is the State Engineer's hearing officer speaking at the very beginning of the hearing, and she tells everybody that she wants to reiterate, and she says they've been trying to make this clear, that this is not a contested or adversarial proceeding. Oh, what a relief. Nothing bad can happen to me here. This is a good place. This is a safe

place; right? That's the announcement at the beginning of the hearing.

She says the scope of this proceeding is for the limited purpose of addressing those four issues, plus the fifth, and she's talking about the four issues identified, the four issues the party were on notice about, as enumerated in Order 1303. But apparently she's concerned about the fifth because the fifth is sort of a catchall, and I think sometimes catchalls have a tendency to just blow the door wide open. So she says, while we're talking about the fifth, she says it's not intended to expand the scope of this hearing, into making a policy determination with respect to management of the Lower White River Flow System basins individual water rights. So she's saying we're not going to do conjunctive management, okay.

And so again, by stating that 8,000 acre-feet or maybe less is the maximum amount of water that the groundwater rights holders in this new superbasin can pump without declining spring flow or river flow, that is conjunctive management.

THE COURT: Let me ask a question. Because, you know, there is a little bit of the writing on the wall with -- was it -- with the interim order as far as maybe that the Nevada State Engineer was potentially considering the joint management of the basins.

But when there was that interim order, what was your understanding of what it meant when they're talking about the management of the Lower White River -- well, the policy determinations of the Lower White River Flow System? I mean, not the policy determinations, the -- let's see, what is it that I'm talking about. Not the policy determinations, but why they needed that information for the Lower White River Flow System as a whole? You know, was it your understanding that that would then dictate how within each basin it would be, you know, that there would be decisions made versus all of the joint or all of the basins being managed as a joint system? Maybe -- I'm not being very clear. I --

MR. FLAHERTY: I can try to see if I can help.

THE COURT: Yes.

MR. FLAHERTY: Kind of picking up where you left off, well, when SNWA was at the podium here yesterday, I believe Mr. Taggart made a reference to Phase 1 and Phase 2.

THE COURT: Yeah, Phase 2. Right.

MR. FLAHERTY: And I think it sounded like some of the things you were articulating, Your Honor, were Phase 2.

THE COURT: They might be. But, I mean, I guess my question is, you know, there are a number of parties that are arguing that joint management has never been done, making a mega basin or a superbasin, that kind of thing.

When we had the testing and the interim orders and

all that kind of thing, what was the perception of your client as far as how that would impact any future decisions as to policy? Did they think that it would just be within their own basin as it relates to the other basins, or was there some understanding that the Nevada State Engineer was looking to do some sort of joint basin conjunctive management?

MR. FLAHERTY: Yeah, I'm sorry. I don't think I can answer your question.

THE COURT: Okay.

MR. FLAHERTY: I kind of came late to the game. I substituted in for Mr. Flangas.

THE COURT: Okay.

MR. FLAHERTY: And I'd be willing to, you know, without waiving attorney-client privilege, you know, share what was going on in my client's head, but I just wasn't privy to those conversations.

I think, I think that looking at Interim Order 1303, you'd understand that the State Engineer was perhaps going to go to the brink of conjunctive management. He was going to try to get science, right. I mean, I think when the hearing officer said this is not an adversarial proceeding, I think that gave everybody the impression that this is just going to be a place where --

THE COURT: We just get information.

MR. FLAHERTY: -- we just get information. And you

can actually kind of see that in the transcript, the hydrologists, the geologists, the hydrogeologist, all the experts. I mean, bless their hearts, Your Honor, they're wonderful people, but it was, at times, it kind of reads like an academic conference as opposed to the lawyers being charged with keeping people strictly on task because there is something big at stake --

THE COURT: Right.

MR. FLAHERTY: -- everybody is just talking science, right. Everybody is just showing everybody else their cards.

And then, boom, Order 1309 comes out after that.

THE COURT: Okay.

MR. FLAHERTY: Now, so had NCA known the outcome could be a severe impairment of its water rights in the Black Mountain's area hydrographic basin, its senior water rights, right, there's a reason they bought the most senior rights in the basin. It would have taken a radically different approach at the hearing. I suspect it would have been a contested and adversarial proceeding at that point.

Now, the State Engineer, he seeks to evade accountability for the shortcomings in Order 1309, as they relate to NCA, by claiming that NCA conceded in its brief that multiple experts -- those are the words the State Engineer uses, multiple experts -- testified regarding inaccuracies in the multiple linear regression model utilized by SNWA, the MLR

model.

