

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.

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District Court Case No.

A816761

JOINT APPENDIX

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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:

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DATED this 27th day of December, 2022.

/s/ Christine O'Brien

Employee of Robison, Sharp, Sullivan & Brust

1 The problem here is that while the legislature
2 articulated the policy, there is no specific authority that you
3 can relate it to that supported the State Engineer's decision,
4 and that was cited by the State Engineer. I mean, and that's
5 the key thing. He's got to come up with the reason he's doing
6 what he's doing, and this in and of itself doesn't do it.

7 Order 1309 also includes the citation to another
8 provision in 533. 24, which is this policy, slash, dictate that
9 the State Engineer consider the best available science. I
10 think the argument goes well, the science told us there's a
11 hydrologic connection. We now need to manage the basins and
12 make decisions, you know, consistent with the connection that
13 we perceive.

14 That's just a -- that's overreaching.

15 On its face, what that statute says is you follow the
16 best -- or we are encouraged to follow the best available
17 evidence. Okay. It's a process consideration. I don't know
18 that the Nevada legislature needed to articulate it, but they
19 did, and so the State Engineer should, in all cases follow the
20 best available science.

21 It doesn't mean that the State Engineer has authority
22 to do whatever he wants to do or whatever he believes the best
23 available science tells him he has to do, right. It's not a
24 source of independent authority. So if the best available
25 science says these are hydrologically connected, and he

1 believes that, that doesn't mean he has the authority to
2 consolidate a basin, subject it to conductive management,
3 subject it to joint administration. Those are concrete steps
4 that have to be rooted in the case law -- or excuse me, in the
5 statute.

6 The other statute that's cited is the one Your Honor
7 asked about yesterday. I think it's 534.120 -- or is it
8 533.120?

9 534.120. I think you asked Mr. Robison about it.

10 THE COURT: I did, about the area versus --

11 MR. FOLETTA: Right. Yeah.

12 THE COURT: Yeah.

13 MR. FOLETTA: And again, what I would say about that
14 is a couple things. One, on its face, it applies on a basin by
15 basin basis, which reflects the Nevada statutory scheme and
16 regulatory scheme, and so it doesn't -- it doesn't work on its
17 face to justify all of these things. You know, acting outside
18 of the basins.

19 The other thing I would just point out is it was
20 enacted in 1955. The conjunctive management policy that's
21 reflected in the statutes wasn't enacted until 2017. You know,
22 it's -- this is not a substantial evidence type analysis where
23 we can search --

24 THE COURT: Well, I guess, you know, I guess I was
25 thinking the area part really talks to me if it was -- if it

1 indicated anything outside a basin would be more in the joint
2 management as opposed to the conjunctive management.

3 MR. BOLOTIN: Okay. What I would say is that in
4 Nevada water law, if you look at it, geographic units have
5 always corresponded -- the legal administrative unit has been
6 basins. Basins are geographic units.

7 THE COURT: Right.

8 MR. FOLETTA: So area corresponds to --

9 THE COURT: To fit in with in the geographic --

10 MR. FOLETTA: Two consistent with is what I would
11 say.

12 THE COURT: Right.

13 MR. FOLETTA: So it's not -- I think you would be
14 reading it too broadly to think that it gives the State
15 Engineer authority to take actions that are beyond the basin
16 because an area is of concern that's larger than a basin, which
17 is what I understand you to be saying.

18 But again, I do think it's important to note that the
19 statute itself is very old. That particular -- not very old
20 but that particular language has been around for decades. It
21 certainly preceded all this discussion about what we're doing
22 here today, and I think it would be and was a stretch at the
23 least for the State Engineer to cite it in support of what he
24 did here.

25 Now, at the same time, that statute is one of the

1 statutes that you can look at as reflecting the availability of
2 tools that the State Engineer does have on a basin by basin
3 basis, right. That's what I would understand -- I would
4 suggest that you -- how you understand that statute, as one of
5 the available tools that the State Engineer has to deal with
6 situations where they feel that there is concern.

7 The -- the importance of there being an actual
8 statutory basis for this action cannot be overstated. The
9 reason why administrative laws like this, why there has to be a
10 clear statutory basis is because without one, decisions of
11 regulators become ad hoc, right. They become untethered.
12 There's no statutory support for them. They, generally
13 speaking when this happens, they become very facts driven, very
14 specific.

15 You end up with -- you end up with decisions that are
16 not consistent, like here, with an overall regulatory
17 framework, and like here, decisions like that disrupt the --
18 what I'll call the regulatory expectations of people, and this
19 is what I talked about earlier, the idea that people who have
20 got water rights don't have, you know, a right, you know, under
21 all circumstances to pump that water, but they've got a right
22 that means something in connection with the regulatory system.

23 And when you make decisions that aren't rooted in
24 that system, in the legal basis of that system, it destroys
25 their reasonable expectations about it. It undermines the

1 value of the right, and it creates chaos. I think it was
2 Mr. Balducci yesterday who talked about, you know, this case
3 setting a terrible precedent. That is true. Right. It sets a
4 terrible precedent because it undermines the reasonable
5 expectations people have in the consistency of this system over
6 time.

7 Other people have talked about how this decision
8 affected their clients, and so I'm going to do that too, but
9 I'll try to do it briefly because we've already talked about
10 how priority works. You understand that.

11 My clients have rights in the Garnet Valley Basin.
12 They have rights. A couple of them have rights that are dated
13 different times, but their rights primarily are dated in the
14 '80s. So Georgia-Pacific has a priority date of October
15 28th, 1986. Republic has rights that post date 1983, and
16 they've got nine permits in 1988.

17 The order that -- the scrambling of priority, as I'll
18 call it, in conjunction with the pumping limit essentially
19 subjects everything after 1983 to question, right. If you're
20 looking at like a point in time, at least in our case where
21 things start to get really different in terms of where you are
22 on the list and what you can expect, that's where things get
23 difficult, okay.

24 Keeping that in mind, the -- between 1981 and 1986,
25 and this is the record at 355556 through -58. The State

1 Engineer issued permits for appropriations totaling 17,000
2 acre-feet, primarily to Coyote Springs and the Water Authority,
3 from points of diversion in Coyote Springs Hydrographic Basin.

4 Okay. So where the cumulative duty from the combined
5 Lower White River Flow System Basins in 1981 was 7,300
6 acre-feet. By 1986, it was more than 24,500 acre-feet. So
7 there is the effect of the order concretely on my clients is
8 that there is now 17,000 acre-feet in front of them that wasn't
9 there before, right.

10 So this is not a situation where nothing really
11 happened. Something really happened, right. This is real.
12 Like 17,000 acre-feet in front of you that weren't there
13 before, you're in a bad way, and these are -- obviously I don't
14 need to go into too much detail, but people are running
15 businesses and so fourth. It has a very dramatic effect on
16 their decision-making and their prospects.

17 I do want to say one other thing about that, you
18 know, and I can address this more in reply, but there's this
19 idea that, well, the State Engineer didn't change the dates on
20 anybody's rights, and so we didn't really do anything. That's
21 not the case. I mean, when you subjected these basins to
22 conjunctive management and joint administration, it changed
23 everything. Because what matters is the priority. It's not
24 really the date, right, like in the grand scheme of things.
25 It's where are you on the list.

1 With that I'd like to move on to the notice, and the
2 last counsel talked about this, and I want to talk about it
3 too. Notice is a problem in this case in multiple respects,
4 right, and it rears its head in different places. The most
5 conspicuous one is in connection with the decision to subject
6 the basins to conjunctive management and joint administration.
7 Because as I talked about at the outset, the specific notice
8 said that, you know, we would be discussing future management
9 decisions, including policy decisions relating to the Lower
10 White River Flow Basins in the future, right. And that is a
11 statement that was reiterated by the presiding officer at the
12 outset -- at the outset of the hearings.

13 The Nevada Supreme Court said,

14 Administrative agencies in particular must
15 follow their procedural guidelines and give
16 notice to the defending party of the issues on
17 which the decision will turn and the factual
18 material on which the agency relies for decision
19 so that he may rebut it.

20 The Supreme Court has gone on to say -- that's, by
21 the way, that's *Dutchess*, which is cited in our briefs. The
22 Supreme Court has also said with respect to notice,

23 Inherent in any notice and herein
24 requirement are the propositions that the notice
25 will accurately reflect the subject matter to be

1 addressed, and the hearing will be -- will allow
2 full consideration of it.

3 The language of *Dutchess* on notice is like could not
4 be more squarely on point, okay. The notice said what I just
5 said it said, and I won't walk through all of these, but the
6 order 1303 reports are referenced in the notice, right. It
7 says we're going to talk about the things that the 1303 reports
8 are about, and they were about five things, and those five
9 things were articulated: Geographic boundary of the
10 hydrologically connected groundwater and surface water systems
11 comprising, in this case, the Lower White River Flow System,
12 information obtained from the order 1169 tests -- I'm
13 paraphrasing to kind of move it along -- the long-term annual
14 quality -- quantity of groundwater that can be pumped
15 (indiscernible), the effect of movement of water between
16 alluvial wells and the carbonate wells on the delivery of
17 senior decreed rights.

18 Okay. So that kind of goes to the bathtub. Water is
19 moving around. How is it moving? What is the effect of the
20 movement on other people?

21 And then the fifth was this catchall, any other
22 matter believed to be relevant to the State Engineer's
23 analysis.

24 The first four of those are clearly fact-based
25 inquiries, right. There's nothing about how to manage rights,

1 nothing like that. It's all about what's the underlying
2 geology look like, what's the geography of the system, what did
3 the pump test show us, how much water can we get out of there?

4 The fifth is broader, but at the outset of the
5 hearing, the presiding officer said the fifth is not what you
6 might think it is, right. The statement was at the August
7 8th, 2019, prehearing conference:

8 I'm going to talk about this, and we've
9 spoken about this before, is that really this is
10 a threshold reporting aspect, that this is part
11 of a multitiered process in terms of determining
12 the appropriate management strategy to the Lower
13 White River Flow System. This larger
14 substantive policy determination is not part of
15 the particular proceeding.

16 That's part of later proceedings. That's what the
17 record at 522. So the message there was let's talk about the
18 facts; we're going to deal with management later.

19 At the September 23rd hearing is where I think she
20 talked about this fifth catchall issue, and she said,

21 While the fifth issue is not intended to
22 expand the scope of this hearing in to making
23 policy determinations with respect to the
24 management of the Lower White River Flow System
25 basins, on individual water rights, those

1 different types of things, because those are
2 going to be decisions that would have to be made
3 in subsequent proceedings should they be
4 necessary.

5 That's the record of at 52962. So, you know, that is
6 saying basically is, you know, the fifth catchall from 1303 is
7 not a justification for getting into areas that we don't want
8 to get into, which is how are these -- how are individual water
9 rights going to be impacted when we manage the basins, which
10 we're going to talk about later.

11 The fact of the matter is, as I've said, the decision
12 to subject the management -- the basins to joint administration
13 and conjunctive management did affect individual water rights.
14 It is a management step that was not noticed in connection with
15 which the presiding officer actively prohibited people from
16 talking about. And so in that respect, the order is not the
17 product of a properly noticed proceeding and therefore must be
18 vacated.

19 The -- there is some discussion now about -- not now,
20 there has been some discussion about the criteria that the
21 State Engineer used.

22 THE COURT: Six?

23 MR. FOLETTA: Six criteria is correct. And I'm going
24 to talk about it too. I'm going to talk about it in two ways.
25 One is in connection with due process, which I could do pretty

1 fast, and the other way is in connection with substantial
2 evidence, and that goes to bathtub, not a bathtub, okay.

3 So in connection with due process, other people have
4 said it, I'm going to say it: The criteria wasn't announced
5 until the order. It was -- so the rubric essentially that the
6 State Engineer used to determine or the -- I should just say
7 criteria, the criteria that the State Engineer used to
8 determine the existence and extent of a hydrological connection
9 between the basins was not articulated until after the hearing,
10 after people put in their evidence. You know, the entire
11 process had already taken place.

12 So and going back to *Dutchess*, what *Dutchess* says is
13 that you've got to have notice of the factual -- what do they
14 have to say -- basically the factual issues on which the
15 proceeding will turn, right, on which the decision will turn.
16 Again, it's squarely on point.

17 The parties did not have proper notice -- oh, excuse
18 me, here it is. The quote is the factual material on which the
19 agency relies for a decision so that he may rebut it, right.
20 The factual material on which the agency relies for a decision,
21 these are the criteria, and no one knew about it until after
22 the case was basically over.

23 So it's, again, it fails due process in that respect.

24 The other thing I want to talk about the criteria is
25 in connection with the substantial evidence standard. So

1 substantial evidence, people have talked about what it means.
2 I think Mr. Taggart articulated it pretty well. It's got to
3 be -- if it's arbitrary and capricious, it does not equal
4 substantial evidence, right, then it cannot be substantial
5 evidence. Substantial evidence is evidence on what you can
6 reasonably rely, right.

7 This case, this hearing, was about the hydrological
8 connection, among other things, of the Lower White River Flow
9 System. The criteria -- or that was at least -- that was one
10 of the key inquiries.

11 The criteria in this case, and I am going to go
12 through them because how they're articulated is one of the
13 reasons why there isn't substantial evidence in the case. The
14 criteria are these:

15 The first is water level observations whose spatial
16 distribution indicates relatively uniform or flat
17 potentiometric surface are consistent with a close hydrologic
18 connection;

19 The second one is water level hydrographs that in a
20 well-to-well comparison demonstrate a similar temporal pattern
21 irrespective of whether the pattern is caused by climate,
22 pumping or other dynamic is consistent with a close hydrologic
23 connection;

24 Water level hydrographs that demonstrate an
25 observable increase in drawdown that corresponds to an increase

1 in pumping and observable decrease in drawdown or recovery that
2 corresponds to a decrease in drawdown or recovery that
3 corresponds to a decrease in pumping are consistent with a
4 direct hydrological -- a hydraulic, excuse me, connection and
5 close hydraulic connection to the pumping;

6 The fourth is water level observations that
7 demonstrate a relatively steep hydraulic gradient are
8 consistent with a poor hydraulic connection and a potential
9 boundary; and

10 Five is geologic structures that have caused a
11 juxtaposition of the carbonate rock aquifer with low
12 permeability bedrock are consistent with a boundary.

13 And there's a sixth. The reason I'm not going to
14 read the sixth is because the first five, it would be a little
15 different than the first five. The first five are all trying
16 to identify a correlation between the factors and the facts
17 that they articulate and the existence of a close hydrologic
18 connection. So they're all saying if you show us this or if we
19 see fact A, that fact is consistent with the existence of a
20 close hydraulic connection.

21 The fundamental analytical problem with that is that
22 correlation is not causation. To identify factors that are
23 consistent with the existence of a close hydraulic connection
24 is not to determine the existence of a close hydraulic
25 connection. It's to determine, at most, the existence of facts

1 that are consistent with that connection based on the State
2 Engineer's view.

3 THE COURT: Okay. Say that one more time.

4 MR. FOLETTA: You're right. Turning this into a
5 philosophy class based on logic.

6 So the -- if all you're doing is determining whether
7 something is consistent with something else --

8 THE COURT: You're not determining that that thing --

9 MR. FOLETTA: That that thing is something else.

10 THE COURT: -- that something else actually exists.

11 MR. FOLETTA: Right.

12 THE COURT: I see. Okay.

13 MR. FOLETTA: If you're to determine that -- if your
14 tests for determining the existence of a tiger is that it has
15 stripes and four legs, and you find something with stripes and
16 four legs, it doesn't make it a tiger.

17 THE COURT: That doesn't make it a tiger. Right.

18 MR. FOLETTA: It could be a zebra or whatever.

19 THE COURT: Okay.

20 MR. FOLETTA: So I don't -- this isn't meant to be
21 sort of flip and casual, like, this is -- this was an
22 incredibly complicated scientific -- set of scientific
23 determinations and an inquiry that gave rise to the
24 determinations, but the test used to determine and to find the
25 ultimate fact in this case, which is that there was a close

1 hydrologic connection, right, that was the outcome of the case
2 was not credible.

3 It didn't get at the actual question. It only did
4 what it could do, which is to determine that there are some
5 facts out there that are consistent with what we think a close
6 hydraulic connection would, and therefore that -- and then they
7 took a jump and said therefore there is a close hydraulic
8 connection.

9 Okay. That is a fundamental issue we have with the
10 case.

11 How does that relate to the actual evidence? It
12 was -- there was lots of evidence put in by parties in the case
13 about why there wasn't a hydraulic connection or why the
14 hydraulic connection wasn't as substantial as some other people
15 thought. There was also evidence. I think SNWA put a report
16 in about -- that got into substantive issue. Is there a
17 hydraulic connection? I think the conclusion they reached was
18 that there was, right.

19 So the point is the -- the reason the substantial
20 evidence was not satisfied in this case, among other things, is
21 because the State Engineer didn't evaluate it in connection
22 with a standard that would have even allowed them to make the
23 determination about the actual existence of a hydraulic
24 connection. It never got that far because all they looked for
25 was consistency with their criteria, not -- they didn't say,

1 you know, we believe -- we think the one report that shows a
2 hydraulic connection is right. They said it satisfies our
3 criteria, and therefore there is a hydraulic connection, right.

4 So they disregarded in effect all the evidence that
5 other people put in about the absence of a hydraulic connection
6 or the limited nature of a hydraulic connection.

7 Also, the way that criteria is worded, it -- it kind
8 of doesn't allow for the possibility that the evidence wasn't
9 good enough at that time to reach the real answer, right,
10 because it's sort of like they short-circuited the inquiry.
11 They stopped when they found consistency. They didn't get to
12 the final question.

13 So one of the things that my client said at the
14 hearing was this is really premature. We need other evidence,
15 and other people have said that too, like the extent of a
16 hydraulic connection just isn't well enough established, right.
17 And now we're phrasing it in terms of substantial evidence.
18 But at the time it was it's not there. The science isn't there
19 yet.

20 The way that the -- because the standard was the
21 standard that that argument got basically thrown out. And, in
22 fact, that's what happened. So the State Engineer referenced
23 our argument at the end, and I'll read you the quote, but the
24 idea was, you know, they said essentially, well, we agree more
25 information would be good over time, as we learn more, the

1 boundaries of the Lower White River System may change. We can
2 look at pumping limits again, but for now, we're going with
3 8,000 feet a year. The system is where the system is.

4 Conjunctive management, joint administration, that's that.

5 That's -- and so that's really kind of our primary
6 issue there.

7 Just to put a little bit of a finer point on what
8 type of evidence that there was, Mr. Flaherty talked about it.
9 I mean, there's all sorts of evidence about the geologic under
10 surface. That essentially was ignored.

11 There were all sorts of -- there was all sorts of
12 evidence about groundwater flows, connectivity, service
13 geology, impact of climate, location of well drilling versus
14 where flows were seen reduced. None of that -- none of the
15 nuance of any of that evidence got captured in the decision
16 because it wasn't consistent with the standard.

17 There is one particular kind of set of facts which
18 might illustrate this point a little better, which is that the
19 State Engineer's consideration of the Lower Meadow Valley Wash.
20 So there is a portion of the order where the State Engineer
21 considers the fish and wildlife services position on how to
22 treat the Lower Meadow Valley Wash.

23 The ultimately the Lower Meadow Valley Wash was not
24 included in the Lower White River Flow System. The reason why
25 it's significant to us is because the evidence was that the

1 Meadow Valley Wash could contribute flows to the system. In
2 other words, there was a lot of discussion about there not
3 being enough water. The Lower Meadow Valley Wash has water to
4 give, right, and so the evidence at the hearing was that the
5 Lower Meadow Valley Wash could contribute water to the Big
6 Muddy Spring, which contributes about 30 percent of water to
7 the Muddy River itself.

8 The analysis that the fish and wildlife service did
9 to put this evidence forward was based essentially on
10 temperature and some chemistry associated with this, I don't
11 know, I'll call it a flow analysis they did. But what the
12 State Engineer ended up saying is like, well, there's not
13 really data consistent with our criteria to include that within
14 the system, and so we're not going to do that.

15 What our position is with respect to that is that
16 essentially what they're saying is that, well, like all this
17 chemistry and temperature data that you showed us that you say
18 supports an inclusion of this unit or this Lower Meadow Valley
19 Wash in the unit was not consistent with the criteria that we
20 had set fourth, and therefore we are not putting it in the
21 Lower White River Flow System.

22 THE COURT: So when you're talking about chemistry,
23 you're talking about the unique water chemistry between the
24 waters to show that it would potentially be flowing from --

25 MR. FOLETTA: Where it's going and (indiscernible),

1 right.

2 So the point here is that this is again the criteria
3 that the State Engineer is using dictating a particular result,
4 which criteria is dictated results. There's no doubt about
5 that, but the point is that the criteria in this case dictated
6 the exclusion, not only of this resource but really of
7 consideration of it because the State Engineer said it's not
8 the kind of data we want to see, like we're looking for
9 something else.

10 But again, the things that they were looking for was
11 all based on consistency.

12 So the criteria itself was really developed kind of
13 outcome oriented. It drove the outcome. And because it was
14 announced after the fact, did not satisfy due process.

15 The last real substantive area I want to talk about
16 is the -- is the pump limit. So the -- our critique of the
17 decision as it relates to the pump limit is based on the
18 substantial evidence standard. So there's a couple reasons why
19 the establishment of the pump limit is not consistent with
20 substantial evidence.

21 First of all, as the order itself acknowledges, there
22 was no consensus among experts at the hearing about, quote, the
23 long-term annual quantity of groundwater that can be pumped.
24 Recommendations range from zero to 30,000 acre-feet. Okay.
25 That's the record at page 58.

1 The order also says the, quote,

2 There is near consensus that the exact
3 amount of water -- or, excuse me, the exact
4 amount that can be continually pumped from the
5 long term -- for the long term cannot be
6 absolutely determined with the data available
7 and that to make that determination will require
8 monitoring of spring flow water levels and
9 pumping over time.