NCA did, in fact, cite that model -- c-i-t-e this time -- they cite that model with approval. Because that model, that MLR demonstrated that there was a very low correlation between NCA's production wells and the water levels in the bathtub, okay. They basically -- this MLR analysis demonstrated that this bucket is outside the tub, okay.

But NCA didn't make that kind of concession. As we already pointed out in our reply brief, there were just two experts who criticized SNWA's MLR analysis. And more importantly, the criticism was limited to the MLR analysis conducted by SNWA in the California Wash Hydrographic Basin and in the Garnet Valley Hydrographic Basin, not in the Black Mountain's Area Hydrographic Basin.

So therefore that meant MLR analysis, it constitutes substantial evidence comprised of the best available science in the record that NCA's production wells did not belong in a bathtub. Okay. They should have been outside this basin.

I'm going to go ahead and wrap up now, Your Honor.

Order Number 1309, it's arbitrary and capricious, and key elements of the order are not supported by substantial evidence comprised of the best available science in the record.

As an initial matter, the State Engineer is simply without authority to engage in conjunctive management in any basin, let alone create a superbasin and impose conjunctive

management thereon.

Despite the legislature's expression of a policy preference for conjunctive management, not superbasins in 533.024, the State Engineer himself understood that he was lacking authority to actually move forward with conjunctive management in the absence of a grant of express additional authority from the legislature. For that reason, he went to the State legislature in 2019, seeking authority in assembly Bill 51, but his efforts were unsuccessful. The bill never made it out of committee.

The State Engineer acknowledged that a failure in a later order, Your Honor, which he issued just a little over two months ago. Yet by designating the Lower White River Flow System a superbasin and stating that only 8,000 acre-feet or maybe less can be withdrawn from those groundwater sources within that superbasin, without impairing spring flow or flow in the Muddy River, the State Engineer did in Order 1309, what he conceded he was without authority to do in front of the State Engineer and in a later order. That is plainly and simply arbitrary and capricious.

With regard to substantial evidence specifically for Nevada Cogen, that portion of the order that establishes the Muddy Mountain Thrust Fault as the southeast boundary of the Lower White River Flow System Basin is not supported by substantial evidence comprised of the best available science in

the record.

The Muddy Mountain Thrust Fault is not the nearest map feature establishing a boundary for the superbasin. And that was one of the criteria enunciated by the State Engineer in Order Number 1309.

To the contrary, it was the strike slip fault emanating from the Dry Lake Regional Thrust Fault that was the nearest map feature, and NCA presented ample evidence to the State Engineer through the testimony of Jay Dixon to that effect.

So for all the reasons stated today and in NCA's petition for judicial review and in our briefs in this matter, we urge you to reverse the decision of the State Engineer in its entirety. He had no authority to engage in conjunctive management.

Barring that, Your Honor, if you're not ready to go there, in the alternative, we'd ask you to remand this matter to the State Engineer to conduct a hearing where he's going to render a decision supported by substantial evidence comprised of the best available science in the record after affording NCA administrative due process, including a full and fair opportunity to be heard. And that will concern the inclusion or not of NCA's production wells in the new superbasin, allowing NCA to fully address the contention that the Muddy Mountain Thrust Fault is the appropriate boundary rather than

the strike-slip fault identified by NCA.

Your Honor, thank you very much for your attention.

Unless you have some additional questions, that concludes my presentation.

THE COURT: All right. I don't think I have any additional questions. Thank you.

MR. FLAHERTY: Thank you.

(Pause in the proceedings.)

THE COURT: All right. We've been going for an hour. Is everyone okay with just moving through to Georgia-Pacific?

(No audible response.)

THE COURT: Okay.

UNIDENTIFIED SPEAKER: I'm ready, Your Honor.

THE COURT: All right. Great.

So and then let me ask -- just make sure.

Do we have a copy of your PowerPoint, Mr. Flaherty, a paper copy that we can --

MR. FLAHERTY: Your Honor, I promised the clerk I would e-mail her one.

THE COURT: All right. Great. Thank you.

MR. TAGGART: Your Honor.

THE COURT: Yes.

MR. TAGGART: Can -- just as a housekeeping matter -- Paul Taggart for the District -- can we just make sure that everybody just distributes their PowerPoints to everyone.

THE COURT: Yes.

MR. TAGGART: And I know it's hard to have a copy here today and everything, but I think we'd all like to get each others', a copy of each others' PowerPoints too.