10 Okay. People are all over the place. There's some
11 huge numbers. There are some small numbers. There is some no
12 numbers. You know, no consensus, right. No answer is emerging
13 from the process itself. No weight of kind of authority is
14 moving in the direction of a number. But what there is
15 consensus about is that we can't -- we don't really know the
16 real number. Like it's going to take us a while to figure it
17 out. Experience is going to show us over time now that we're
18 kind of paying attention. The order goes on to say, quote,

19 There is almost unanimous agreement among
20 experts that data collection is needed to
21 further refine the certainty, the extent of the
22 groundwater development that can continually be
23 pumped over the long term.

24 That's at the record at 58. Again, we need more
25 data.

1 Notwithstanding those determinations, those findings
2 up front, the State Engineer concluded, again, at page 58 of
3 the record, quote,

4 The current data are adequate to establish
5 an approximately -- and approximately limit to
6 the amount of pumping that can occur within the
7 system, but -- and I'm adding some words further
8 data. It's my insert -- essential to refine and
9 validate this limit.

10 So and other people talked about this. It's like the
11 numbers are all over the place. We know it's going to take
12 more time to really figure this out. We need more data, but
13 right now we're going to pick a number, and the data is
14 adequate to do that, okay, but there's nothing in the order
15 that substantiates the adequacy of the number. It's just
16 there. It's picked at 8,000 acre-feet.

17 Now, other people have said, well, we had a study
18 that says 4- to 6,000, and there are some studies in there that
19 are kind of close to 8,000, but there's no -- if you read the
20 order -- I'm sure you've read it -- you should read it again
21 because it's the best way to understand the case, there's no
22 rigorous analysis of how they get to the 8,000. It just shows
23 up in the context of statements about how the numbers are all
24 over the place; there's no consensus, and we need more data,
25 right. So it's a Band-Aid.

1 They can't be a Band-Aid.

2 The process is not a Band-Aid process. It was a
3 noticed hearing. The purpose was -- of it was to determine
4 hydrologic connection, sustainable yield pumping, so on and so
5 forth. They have to figure it out. And if they can't figure
6 it out, they can't pick a number because substantial evidence
7 says you got to have a -- you know, in this context you've got
8 to have a number. It's got to be a reasonable number. It
9 can't be arbitrary and capricious. It's arbitrary to pick a
10 number when you know it's not the right number, and it's not
11 going to be the right number until you learn more about it.

12 The -- another reason I think the number is there,
13 because this discussion is there around the 8,000 acre-feet is
14 because of the dace. All right. So well, same topic, but kind
15 of subtopic, a lot of discussion about how to handle the dace.

16 We raised the Endangered Species Act in our brief,
17 and we had a kind of back and forth going with the State
18 Engineer about that. Here's what we're saying. We're not
19 saying the dace is a dumb fish and we don't like it, and they
20 can all go away, right.

21 What we're saying is we agree. The State Engineer
22 considers environmental factors, including the prospects of the
23 dace. Totally legitimate, okay.

24 But what we are saying is that the Endangered Species
25 Act, totally wrong context to consider the dace. The

1 Endangered Species Act is a federal law. It's governed by the
2 federal government, enforced by the federal government. Fish
3 and Wildlife Service determine when a take occurs. If a take
4 occurs of endangered species, big deal, right, like this isn't
5 like -- you don't determine whether a take occurs or that it's
6 going to occur after a weeklong hearing at the State Engineer's
7 office. It's like, you know, there's a whole rubric framework
8 around how to determine that, and liability on the Endangered
9 Species Act is a very serious thing.

10 THE COURT: So then is it your position that it
11 shouldn't be under the Endangered Species Act that the Nevada
12 State Engineer considers that, but under the public interest?

13 MR. FOLETTA: Right. Can't do it that way.

14 And the problem with the decision, the reason why
15 it's -- you know, you can't, like -- because (indiscernible),
16 oh, what if I just construe it as a consideration of the public
17 interest. You can't do that because the State Engineer
18 considered it how he considered it. He considered it in the
19 context of liability under the Endangered Species Act.

20 Liability under the Endangered Species Act is not an
21 environmental consideration. It is a legal consideration about
22 jeopardy that the State or water rights users could be subject
23 to if they make a different decision in this case, right, that
24 was kind of how they articulated it.

25 It's all about we're avoiding -- we're avoiding that.

1 We're avoiding jeopardy, legal jeopardy. That's not the proper
2 way to consider the impact of whatever decisions they were
3 going to make on the dace, and we can't reconstrue it in a way
4 that is appropriate for them because they didn't do it that
5 way.

6 If they want to consider the dace, I mean, unless
7 everything else in the case, you throw out all arguments and
8 you buy this one, what you would have to do is remand it for
9 reconsideration on that particular issue in light of the
10 appropriate statutory factors.

11 The last point I was going to make about this is
12 that, and this kind of gives you a feel for our view of the
13 case, but also kind of how textured the decision really should
14 have been, right. So the decision was all these basins in the
15 Lower White River Flow System, 8,000 acre-feet, whole system,
16 right, that's the limit on everything.

17 One of the problems is that -- and kind of like the
18 underlying basis, factual basis of the decision was bathtub,
19 right. So bathtub, big basin, here's a limit. Slap it on top.
20 We're done for now, right. We'll come back and talk about
21 management later. Maybe these things change, and maybe they
22 don't, but that's where we're at.

23 Totally overbroad decision, right. There was a lot
24 of evidence about, among other things, the location of where
25 pumping was taking place in the pump test, and what the results

1 were showing people. And so I talked a little bit about it,
2 but, I mean, the point is our view is that even putting aside
3 the number, the 8,000 acre-feet, the application of the 8,000
4 acre-feet to the system as a whole was arbitrary and capricious
5 because not -- not all the evidence demonstrated that 8,000
6 acre-feet was necessary to preserve the integrity of the entire
7 system. Because, I mean, water is not -- it's not a uniform
8 system, right. Like it's not one bathtub with an equal amount
9 of bathtub. It's, at least as the State Engineer has
10 conceptualized it and ordered it, it's a large geographic area,
11 and there's like, you know, the availability of water, the
12 existence of water is not consistent at every square foot.

13 And so the point is, there was no consideration of
14 the appropriate, even putting aside basin specific approach,
15 there's no consideration of the appropriate geographically
16 centered approach within the Lower White River Flow System as
17 it relates to the pumping volume, right. So the point is you
18 can do more pumping in other places than you can in other
19 places.

20 The -- I'll read a statement from the order to try to
21 wrap this up. It said -- the order says -- this is the record
22 at page 60:

23 The State Engineer finds that the data
24 support the conclusion that pumping from
25 locations within the Lower White River Flow

1 System that are distal from the Warm Springs
2 area can have a lesser impact on spring flow
3 than pumping from locations more proximal to the
4 Springs. The Lower White River Flow System has
5 structural complexity and heterogeneity, and
6 some areas have more immediate and more complete
7 connections than others.

8 Goes to the point I'm trying to make.

9 There remains some uncertainty as to the
10 extent that distance and location relative to
11 other capturable sources of discharge, either
12 delay, attenuate or reduce capture from the
13 Springs.

14 Okay. I think they're saying what I'm trying to say.
15 They're saying it better, right. This is the Lower White River
16 Flow System is not the same corner to corner. It's different,
17 right. Flows are different. Geography matters within the
18 system. We don't -- we know it matters, right. They're
19 finding that it matters, and notwithstanding the finding,
20 they're saying 8,000 acre-feet is the limit across a thousand
21 square miles at the Lower White River Flow System.

22 It is arbitrary and capricious to acknowledge on the
23 one hand uncertainty about -- about the relationship of the
24 Lower White River Flow System to itself and then choose a
25 solution that is unequivocal and generally applicable.

1 To conclude, I'll go back to kind of where I started,
2 which was I talked about this idea that we had raised at the
3 hearing about this preceding being in some ways ahead of itself
4 in that it ultimately there was a decision about policy and
5 management that wasn't preceded by a full-throated discussion
6 of how to do that in relationship to the data, the scientific
7 data.

8 And so our view is that you really cannot disconnect
9 the two very well, right. The policy discussion informs your
10 understanding of the data. It doesn't change it, right, but it
11 tells you what's relevant about it in some cases and what's
12 not, and it's the only way that you get a solution that's not
13 overbroad, right. Because if you do -- if you do one but not
14 the other, you're not getting something that is, among other
15 things, based on substantial evidence and lawful, but that's
16 just not -- it's just not very good.

17 So we raised this at the hearing.

18 In the Order 1309 at page 54, the State Engineer
19 addresses our point, and this is the quote:

20 Georgia-Pacific and Republic asserted that
21 boundaries are premature without additional data
22 and without legally defensible policy and
23 management tools in place. They expressed
24 concern that creating an administrative unit at
25 this time inherently directs policy without

1 providing for due process.

2 That's what we're saying today.

3 The State Engineer has considered these concerns and
4 agrees that additional data and improved understanding of the
5 hydrologic system is critical to the process.

6 He also believes that the data currently
7 available provide enough information to
8 delineate the Lower White River Flow System
9 boundaries and an effective management scheme
10 will provide for the flexibility to adjust
11 boundaries on additional information, retain the
12 ability to address unique management issues on a
13 subbasin scale and maintain partnership with
14 water users who may be affected by management
15 actions throughout the LWRFES.

16 I think that this actually, the way they addressed
17 our concerns in the order reflects what our concerns remain,
18 and I think it really reflects a misjudgment about the effect
19 of what they were doing, right. They were kind of
20 encapsulating everything that I've been trying to talk about,
21 which is that they're acknowledging more data. This isn't
22 right yet, but for now we're going to try to get it right. But
23 don't worry because we're going to manage it later in a way
24 that is, you know, (indiscernible) okay for you, but there will
25 be a process. You will -- we'll work in partnership with water

1 users. You know, all of that.

2 I think it reflects kind of an obliviousness to the
3 concrete impact of what they did in scrambling people's
4 priorities, and I think it's -- it's also naïve to think that
5 the regulator in this case could make a kind of -- another kind
6 of quasi interim order that is definitive entirely impactful,
7 incredibly harmful to some people, acknowledge that it's
8 interim nature, not just because in time it's interim, but
9 because they need more information to make the real decision,
10 and then to say don't worry about it. We're going to come back
11 later and figure this all out, and it'll be okay. It's not
12 okay.

13 So for these reasons, Your Honor, we have asked that
14 in our prayer that the order be vacated. If -- and, you know,
15 you're going to have to walk through probably a checklist here
16 and figure out what you're going to do, but obviously legal
17 errors demand that it be vacated.

18 So lack of authority gets vacated, not remanded,
19 vacated. You know, if the State Engineer wants to notice
20 another hearing, wants to take a second crack at this, if they
21 don't have authority to do conjunctive management, joint
22 administration, they can do that. They would follow all the
23 rules as set forth, but that would be their choice, but legal
24 error is -- it goes away.

25 Due process, if it is due process on the notice

1 overall, then it should be remanded. It should be vacated.
2 You have the option to remand it in that case if you want, but
3 the State Engineer maybe would have the option to renotece it
4 or not. They don't have to reconsider the case, right. But
5 notice is -- failure of properly noticing the proceeding is
6 death to the order because nothing -- nothing that comes out of
7 it can be managed at that point.

8 THE COURT: So is it your position that if I find
9 that there was not the due process necessary that it -- I would
10 have to vacate it as opposed to remand it to then have a
11 proceeding that's consistent with due process?

12 MR. FOLETTA: Right. You -- because an order that is
13 not a product of due process and doesn't satisfy it cannot
14 stand. So the order must be vacated, but vacating and remand
15 are not necessarily related, right.

16 THE COURT: Right.

17 MR. FOLETTA: So your decision on remand is -- I
18 think there's actually some debate on what you can remand and
19 when you can remand, but my view is you must vacate the order.
20 Whether you remand it or not is not totally relevant to me
21 because I don't think you can force the State Engineer to have
22 this proceeding again, right. I think you can't tell them you
23 failed to do the notice right. Do the notice and redo the
24 hearing. So I think if it was a failure of the notice that
25 affected the entire case, so if the notice itself was found

1 deficient, you should probably just vacate it.

2 When it comes to notice as it relates to the
3 criteria, I would say you have to -- in my view, that failure
4 taints the whole order because I don't think you can pull out
5 the pieces that flow from the criteria itself, and so I think
6 you vacate the order in that instance. You could try to carve
7 the order up and take out everything related to the hydraulic
8 connection, but I don't -- you wouldn't end up with anything
9 that makes sense, right.

10 So it could be in that situation that you vacate and
11 remand for the State Engineer to kind of conform things, but I
12 don't think that's possible. It's really I think a poison
13 pill.

14 While the substantial evidence portion again I think
15 it's the same answer there. It's very hard to pull this order
16 apart and try to say, well, there was substantial evidence on
17 this, but not on this. You know, pumping limit versus LWRF as
18 a basin as a whole, and if you were to do that, it wouldn't
19 work, right. Like if you let the pump limit stand, but you say
20 there wasn't substantial evidence for the hydraulic connection,
21 the pump limit has no application. So I think it gets vacated
22 in that case as well. And again, the State Engineer can decide
23 where to go from there.

24 Thank you, Your Honor.

25 THE COURT: All right. Thank you.

1 All right. So I think at this point it would
2 probably be a good time to take a break.

3 Why don't we do a 10-minute break.

4 So let me ask, Ms. Peterson, so, you know, I said
5 yesterday that I do need to break at 12:30 and go from 12:30 to
6 1:30. That will give you a little less than two hours. Do you
7 think that that's something you would be able to do?

8 MS. PETERSON: I think that would work.

9 THE COURT: Okay. All right.

10 UNIDENTIFIED SPEAKER: We're going to split time.

11 THE COURT: Okay. Okay. So why don't we take a
12 10-minute break, but I'll --

13 MR. LAKE: Your Honor --

14 THE COURT: Yes.

15 MR. LAKE: I just want to let you know that I have
16 paper copies of my presentation from yesterday.

17 THE COURT: Oh. Great.

18 MR. LAKE: Just to let you know. When would be a
19 good time to distribute those?

20 THE COURT: If you want to stand at the door and
21 distribute it to people as they go on their way out, that would
22 probably be a good time.

23 All right. We'll see everyone in a bit.

24 (Proceedings recessed at 10:31 a.m., until 10:42 a.m.)

25 (Pause in the proceedings.)

1 THE COURT: Okay. You may proceed.

2 MR. KLOMP: Thank you, Your Honor. Good morning.
3 Wayne Klomp on behalf of Lincoln County Water District. And as
4 we are joint petitioners with Vidler, we'll be splitting time
5 and also changing attorneys during our presentation.

6 THE COURT: Okay.

7 **ARGUMENT FOR LINCOLN COUNTY WATER DISTRICT**

8 MR. KLOMP: Lincoln County Water District is a
9 political subdivision that was created by the Nevada
10 Legislature to develop and -- develop water rights and hold
11 water rights for the purposes of economic development within
12 the borders of Lincoln County. And so that is our role in the
13 water process.

14 First I'm going to talk a little bit about the
15 timeline as it pertains to Lincoln and Vidler and then go into
16 the comprehensive statutory scheme, how 1309 deviates from that
17 comprehensive statutory scheme.

18 And then I'll talk a little bit about how it violates
19 the due process rights of Lincoln and Vidler and also violates
20 the separation of powers doctrine.

21 And starting with the case *Mineral County versus Lyon*
22 *County*, the Supreme Court said,

23 Certainty of rights is particularly
24 important with respect to water rights in the
25 Western United States and the doctrine of prior

1 appropriation is itself largely a product of
2 compelling need for certainty in the holding and
3 use of water rights.

4 THE COURT: And this is Slide 1?

5 MR. KLUMP: This is Slide 1, thank you. And I'll try
6 to refer to those, but reminders are certainly welcome.

7 So it's under that backdrop that we challenge 1309
8 because 1309 has really thrown into a tailspin the parties
9 understanding of what water rights are and how they're
10 administered by the State Engineer and what the statutory --
11 comprehensive statutory scheme means. And the backdrop of that
12 also is this statement that the legislative act is the charter
13 of the administrative agency, and the administrative action
14 beyond the authority conferred by the statute as *ultra vires*.
15 And so it's with those two concepts in mind that I'd like to
16 continue the presentation.

17 I want to first dispel the notion that 1309 is a new
18 idea that groundwater and surface water are connected or that
19 these hydrographic basins that were hydrographic basins for
20 separate administration purposes were also not connected.

21 In 1966, the Department of Conservation and Natural
22 Resources, which is the umbrella for the State Engineer's
23 office, together with the USGS, issued Bulletin 33. This is a
24 map of the White River Flow System. And as you can see from
25 the map of --

1 THE COURT: This is Slide 3, or is it Slide 2 -- or
2 part of --

3 MR. KLUMP: Slide 3. So this is Slide 3, and there's
4 some graphics in the Slide 3.

5 THE COURT: Okay.

6 MR. KLUMP: So you asked earlier whether there's been
7 consideration of whether there's an interaction between
8 groundwater and surface water before, has it been considered.
9 This is an emphatic, yes. Of course, it's been considered. So
10 in 1966, the department -- the Nevada Department of
11 Conservation and Natural Resources issued Bulletin 33 and
12 released this map showing that the lower -- or not the Lower
13 White River Flow, but the White River Flow System extends just
14 beyond the border of White Pine County into Elko County, right,
15 and this extends all the way down into Clark County.

16 From the abstract, these are the principal findings
17 of that 1966 report:

18 One, Paleozoic carbonated rocks are the principal
19 means of transmitting groundwater in the intrabasin regional
20 system.

21 Two, estimates of recharge and discharge show wide
22 discrepancies in individual valleys. And then it goes into a
23 discussion of the recharge.

24 And the critical one is three.

25 The discharge of the Muddy River Springs, the lowest

1 of the three principal spring groups is shown to be highly
2 uniform, which is consistent with their being supplied from a
3 large regional groundwater system.

4 So, yes. The answer is yes. There has been a
5 recognition since at least 1966 that there's an interaction
6 between groundwater and surface water.

7 Despite that knowledge, the State released and
8 developed the 232 distinct hydrographic basins.

9 Now, why it didn't -- why it drew those lines, that's
10 not for me to say, but the fact is they drew those lines for
11 administration purposes. So the --

12 THE COURT: So let me just ask you a question because
13 I know that you cited to the 233 basins or geographic areas
14 that were designated as basins. Is that what it's called?

15 MR. KLUMP: Yes.

16 THE COURT: Okay. So 232 hydrographic areas which
17 are the basins, what are the 14 major hydrographic regions for
18 basins?

19 MR. KLUMP: Brad, is it okay if I use your --

20 MR. HERREMA: Certainly.

21 MR. KLUMP: Okay.

22 THE COURT: Okay. So, I mean, because it seems to
23 use the same terminology for basins.

24 MR. KLUMP: So this is the map that the State
25 released.

1 THE COURT: Okay.

2 MR. KLUMP: And just so you guys know, this shows the
3 230 two distinct hydrographic basins.

4 THE COURT: Right.

5 MR. KLUMP: And then down here, they're divided into
6 14 different units, right. So the Lower White River Flow
7 System -- not the Lower, the White River Flow is one of those I
8 believe. Let me look at 206. Sorry. It's defined as the
9 Colorado River Basin.

10 THE COURT: Okay.

11 MR. KLUMP: So that includes what we're talking about
12 today as the Lower White River Flow as well as other basins.

13 THE COURT: Okay. So explain to me the difference
14 between those 14 basins and the 233 basins.

15 MR. KLUMP: So my understanding is that the 232 were
16 separated for administration purposes.

17 THE COURT: Okay.

18 MR. KLUMP: And I don't -- I can't pretend to know
19 what the 14 are, but I believe that they were for -- those were
20 the connected ones. So the basins within these 14 units are
21 connected.

22 THE COURT: Is there anything in the statutes that
23 regulates the 14 areas?

24 MR. KLUMP: Not that I know of.

25 THE COURT: So only -- the only regulatory scheme

1 within the statutes has to do with the 233 separate basins
2 within as opposed to the 14 larger areas -- or larger basins or
3 whatever -- it says hydrographic regions or basins. It says 14
4 major hydrographic regions or basins, according to the water
5 words dictionary on the State Engineer's website.

6 MR. KLUMP: So I think to understand the answer to
7 that question, we have to understand how these basins came
8 about, and I think that they were drawn by the State as
9 joint -- or separate administrative units.

10 THE COURT: Right. And I think that this started out
11 like if you wanted to use water you had to do a petition, and
12 then that kind of thing; is that right?

13 MR. KLUMP: Yes. So you have to do an application.

14 THE COURT: Right.

15 MR. KLUMP: And you have to identify the source where
16 that water is going to be drawn from. Then you have to
17 identify the location that you're going to use that water.

18 And then the statutes grew up around this separate
19 administration of these 232 distinct basins.

20 THE COURT: Sorry. I didn't mean to throw you off,
21 but I just wanted to have a better understanding because I
22 think there are different interpretations I guess of the word
23 basin depending on what your position is. So I just wanted to
24 make sure.

25 MR. KLUMP: No. And I totally appreciate that

1 because I did a ton of research trying to figure out how these
2 basins were drawn, and it doesn't seem like that information is
3 readily available.

4 But if you look at this map, the basins do not yet
5 exist as they do on this map.

6 THE COURT: Okay.

7 MR. KLUMP: And I would have thought that since they
8 were doing an analysis of the White River Flow System, they
9 would have included the distinct hydrographic basins had they
10 existed. And I think there was test -- or comment yesterday
11 that they were developed starting in 1968. That was a comment
12 from Mr. Robison.

13 THE COURT: Okay.

14 MR. KLUMP: But further to your point, Your Honor, I
15 wanted to talk a little bit about the timeline as it pertains
16 to Lincoln and Vidler and then use that --

17 THE COURT: What is the slide?

18 MR. KLUMP: This is Slide 4. And to use that
19 timeline as a method to talk about the -- what you just
20 mentioned, which was the application process and the
21 appropriation process.