THE COURT: That's fair. Okay. Thank you.

Okay. Whenever you're ready.

ARGUMENT FOR GEORGIA-PACIFIC AND REPUBLIC ENVIRONMENTAL

MR. FOLETTA: All right. Thanks, Your Honor. Lucas Foletta for Georgia-Pacific and Republic.

I do not have a PowerPoint, and a lot of my remarks are consistent with what you've heard other people say. I'm going to try not to be overly repetitive, but I do think some of the things, and particularly what Mr. Flaherty just said, bears some repeating and some emphasis.

I do want to pick up with a question or start with a question you asked Mr. Flaherty kind of early on in his argument, which was something to the effect of, you know, has the -- has the connection between groundwater and surface water ever been considered in the past?

THE COURT: Hang on just a second.

(Pause in the proceedings.)

THE COURT: My apologies.

MR. FOLETTA: It's okay.

So, yeah, I think you asked Mr. Flaherty that question, and I think the reason has stuck with me and what I

want to say about it is right off the bat, you know, there is a fundamental disagreement in this case about a lot of things, right, and but one of them is the extent of the hydrologic connection between the basins. So it is not a foregone conclusion or an accepted fact that, you know, we agree, and I don't think other people on our side of the argument agree with the State Engineer's findings about the extent of the hydrologic connection or even that one exists. I mean, really whether one exists or not is not the most relevant point.

The basic question is whether substantial evidence to support the State Engineer's conclusion, that it exists to the extent they say it existed and thus whether it supports the approach they took and the findings they made and the conclusions they drew in connection with 1309.

And so, you know, the basic kind of analogy people have been using is a bathtub. Is it a bathtub? Is it not a bathtub? It's not don't take it for granted that it's a bathtub, because we don't agree, right. It's an incredibly complicated subsurface geology, right. The last speaker pointed out there are faults. Some faults impede water. Some faults advance them to (indiscernible) water. But faults don't -- they're not, you know, in the shape of a bathtub, and all these basins don't sit right in them.

And so, you know, there was a lot of testimony given at the hearing about the extent of that connection, and that's,

as I say, still very much in dispute.

THE COURT: But traditionally they've been managed completely separately because there was a theory, I guess, that they were not connected; is that correct?

MR. FOLETTA: I think that -- I think that over the history of water law it's true to say that surface water and groundwater have been managed independently pursuant to principles of water management that are reflected in our laws. That's right.

But I don't know that it's necessarily fair to say that the State Engineer has always been oblivious to the connection between groundwater and surface water. I mean, the history of this case shows that the State Engineer and multiple State Engineers over a period of decades has been concerned about the relationship between groundwater and surface water or at least the underlying geology and the surface water in this system. And so again, that's in dispute, as I said.

But the other thing I want to say is that we are also not saying that the State Engineer should be oblivious to the connection between groundwater and surface water.

What we are saying is that to the extent that water rights in these basins are going to be managed, they need to be managed in a way that's consistent with the existing regulatory scheme. And the basic component, the fundamental component of the regulatory scheme is administering water rights on the

basis of legal administrative units, which are independent water basins, which in this case, as we talked about yesterday, have already been established. That's fundamentally where we are, where we are coming from.

We are also not saying that there may be no need -- that there is no need to take particular actions to manage the water in these basins. We talked about the total number of water rights that have been permitted here.

But what we are saying in connection with that issue is that the decision to subject the LWRFS to joint management -- or conjunctive management and joint administration, one, was a management decision in and of itself, but two, is inappropriate for a number of reasons, not the least of which is there are other tools that the State Engineer has to address concerns that he might have about any of these individual basins being over appropriated.

THE COURT: Such as what?

MR. FOLETTA: Such as the law provides the State Engineer the ability to curtail water rights. The law provides the State Engineer under drastic circumstances to seek forfeitures of water rights. The law provides under circumstances under I believe it's -- I had it in my notes. I was going to get to it in a minute. I think it's Chapter 524, the ability to designate a critical management area and establish a water management plan for a particular basin.

These are all tools that the State Engineer has to address perceived shortages of water or competition for water in particular basins on a basin by basin area.

I think it's, you know, you'd probably have debates about which one is the right fit for this situation. Well, we just haven't got there yet, right? And that's the whole point of where a lot of the petitioners are coming from.

But that is -- but those tools do exist.

That being said, I think what I really want to start by talking about is kind of where I think things kind of went off the rails here. And it's easy to say in retrospect, but I think if you go back, again as other speakers have done, and you talk about the notice of that -- that preceded the hearings in this case, you know, that really is the seeds of a lot of at least the legal problems in the case.