22 So this proceeding really started in 2002, and the
23 State Engineer issued Order 1169. Lincoln and Vidler did
24 not -- we didn't know they had participated until 2018 or so,
25 but critical to I think these proceedings, in 2005, Lincoln and

1 Vidler filed for appropriation of water in Kane Springs. So
2 they filed an application. And I'm going to maybe come back to
3 this, but as we talk about the timeline, I'm going to go
4 through some of those documents that are issued during this
5 time frame.

6 So starting with Order 1169, it mentions six of the
7 hydrographic basins by name and number. Kane Springs is not in
8 there.

9 So in 2005, Lincoln and Vidler apply, file an
10 application for appropriation of water, which in 2007 resulted
11 in the issuance of Ruling 5712, which granted an appropriation
12 of a thousand acre-feet. So between 2005 and 2007, the State
13 Engineer would have held hearings. He would've heard protests
14 and then come out with this ruling. There were several
15 protestants during those proceedings; National Park Service was
16 one. The U.S. Fish and Wildlife Service was another. And
17 those two entities specifically requested that Kane Springs be
18 included in the Order 1169 study area.

19 The State Engineer in issuing Ruling 5712 by statute,
20 NRS 533.370, and this is Slide 6, the State Engineer has to
21 make by law certain findings, and those are listed here in the
22 ruling. He asks that -- there cannot be any unappropriated
23 water at the proposed source. The proposed use or change
24 cannot conflict with existing rights. The proposed use or
25 change cannot conflict with protectable interest in existing

1 domestic wells, and the proposed use or change cannot threaten
2 to prove detrimental to the public interest. So those are
3 express findings that he has to make in order to grant an
4 appropriation of water.

5 Further to that in slide 7, it shows what findings,
6 some of the findings from Ruling 5712, specifically the State
7 Engineer in the first -- in the top quote is still able to
8 manage the groundwater basins as they have been historically
9 managed administratively. That is as separate administrative
10 units, but also take into consideration the concerns that arise
11 for groundwater basins that are hydrologically connected.

12 So the fact that these basins are hydrologically
13 connected is not new, and it was known at the time that
14 Ruling 5712 was granted.

15 And then the third one, the State Engineer finds that
16 there is not substantial evidence that the appropriation of
17 limited quantity being granted under this ruling will likely
18 impair the flow of the Mighty River Springs.

19 So in making those rulings, he overruled the --

20 THE COURT: In making 1309 rulings?

21 MR. KLUMP: In Ruling 5712 --

22 THE COURT: Right.

23 MR. KLUMP: -- he overruled the protestant from the
24 National Park Service, who wanted Kane Springs to be included
25 in the 1169 study area and the pump test. Lincoln and Vidler

1 settled their dispute or the protest of the U.S. Fish and
2 Wildlife Service by entering into a stipulation to protect the
3 dace.

4 And I bring that up, Your Honor, because in ruling
5 1309, it is specifically the National Park Service that he
6 relies on to include Kane Springs, right. So that's one of our
7 contentions is that --

8 THE COURT: Already --

9 MR. KLOMP: You've already, yeah. You've made this
10 decision already.

11 THE COURT: Okay.

12 MR. KLOMP: And it's a ruling. It's not like a
13 policy or it's an adjudication of an appropriation of water.

14 THE COURT: Okay. Let me ask you a question because
15 there was a position in the briefing that the -- a subsequent
16 Nevada State Engineer can't overrule a previous Nevada State
17 Engineer's decision. Is that really your position that, you
18 know, as science or conditions change, that, you know, the more
19 recent Nevada State Engineer can't then look back to change a
20 prior State Engineer's order or, you know, I guess in effect
21 change the order?

22 MR. KLOMP: So, no, he cannot. And for many reasons.

23 THE COURT: Okay.

24 MR. KLOMP: But that is not without saying that he
25 doesn't have resources to administer the rights that have been

1 appropriated. And the way that that happens is through the
2 comprehensive statutory scheme. There is the designation of a
3 basin as a basin in need of further administration. There is
4 the designation of a basin as a critical management area.

5 And so there are other tools, and I'm going to go
6 into those.

7 THE COURT: Sure.

8 MR. KLUMP: And we can even skip forward if --

9 THE COURT: No, that's okay. I won't throw you off
10 your argument. That's just a question that I had, but if
11 you're going to be addressing it, just (indiscernible).

12 MR. KLUMP: Yeah, no. Specifically that question,
13 because when you overrule prior rulings, that implicates severe
14 due process violations.

15 Now, we're not saying that he can't administer the
16 water rights from those hydrographic units. Even as
17 Ruling 5712 states inside the ruling, as stated inside 7.

18 Moving to Slide 8, Ruling 5712 also recognized in
19 line 1 a strong hydrologic connection between Kane Springs
20 Valley and Coyote Springs. So again, not new information.
21 Order 1309 did not expressly for the first time come out with
22 that information. It just joined those basins for joint
23 administration.

24 This section of the ruling also talks about the
25 change in elevation. You know, the State Engineer found that

1 there was a distinct change in elevation of the water table
2 between Kane Springs and Coyote Springs, which is significant
3 in the development of the six criteria. It's significant to
4 our arguments about substantial evidence. And then again, the
5 bottom of slide 8 finds there is not substantial evidence that
6 the appropriation of a limited quantity of water in Kane
7 Springs is going to disturb the --

8 THE COURT: Impact on the --

9 MR. KLOMP: Impact on the Muddy Springs, and it
10 doesn't warrant the inclusion of Kane Springs in Order 1169,
11 critically.

12 THE COURT: So I have a question. Because I know
13 that there was -- that you had made some points, and maybe I
14 don't -- I didn't understand the significance of the points you
15 were trying to make as far as the Muddy Valley Irrigation
16 Company not being listed as an appropriate or of the Muddy
17 River Decree with tributary sources. Can you tell me how that
18 makes an impact or, you know, that I know that there was the
19 headwaters and tributary sources. I'm not sure I understand
20 the true distinction and how that makes a difference for you.

21 MR. KLOMP: So I wish I could answer your question
22 really well.

23 THE COURT: Okay.

24 MR. KLOMP: But Ms. Peterson.

25 THE COURT: Okay. Will answer that question for me?

1 MR. KLOMP: She could answer right now, yeah.

2 MS. PETERSON: Do you want me to do it now?

3 THE COURT: Oh, sure.

4 MR. KLOMP: And thank you, Your Honor. Karen
5 Peterson representing Lincoln and Vidler for purposes of the
6 oral argument.

7 So the Muddy River Decree sets fourth, if you read
8 the decree, and I think Mr. Dotson asked you to read the
9 decree.

10 THE COURT: Right.

11 MS. PETERSON: It sets forth -- here's a table, and
12 we cited it in the record on appeal with it attached to our
13 brief, and it delineates -- the Court delineated in the decree
14 all the tributaries that it considered to be the tributaries
15 and headwaters to the Muddy River.

16 THE COURT: Right.

17 MS. PETERSON: And the specific claim is that then
18 there weren't that many. It notes right in that chart what the
19 tributary was or what the I think -- I don't know. I don't
20 have it right in front of me, but it notes what the --

21 THE COURT: It has like tributaries are Bloedel
22 Springs, Big Springs, Jones Spring, High Springs, Rock Cabin
23 Springs, Cox Springs, and Baldwin Spring.

24 MS. PETERSON: Right.

25 THE COURT: But then there was a distinction between

1 what -- who was listed as an appropriator of the tributary as
2 opposed to -- is it headwaters? Maybe I'm making mixing things
3 up. I don't know.

4 MS. PETERSON: No. The decree notes specifically in
5 the decree what waters the claimant is getting. They can be
6 waters from the Muddy River directly. They can be waters from
7 a tributary source to the Muddy River, which are those named
8 sources.

9 THE COURT: Okay.

10 MS. PETERSON: There's no appropriations from
11 anything that's described as a headwater in the decree.

12 THE COURT: And explain to me what the difference is
13 between what a headwater is and a tributary.

14 MS. PETERSON: Oh, boy, how to begin. I'm not the
15 hydrologist. So the tributary, I would say, and I can ask
16 someone to clean this -- I can clean it up if I need to when I
17 come back.

18 THE COURT: Sure.

19 MS. PETERSON: But the tributary, I would say, is
20 that it's a named source that may come down further in the
21 system that that contributes. The headwaters, I would say, and
22 I don't know all the gauges. I can't remember all of the
23 gauges off the top of my head, but the headwaters would be up
24 towards I believe where the springs are and where the springs
25 start. And those would be the headwaters to the Springs.

1 THE COURT: Okay. So then --

2 MS. PETERSON: And then you've got the Muddy River
3 coming down, and it goes all the way down to Lake Mead.

4 THE COURT: So then headwaters in relation to
5 tributaries would be a larger water source than the
6 tributaries, or is that completely --

7 MS. PETERSON: It just depends on what decree you're
8 talking about and what the, you know, what the whole system is.

9 THE COURT: Right. But what is the significance then
10 that Muddy River Irrigation Company doesn't have tributary
11 rights.

12 MS. PETERSON: Right. So when you -- when the Court
13 was -- and it came from the State Engineer first. And then
14 went to the Court for confirmation, but everybody has to prove
15 up their claim to the water rights. And so they claim a
16 source. Like let's say it was a tributary to Baldwin Springs,
17 and that's probably not the right name, but let's say it's one
18 of those, or it's the Muddy River. And they show that they
19 beneficially use that water, and there's a quantity of water
20 set, let's say 1 CFS, and it at that time is tied to land,
21 irrigated land, that the Court found that that 1 CFS was, you
22 know, irrigated that particular land.

23 And so one of the basis of Nevada law, even
24 prestatutory law is that you're only entitled to the water that
25 you beneficially use. And so when the Court set the decree,

1 the Court recognized what the beneficial use of the waters was
2 and the quantity and where it was used. And then it went
3 through, and it had this chart at the end that summarized what
4 everybody proved up. And so the rights that the Muddy Valley
5 Irrigation Company has are not -- they're from the Muddy River.
6 They're not associated with any of those tributaries, if you
7 look right at where it says the source of their rights are. So
8 that was the point of that, that it says right in the decree.

9 So if Claimant Number 1 was taking from Baldwin
10 Springs, it'll say the source is Baldwin Springs right in that
11 chart.

12 THE COURT: Okay.

13 MS. PETERSON: And it's part of the Muddy River
14 Decree.

15 For Muddy Valley Irrigation Company, it just says --
16 it just says Muddy River. It doesn't say any tributaries.

17 THE COURT: And then how does that affect your
18 position or claims in this litigation? Because it seems like
19 you made a big point of that, but I wasn't sure what the
20 significance of that was as it related to your position.

21 MS. PETERSON: Well, because there is a big concern
22 here, and you heard it yesterday, and that we were going to
23 respond to it in our answering portion of the argument, but
24 there is a concern that the Muddy Valley Irrigation Company is
25 not just claiming the, you know, 36 CFS or whatever the number

1 was that was delineated in the decree, the specific amount set
2 in the decree, but they're also contending that they're
3 entitled to all the tributaries and all the headwaters.

4 THE COURT: Okay.

5 MS. PETERSON: And so if I understand their position
6 correctly, they're contending that Kane Springs, which is
7 22 miles away, groundwater --

8 THE COURT: Is affecting their -- I see.

9 MS. PETERSON: -- is headwaters or tributary.

10 THE COURT: I got it. Okay. Now, I understand.
11 Thank you.

12 MR. KLUMP: Now, I understand better too. Thank
13 heavens for smarter people than me.

14 The other thing that Ruling 5712 did is it overruled
15 the protestant in National Park Service who requested that this
16 application for appropriation of water be held in abeyance
17 along with the 102 other applications in the six remaining
18 Lower White River Flow System Basins. And so the State
19 Engineer found that he did not need to hold this one in
20 abeyance but proceeded even though 1169 had already been
21 issued, and they were aware of what they were, you know, the
22 pump testing, and then the results of that. This proceeded
23 despite those proceedings.

24 So fast forward. Order 1303 comes out, and it
25 recognizes again those same six basins. But what it also

1 recognizes is that each of these basins has been designated
2 pursuant to Statute 534.030. And I'll go into that a little
3 bit in a little bit, but that is a specific designation that
4 allows the State Engineer to recognize that that basin needs
5 additional administration, right. So those six basins have
6 been designated pursuant to that statutory provision. Nowhere
7 in Order 1403 again is Vidler -- Vidler or Lincoln mentioned.
8 Nowhere does it recognize Kane Springs might be considered as a
9 part of the Lower White River Flow System.

10 Again, this just talks about Order 1303, and
11 mentioning the groundwater pumpage.

12 THE COURT: Which slide?

13 MR. KLUMP: This is Slide 10.

14 The last one mentioning the designation was Slide 9.

15 And now, moving to Slide 11.

16 So Order 1303, what it did was it took those six
17 distinct hydrographic basins, and it said we're going to
18 consider them for joint administration for purposes of
19 administration of water rights. Again, no mention of Kane
20 Springs. No mention of Ruling 5712 or Lincoln, Vidler's water
21 rights.

22 And then for the first time in Order 13 --

23 So somewhere in there, Lincoln and Vidler started to
24 participate in the 1303 proceedings. There was never any
25 notice from the State Engineer's office to us that I'm aware

1 of. We just recognized, hey, look, wow, there's -- something
2 is happening here. Maybe we should give our information as
3 well.

4 During the 1169 pump test, no pumping took place in
5 Kane Springs. I think there was maybe one monitoring well,
6 right across the border from Coyote Springs Valley, which
7 Ms. Peterson will go into.

8 THE COURT: Within Kane Springs?

9 MR. KLUMP: One in Kane Springs.

10 Oh, the other thing that this Slide 13 -- or 12
11 demonstrates is that the State Engineer now is relying on the
12 expert from the National Park Service, a witness or an entity
13 that protested initially Ruling 5712 but was overruled.

14 And then in 1309, he finds that Kane Springs is
15 hydrologically connected and includes them within the Lower
16 White River Flow System. That's in Slide 13.

17 So again, there's a limit on the State Engineer's
18 authority, and this was also a quote from Mineral County:

19 The legislature has established a
20 comprehensive statutory scheme regulating the
21 procedures for acquiring, changing and losing
22 water rights in Nevada, and it's our contention
23 that this comprehensive statutory scheme was not
24 followed in the issuance of ruling -- or of
25 Order 1309.

1 THE COURT: And that's on Slide 14?

2 MR. KLUMP: This is Slide 14. Also states that,

3 The State Engineer's powers thereunder are
4 limited to only those which the legislature
5 expressly or implicitly delegates. And noting
6 that the State Engineer cannot act beyond his or
7 her statutory authority.

8 And again, this is authority that the State Engineer
9 recognized he did not have during the 2019 legislative session,
10 as reflected on Slide 15. The State Engineer stated in
11 hearings that, Existing statute does not provide the framework
12 necessary to effectively implement the legislature's policy
13 direction. That's speaking about the conjunctive management
14 policy.

15 And then the director of the Department of
16 Conservation of Natural Resources said, We have been managing
17 groundwater and surface water separately for over a hundred
18 years. The proposed bill, Assembly Bill 51, is designed to get
19 some direction from the legislature as to how best to manage
20 conflict among existing rights holders.

21 So with that backdrop, I just wanted to talk a little
22 bit about the basic designations and recall that six of those
23 basins in the Lower White River Flow System were designated,
24 and this is the section that talks about the designation. And
25 again, it's any particular basin or portion thereof.

1 This is Slide 16, referencing NRS 534.030.

2 There are two different ways that the basin can be
3 designated. The first is by petition of 40 percent of
4 appropriators of record in the office of the State Engineer, in
5 any particular basin or portion therein.

6 And again, this is speaking specifically to the
7 distinct hydrographic units, the 232 numbered basins. In slide
8 17, this is the statute where the State Engineer can designate
9 a basin without a petition from the water rights holders.

10 So in the absence of a petition, there has to be a
11 hearing, and it has to be held in the county where the basin
12 lies. There's no disputing the fact that Kane Springs has
13 never been designated pursuant to either of these portions of
14 the statute.

15 This also, and I have a slide on this, but this is
16 the context under which the 534.120 has to be read when it's
17 talking about an area that's been designated under this
18 chapter. And it's referring back to these two designations by
19 basin.

20 So what does designation of a basin do? Well, it
21 allows the State Engineer additional tools to manage those
22 administrative units. Under 534.035, he can establish a
23 groundwater board made up of various individuals in that basin.
24 Under 534.050, a new permit is required before new wells can be
25 drilled. Other -- you can drill wells in some basins without a

1 permit if it's like for domestic purposes.

2 THE COURT: Okay. And that's slide --

3 MR. KLUMP: This is Slide 18.

4 And under 534.1108, he can restrict dwelling -- or
5 drilling of wells in the designated basin or portion thereof.

6 Again, it's referring to those hydrographic basins.

7 And then Slide 19 is that reference that has been
8 discussed several times about within an area -- this is
9 534.120, within an area that has been designated by the State
10 Engineer as provided for in this chapter. So that's talking
11 about a designated basin or portion thereof. Where the
12 judgment of the State Engineer the groundwater basin is being
13 depleted, the State Engineer in his or her administrative
14 capacity may make such rules and regulations or orders as are
15 deemed essential for the welfare.

16 So these are the tools that this legislature has
17 deemed to give to the State Engineer. Anything beyond those is
18 *ultra vires*.

19 Moving to Slide 20, there are additional tools that
20 the State Engineer has, and that's including he can designate a
21 critical management area. That's under 534.110 sub 7, and
22 that's -- he can designate that where the groundwater
23 withdrawals consistently exceed the perennial yield of the
24 basin.

25 Again, once designated as a critical management area,

1 there are additional tools that are available to the State
2 Engineer. Some of those are included in 534.037, as reflected
3 on Slide 21, but that process involves the groundwater users in
4 that basin. So they can get together and say, hey, we've got a
5 big problem here. Let's propose a solution to the State
6 Engineer, and that's what 534.037 talks about. The petition
7 must be signed by a majority of the holders of permits or
8 certificates to appropriate water in the basin that are on file
9 in the office of the State Engineer.

10 And then finally, the harshest of remedies in
11 Slide 22 reflects that curtailment could ensue once a basin has
12 been designated as a critical management area, and that's under
13 534.110, sub 7.

14 But those are not all the duties of a State Engineer,
15 as enacted by the legislature to administer on a basin by basin
16 basis. In 2017, as reflected in Slide 23, the legislature
17 assigned or delegated to the State Engineer the duty to create
18 a water budget and an inventory.

19 Recall -- I believe this is the same year that the
20 conjunctive management statute was adopted. And then in
21 2019 --

22 Boy, now we're going to test my PowerPoint skills. I
23 might have to get Robert Dotson up here to help me.

24 THE COURT: And what slide is this?

25 MR. KLUMP: Okay. This is 24. And in 2019, the

1 legislature again adopted this statute, that the State Engineer
2 was to reserve a certain amount of groundwater in each basin up
3 to 10 percent of the unallocated water.

4 So there's one other element of Ruling 5712 that I
5 failed to mention. That was the one where they appropriated
6 water to Lincoln and Vidler.

7 When they made that application, the place of
8 diversion was Kane Springs, right. So they were going to take
9 the water out of Kane Springs.

10 THE COURT: Right.

11 MR. KLUMP: But they were going to use that water in
12 a different basin, and that was --

13 THE COURT: Is this the -- I know that there's a
14 process for transferring basin between -- I mean transferring
15 water between basins; right?

16 MR. KLUMP: Yes. That is an interbasin transfer of
17 groundwater.

18 But this -- the reason I raise this is because it
19 again reflects the intent of the legislature, whether or not it
20 was based on the hydrographic units, to require that when
21 you're using water at a distance from the source, you have to
22 get approval from the State Engineer.

23 And so as part of Ruling 5712, Lincoln and Vidler
24 went through that process of an interbasin transfer, and that
25 was approved. So we could draw the water out of Kane Springs

1 using Coyote Springs. But again, just to show that those were
2 considered distinct basins under the statutory scheme, and that
3 was Slide 25.

4 26 just shows what additional criteria the State
5 Engineer has to consider when ruling on an interbasin transfer
6 of water. So I just wanted to put that up there to show that
7 it's not just the same criteria that are used to appropriate
8 water. There are additional criteria that have to be
9 determined. Those were determined in Ruling 5712 and the
10 interbasin transfer was granted.

11 So where the legislature leaves a statutory scheme in
12 place, the supreme -- the Nevada Supreme Court has stated that
13 the Nevada Legislature has demonstrated through its silence
14 that Nevada's water laws statute should remain as they have
15 been for over 45 years. This was in 1996. So now add an
16 additional -- I'm no good at math, but 26 years, and that's
17 Slide 27.

18 So in addition to violating this comprehensive
19 statutory scheme and going beyond what authority the State
20 Engineer was granted by the legislature, Lincoln and Vidler
21 contend that Order 1309 violated their due process rights.

22 Slide 28 is from the *Eureka County versus State*
23 *Engineer*:

24 Due process clause forbids an agency to use
25 evidence in a way that forecloses an opportunity

1 to offer a contrary presentation.

2 And in 29,

3 A party is entitled, of course, to know the
4 issues on which a decision will turn and to be
5 apprised of the factual material on which the
6 agency relies for a decision so that he may
7 rebut it.

8 THE COURT: And which slide is this?

9 MR. KLOMP: This is 29.

10 So in the process leading up to the hearing under
11 Order 1303, Lincoln and Vidler were never given notice of the
12 fact that Kane Springs was being considered for inclusion in
13 the Lower White River Flow System. In fact, we had contrary
14 rulings from the State Engineer that said we're not going to
15 put it in the Lower White River Flow System. Not only that,
16 but the six criteria -- it's been discussed before, and I'll
17 just mention it briefly, the six criteria, as reflected in
18 Slides 30 and 31, and I'm not going to read those criteria,
19 those were developed and released only after the hearing and in
20 Order 1309.

21 It's our contention that the development of those,
22 not only was an *ultra vires* act beyond the scope of the
23 comprehensive statutory scheme, but it violated due process by
24 not allowing us to know the issues on which a decision would
25 turn or to be apprised of the factual material on which the

1 agency would base its decision.