As other people have shown you, the notice in this case said, quote, the hearing was to provide the participants an opportunity to explain the positions and conclusions expressed in the reports -- talking about the 1303 reports and/or rebuttal reports submitted in response to the order 1303 solicitation.

And then it went on to say the order 1303 reports was the first step in determining to what extent, if any, and in what manner, the State Engineer would address future management decisions, including policy decisions relating to the Lower

White River Flow System Basins.

I think you asked the last speaker, you know, what did you have in mind in terms of what the policy decisions would be.

THE COURT: Right.

MR. FOLETTA: And I think that what people had in mind is how the basins would be managed, meaning how would water rights holders' right be treated in connection with this generalized concern that the basins are over appropriated, right. And --

THE COURT: Basically within the basin you think these other tools that the water engineer has to manage within that basin.

MR. FOLETTA: Right. Right.

THE COURT: Even though they may be connected somehow?

MR. FOLETTA: Right. You know, over appropriated basins in Nevada is not unusual.

THE COURT: Sure.

MR. FOLETTA: Right. They exist.

The tools that the State Engineer has, the authority the State Engineer has to deal with that situation are known to people who hold water rights and (indiscernible) in the states and all sorts of people. And so it wasn't as if people were, like, surprised that there would be a conversation about what

to do because it's a type of conversation that happens frequently.

I think what was a surprise is that, as other people have suggested, again, that the State Engineer went beyond a factual inquiry that could be used to inform a subsequent proceeding or discussion about how to manage folks' rights and jumped, at least in part, in our view, to management of the basins by subjecting them unequivocally to conjunctive management and joint administration. So in our view, that was an active concrete management step that, as I just indicated, was not reflected in the notes and was contrary to the other signals on the statements that the presiding officer was given.

The reason that it was a concrete step, as other people have described, is because it scrambled the priority in these basins; right? We've all got that figured out, but, you know, people with rights in one basin were not subject to rights from other basins, and that's where the rubber meets the road in terms of, you know, people's expectations, the harm and so on and so forth. So we've had a sort of settled regulatory principles and a process that people understood. They had rights in connection with, and all of a sudden, that didn't exist anymore.

And so I don't think anyone is going to sit here and tell you that, you know, it's fair to say that anyone who holds a water right in any basin in Nevada is entitled to get that

water out of that basin. Everyone knows there's some risk, you know, of not being able to do that depending on where they are on the list and what the nature of the basin is and so on and so forth. But there is a certain level of certainty associated with the process that overlays the existence of those rights. So you know how to game it out; right? You know where you are on the list. People study this stuff. They understand what the basins are like that they're in. They get rights from places they want rights, and they're making the best decisions they can about securing their water future.

This was a regulatory action that upended all of that, right, and that's why there's so much consternation about it.

The question of authority is an interesting one, and that's where I want to go next.

So our position obviously is pretty straightforward. The State Engineer is a creature of statute. He's got to have a statutory basis upon which to act, and in this case, there isn't a clear -- there isn't a statutory basis to act.

The State Engineer in Order 1309 identified a number of statutory bases that he says justify the action. The one on its face that is the most, I guess, logical in terms of the text is 533.024(1) (e), which states that it is the policy of the State to, dot, dot, dot, manage conjunctively the appropriation, use and administration of all waters in this

state, regardless of the source of water.

So our brief is pretty clear about this. The Nevada Supreme Court has articulated a number of times, particularly in connection with how to understand legislative history, what you do with policy statements made by the legislature.

Because the Nevada Revised Statutes are full of them, right. Almost every chapter has a legislative declaration somewhere. Sometimes they're factual in nature. Sometimes they're like this where it's kind of a broadly stated policy. Sometimes they apply to people generally, like citizens of Nevada. Sometimes they apply to government actors.

But what's common about all of them is that none of them are operative; right? No one, and other people have said this, but no government actor can look at a statement of policy, even that applies directly to them and say, well, that is a source of authority. Because it sits outside the regulatory system, it's an introduction to it. And so the Nevada Supreme Court has said in the cases that we've decided that you can use -- you know, you interpret statutes consistent with their policy.

The reason the legislature articulates the policy is to help courts interpret statutes if it's necessary, right. If a statute is compliant on its face, you don't bother with it. If it becomes ambiguous, you have tools. One of them is legislative history, and an articulation of what the policy is.