2 So just to summarize, the issues that we claimed
3 violated the due process rights of Lincoln and Vidler, Slide 32
4 summarizes though Kane Springs is not mentioned in Order 1169
5 or in order 1303, Ruling 5712 granted a thousand acre-feet
6 despite protests from the National Park Service, U.S. Fish and
7 Wildlife Service to include Kane Springs specifically in
8 Order 1169. And I duplicate that there because I don't have an
9 editor.

10 The fourth bullet point is Lincoln and Vidler
11 specifically excluded from the pump test, and no pumping
12 occurred in Kane Springs.

13 Ruling 5712 is not mentioned in Order 1169 or Order
14 11 1303. The reason is that is critical is because that is an
15 adjudication which was appealed on a petition for judicial
16 review and settled after that petition was filed. So that is
17 an adjudication of an appropriation of water rights.

18 The State Engineer didn't say, hey, we're going to
19 reconsider the things that we found in that. We're going to
20 reconsider whether or not we should jointly administer Kane
21 Springs with other hydrographic units. We're going to
22 reconsider whether or not you are the -- we were the only
23 people that had an appropriation of groundwater in Kane Springs
24 at that time. And I think that's still true today. That
25 thousand waters is the only groundwater that can be pumped in

1 Kane Springs, but there was no mention that, hey, we're going
2 to reconsider your priority, and we're going to lump you in
3 with all these other hydrographic basins. And those were
4 specific findings that Ruling 5712 made that were never put on
5 notice that they were in jeopardy.

6 And as discussed, nor could the State Engineer
7 overrule those things. He can administer the appropriation.

8 And I just put this kind of as a bookend to the due
9 process argument. The legislature in Slide 33, has established
10 a comprehensive statutory scheme regulating the procedures for
11 acquiring, changing and losing water rights. And it's our
12 contention that Order 1309 significantly and fundamentally
13 changed the nature of the water rights that were appropriated
14 in Ruling 5712, which raises the next quote there. The
15 statutory water scheme in Nevada expressly prohibits
16 reallocation -- reallocating adjudicated water rights that have
17 not been abandoned, forfeited or otherwise lost pursuant to an
18 express statutory provision.

19 And I don't think it's disputed that there was no
20 express statutory provision that provided for the loss of those
21 rights or the changing, the altering of those rights in ruling
22 5712.

23 THE COURT: Wait. Oh, changing the rights from 5712
24 in 1309?

25 MR. KLUMP: Yes. Correct.

1 We also contend that ruling or Order 1309 violated
2 separation of powers doctrine by allowing the State Engineer to
3 legislate, specifically with development of the six criteria,
4 but also departing from the statutory scheme, not designating
5 basins, not designating critical management areas, not
6 following prior rulings.

7 And Slide 34 just summarizes some of the case law
8 from *Sheriff v. Luqman* that talks about the separation of
9 powers. And I think the first quote is important because it
10 talks about,

11 Although the legislature may not delegate
12 its power to legislate, it may delegate the
13 power to determine the facts or the state upon
14 things -- state of things upon which the law
15 makes its own operations depend.

16 And that's not what happened here. This was not
17 merely a fact-finding mission although it's been characterized
18 that way.

19 And then the second quote, this legislature has to
20 establish standards for the State Engineer. And so while two
21 branches of the government are represented here, the judiciary
22 and the executive, we can point the finger at the one that's
23 absent, right. We can say that the legislature failed in its
24 job to properly direct the State Engineer.

25 So you asked, and I just wanted to address quickly --

1 this is Slide 35. And again it's a quotation from the
2 legislative history for Assembly Bill 51 in 2019. You asked
3 whether or not you can take judicial notice of this, and it's
4 our contention that, as a canon of statutory construction,
5 legislative history aids the Court in interpretation of the
6 statutes. Not only that, but I don't even think -- these are
7 comments by the State Engineer regarding his authority, and
8 there's been no contention by the State Engineer that these
9 should not be considered by the Court.

10 THE COURT: And this is all part of your argument
11 regarding the legal basis for the authority?

12 MR. KLOMP: Correct.

13 Finally, I wanted to raise one quote from one of the
14 assembly people that considered Assembly Bill 51, recognizing
15 that it's a separation of powers issue, and she said,

16 Assembly Bill 51 is essentially giving all
17 of the authority to the State Engineer, someone
18 who is not an elected official. This does not
19 have a lot of input from the elected body,

20 Which we contend it's resulted in a fundamental
21 change of our water rights, our property rights, and
22 uncertainty. Going back to the first slide that talked about
23 uncertainty is critical in administering water rights. That
24 uncertainty has been removed.

25 With that, I'll yield time to Ms. Peterson.

1 THE COURT: Okay. Thank you.

2 ARGUMENT FOR VIDLER WATER COMPANY

3 MS. PETERSON: So, Your Honor, Karen Peterson from
4 Allison MacKenzie law firm, and Mr. Hirth (phonetic) is going
5 to switch over to our PowerPoint, but I did have a couple --

6 THE COURT: Did you want to take a couple minute
7 break to do that or --

8 MS. PETERSON: No.

9 THE COURT: No. Okay.

10 MS. PETERSON: We'll try to -- I had a couple of
11 comments. I just wanted to follow up on a couple of questions
12 you had yesterday to some of the other attorneys.

13 THE COURT: Sure.

14 MS. PETERSON: And a question that you actually had
15 today, but you asked Mr. Robison yesterday what his response
16 was to the State Engineer's argument and others arguments that
17 our -- we petitioners were reading the statutes too narrowly.
18 And that also ties into I think one of the questions you had
19 today just to Mr. Klomp about the difference between regulating
20 by these 234 basins and, you know, geographic basins versus the
21 larger basin. Mr. Robison said that the law dictates that it's
22 the 232 or 234 hydrographic basins.

23 But I also wanted to say it's the way the State
24 Engineer has managed and regulates those basins that also
25 dictates that interpretation of the statute because he has set

1 priorities in the basins, the groundwater basins. Based upon
2 those units, he's also set perennial yields, meaning the amount
3 of groundwater that can be safely pumped from the basin based
4 upon those hydrographic units. And we all as water
5 practitioners have relied on those determinations when we make
6 decisions with regard to water rights.

7 For example, Lincoln and Vidler applied for water
8 rights in Kane Springs. There were no senior groundwater
9 rights in the basin at that time, and Mr. Foletta was talking
10 about the relative -- where you are in the relative priority.
11 So we know we want to apply for water rights. We know under
12 the statute we have to show there's no -- there's water
13 available to appropriate in that basin. It's not going to
14 conflict with any existing rights, and it's not going to be
15 detrimental to the public interest.

16 And so we look at the basins. We see how many water
17 rights are already appropriated in the basin. We see how --
18 what the perennial yield is in the basin. And so let's say if
19 the perennial yield of the basin is 100 acre-feet, and we want
20 10 acre-feet of that we know that there's -- if then there's
21 nobody else senior to us, we know that there's 100 acre-feet in
22 that basin that can be appropriated, and so we can comply with
23 the statute and hopefully the State Engineer would grant, it
24 would mean a permit to appropriate.

25 If we are in a basin with a perennial yield of a

1 hundred acre-feet and there's already 95 acre-feet
2 appropriated, then the State Engineer is not going to grant our
3 application for 10 acre-feet to appropriate out of that basin
4 because he'll find it's not in the public interest because it
5 exceeds the perennial yield.

6 So there's decisions that are made to apply for water
7 based on these discrete hydrographic units, and the seniority
8 that's already in the basin, the water rights that have already
9 been appropriated in the basin. There's decisions made on if
10 you're going to change your water rights. Or let's say maybe
11 I'm going to drill someplace in a basin. If you're going to
12 drill someplace in a basin, and you know it's close to a senior
13 water right, you may have water rights, but you can't impact
14 that other senior water right by drilling your well close that
15 senior water right.

16 There's decisions made on loans. People getting
17 loans. Water rights are secured based upon opinions we lawyers
18 make, based upon the seniority of the water rights in the
19 basin, and are they in good standing, and that's the chaos that
20 the Supreme Court was talking about in Mineral County versus
21 Lyon County. By disrupting all of that, by changing
22 priorities, because, you know, property rights, we have vested
23 property rights with our applications. They can only be taken
24 away under the statutory criteria that the legislature has set
25 forth that the State Engineer has to curtail our water rights

1 or to not allow us to pump our water rights.

2 Businesses make decisions. The economy is based on
3 this priority and knowing what your priority is, and that's the
4 chaos again that the Supreme Court wants to avoid, as I said,
5 in Mineral County versus Lyon County by upsetting that
6 reprioritization.

7 And frankly, if there had been a superbasin back in
8 2005 when Lincoln and Vidler applied for their water rights, we
9 wouldn't have been granted our water rights in Kane Springs
10 because if Kane Springs is part of the superbasin at that time,
11 it would have been over appropriated, and we would never have
12 gotten our rights.

13 So it just shows how this -- it just shows the
14 disruption, and then I'm trying to give it to you from a
15 practical standpoint.

16 THE COURT: Sure. I mean, so what you're -- I mean,
17 you're making a point basically that it's not just the rights
18 that are impacted that you already have, but in even making the
19 initial decision of where am I going to place my business
20 that's going to need this much water. You're looking at the
21 existing framework of the basins, you know, the perennial yield
22 and who actually has those rights within it to make that
23 business decision and the investment within that basin?

24 MS. PETERSON: Right. And if the law is interpreted
25 that the State Engineer has this power under the, you know,

1 under the existing statutes, then anywhere in the State of
2 Nevada, the State Engineer can change those seniorities, those
3 priorities in the basin and make a superbasin and reallocate
4 those rights and again upset everything. And we want certainty
5 in our property rights. We want certainty in our business
6 decisions. We want certainty in our economy, as, again, as the
7 Supreme Court said. And we don't want to always be looking
8 over our shoulder: Are we going to be lumped into some
9 superbasin down the future that disrupts all these decisions
10 that have been made. So that's my practical explanation of how
11 it impacts us.

12 THE COURT: Okay. Thank you. Sure.

13 (Pause in the proceedings.)

14 MS. PETERSON: Slide 1. Well, first of all I'm going
15 to talk about substantial evidence with regard to the State
16 Engineer's inclusion of Kane Springs. If I have time, I'm also
17 going to talk about the 8000-acre foot pumping cap, how Lincoln
18 and Vidler are compliant with the Endangered Species Act,
19 observations about the Muddy River Decree and the State
20 Engineer's management determinations are discriminatory. We've
21 addressed all of those in our opening brief, and all of those
22 are issues in our petition. So if I have time, I'll try to get
23 to it.

24 But going to Slide 1, standard of judicial review,
25 you've heard a lot about substantial evidence and what the

1 standard is, and you also know that you cannot -- and I'm not
2 going to ask you to -- reweigh the evidence, rejudge the
3 credibility of the witnesses, substitute your judgment for that
4 of the State Engineer, but you do have the obligation under
5 judicial review to look at the evidence that the State Engineer
6 says he relied on to make his decision and determine if that's
7 the evidence of the quality and the quantity that a reasonable
8 mind might accept as adequate to support a conclusion and also
9 that there's a rational connection between the facts that the
10 State Engineer cites and the conclusion that he made.

11 Going to Slide 2. Your Honor, on the left-hand side
12 is a map from one of the SNWA reports, and I believe it's
13 probably from one of the 1169 reports, and the cites are on the
14 slides to the record on appeal, but that shows you all the
15 wells in the Lower White River Flow System. Kane is not
16 included in there at the time, but it just gives you an idea of
17 all the wells in the lower --

18 THE COURT: And this is slide -- which is Slide 2?

19 MS. PETERSON: This is Slide 2, yes. And then if you
20 go to the depiction, the picture on the right, that does
21 include Kane, and that gives you an idea of where the Kane
22 Springs wells are.

23 Do you see that, it's right at the border there
24 between Kane Springs Valley and Coyote Springs Valley, and it's
25 KPW 1 that's the production well, and KP -- or KMW 1, and

1 that's the monitoring well. And those are, just to orient you
2 a little bit, Kane Springs is 22 miles from the Muddy River
3 Springs area, and that's where, you know, where all the Springs
4 are located. And I think we said this in our brief too, just
5 orient you from this courtroom, if we wanted to go 22 miles,
6 we're talking about Boulder City High School.

7 THE COURT: So let me just ask quickly. Is that the
8 only well that's within Kane Springs?

9 MS. PETERSON: Those two.

10 THE COURT: Those two are the only ones?

11 MS. PETERSON: Yes. Yes.

12 And then just to give you a little bit more
13 information about our wells, the KMW, the monitoring well,
14 KMW-1, we'll talk about that a lot, that -- the duct to water
15 in that well is 990 feet, and the depth of the well is
16 1800 feet. So there are 810 -- there's 810 feet of water in
17 that well between the depth to water and the bottom of the
18 well.

19 And then the well that KMW is compared to a lot is
20 CSVN-4. And CSVN-4, you can see, if you look at the graph on
21 the right, the picture on the right, you can see CSVN-4 there.
22 It's in the northern Coyote Springs Valley, and there's
23 2.5 miles between --

24 THE COURT: KMW one --

25 MR. TAGGART: KMW-1 and CSVN-4.

1 And then the other thing I wanted you to look at too
2 is just keep it in your mind that Lower Meadow Valley Wash --
3 do you see that off to the right there? It's basin --

4 THE COURT: Yes. 205.

5 MS. PETERSON: 205. We'll bring that up later on.
6 Mr. Foletta brought that up.

7 THE COURT: Oh, okay.

8 MS. PETERSON: But and then so the depth to water in
9 CSVM-4 is 970 feet. The depth of the well is 1580 feet. So
10 there's 610 feet of water in that well between the depth to
11 water in the bottom of that well.

12 THE COURT: So just so I make sure that I'm
13 understanding this correctly, from the ground to the water --

14 MS. PETERSON: Level.

15 THE COURT: -- level, there's the air, right, and
16 then the depth of the water to the bottom of the well is what
17 you're talking about?

18 MS. PETERSON: Right. So for KMW, the depth of the
19 water is 990 feet, over nine stories.

20 THE COURT: Okay.

21 MS. PETERSON: The well depth is 1800 feet. So that
22 means there's 810 feet of water in the well, okay, and again,
23 over eight stories.

24 THE COURT: Okay. Here's a very strange question.
25 How big are these wells around?

1 MS. PETERSON: The production well KPW-1 is 18 inches
2 in diameter, and KMW is 4 inches in diameter.

3 THE COURT: Okay. So all of the wells that we are
4 talking about are not necessarily uniform in diameter?

5 MS. PETERSON: Correct. Correct.

6 And then going on to Slide 3, this is found on
7 page -- well, the record on appeal, it's page 7.

8 THE COURT: And what slide is this?

9 MS. PETERSON: It's Slide 3. And that's where the
10 State Engineer described, and this is in Order 1309, where the
11 State Engineer describes the results of the aquifer test, and
12 this is the first time in the second line there where he says
13 that the result extended from Southern Kane Springs Valley --
14 so you know where that is, and then he goes through, you know,
15 the other areas in the Lower White River Flow System.

16 And then that last sentence there, he indicates that
17 the water level decline was estimated, estimated, estimated to
18 be 1 to 1.6 feet throughout this area.

19 And then he indicates with minor drawdowns of
20 0.5-foot or less in the northern portion of Coyote Spring
21 Valley, north of the Kane Springs Wash fault zone.

22 And so he's talking about minor drawdowns in northern
23 Coyote Springs Valley, which you saw, and I brought my ruler
24 today, and I'm showing you this. And it's estimates, in
25 northern Coyote Springs Valley, which is not quite 22 miles

1 from the Springs, we're talking 6 inches or less of drawdown in
2 the northern portion of Coyote Springs Valley. He doesn't talk
3 at all in that determination of what the drawdown was in
4 southern Kane Springs Valley at all. He's only talking about
5 northern Coyote Springs Valley, not Kane Springs at all.

6 THE COURT: So and just so I understand -- I
7 understand what that means, that means that there was 6 inches
8 less in the well of that Coyote Springs well?

9 MS. PETERSON: He's saying there was -- there was,
10 yeah, there was drawdown -- estimated drawdown of 6 inches or
11 less in northern Coyote Springs Basin north of the Kane Springs
12 wash fault, and I'll show you where the fault is.

13 THE COURT: Okay.

14 MS. PETERSON: But that's what he's saying. Again,
15 he doesn't say anything about Kane Springs.

16 And if you want to put the quantities of water that
17 are in those wells, the Kane Springs well and the Coyote
18 Springs well in perspective, if you take that 810 feet of water
19 that I said was in -- sorry, Kane Springs monitoring well, that
20 equates to, if you want to convert that to inches, that's
21 9,720 inches of water, and he's talking about 6-inch or less
22 minor drawdown, if you can even equate it to Kane Springs to
23 that level of water.

24 THE COURT: Okay. So here's a stupid question.

25 Since the width of the wells are not uniform, like

1 6 inches of drawdown in one well may not be the same water
2 volume as 6 inches of drawdown in another well; right?

3 MS. PETERSON: Right. Well, it's the elevation.

4 THE COURT: Or is it --

5 MS. PETERSON: It's the elevation.

6 THE COURT: Okay. So when you're saying 6 inches of
7 drawdown, is it the well or the basin, or is it measured by the
8 well itself.

9 MS. PETERSON: It's measured in the well.

10 THE COURT: Okay. Okay.

11 MS. PETERSON: And then turning to Slide 4, and
12 again, that's the State Engineer's -- that's his
13 determination --

14 THE COURT: No, I understand --

15 MS. PETERSON: -- that he made --

16 THE COURT: -- I'm just trying to wrap my head
17 around, I mean, since I have to look at this to see if this is
18 substantial evidence or not, if, I mean, if there is a
19 consideration regarding the differences in the volume or if
20 that even matters or any of that kind of stuff.

21 MS. PETERSON: It's the water elevation.

22 THE COURT: Okay. It's just the elevation itself
23 because if they're -- if they are hydrologically connected,
24 then they would go down at an even rate. Is that the -- is
25 that the -- if they are hydrologically connected, if you're

1 basing the assumption that there's a hydrological connection,
2 then the actual basin itself would go down. Is that -- kind
3 of -- kind of --

4 MS. PETERSON: I don't think you can say that.

5 THE COURT: I mean, I'm probably oversimplifying.

6 MS. PETERSON: I don't think you can get there, yeah.

7 THE COURT: Okay.

8 MS. PETERSON: What they show is that at that well,
9 this is what we estimate the minor drawdown to be, 6 inches.

10 THE COURT: I see.

11 MS. PETERSON: Just at this well.

12 THE COURT: Okay.

13 MS. PETERSON: Just because the geology and the
14 hydrology is --

15 THE COURT: I know it's way more complicated than
16 I'll ever understand --

17 MS. PETERSON: So different.

18 THE COURT: -- but I'm just trying to get some
19 basics.

20 MS. PETERSON: Right.

21 THE COURT: All right.

22 MS. PETERSON: And then turning to Slide 4, again,
23 this is -- and you saw this with Mr. Klomp. The first quote is
24 from State Engineer's Ruling 5710, and it talks about that
25 difference in elevation between the Kane Springs wells and the

1 Lower White River Flow System wells that indicates the
2 probability of a low permeability structure or change in
3 lithology.

4 And then the second, again, the State Engineer ruling
5 in 1309, page 52, record on appeal 53, again confirmed that he
6 saw approximately 60 feet difference in water level elevations
7 in the Kane Springs wells versus Lower White River Systems Flow
8 wells, and 60 feet is six stories high, Your Honor. So we're
9 on the fifth floor here. We go up one more floor. That's what
10 were talking about the difference in elevations in the water
11 levels are from Kane Springs, Kane Springs Valley, down to
12 lower -- the southern part of the Lower White River Flow
13 System, Muddy River Springs --

14 THE COURT: So and just so I understand, you're
15 talking about the actual elevation of the land itself, no?

16 MS. PETERSON: Water level elevations.

17 THE COURT: Okay.

18 MS. PETERSON: Yeah, in the wells.

19 So the wells in -- the wells in Kane Springs.

20 THE COURT: Right.

21 MS. PETERSON: Has a water level elevation that's six
22 stories higher than the water level elevations in the area near
23 the Muddy River Springs.

24 THE COURT: Right. But that may also be related to
25 the elevation of the land itself too; right?

1 MS. PETERSON: It could. It could.

2 And again, what we're talking about here when they're
3 talking about this pump test, and they're talking about this
4 connectivity and, you know, we want you to picture this, what
5 they're talking about is that, you know, there's a change, up
6 gradient from pumping six stories, right, lower Muddy River
7 Springs area, six stories lower than the water elevations in
8 the Kane Springs well, and they're saying that there's a 6-inch
9 decline based on, you know, based on the pumping, and it just
10 doesn't make a lot of hydrologic sense that there could be that
11 change six stories high from the pumping over 22 miles away.

12 And if you look at what -- if you go to Slide 5, what
13 SNWA said in their report after the 1169 pumping, they
14 indicated, and it's right here on the left-hand side, that
15 there's a lack of pumping response from the Order 1169 pumping
16 north of the Kane Springs fault and west of MX-5 and CSI wells
17 near the eastern front. That's their interpretation of the
18 pump test.

19 And on this slide, which is Slide 5, we've shown, and
20 again we give you the site to the record where this map is, and
21 it's been blown up a little bit so that you can see where the
22 Kane Springs wells are, and they're north on the Kane Springs
23 wash fault. And the yellow in the graph is the Kane Springs
24 basin. The wells -- our wells are on the basin boundary.

25 And again, north of the Kane Springs wash fault.

1 Turning now to Slide 6. This is the information that
2 the State Engineer put in the order with regard to Kane Springs
3 when he did his analysis of what he saw with regard to Kane
4 Springs.

5 And so the first sentence in there is the 60-foot
6 difference in the water elevations. And again he confirms it's
7 consistent with a zone of low permeability. I just want you to
8 look at the language here that the State Engineer uses.

9 Then going to the next sentence, he talks about the
10 hydrographic response pattern, and he acknowledges that the
11 hydrographic response pattern in Kane Springs is different,
12 uses the word different, compared to that exhibited in the
13 wells in the Lower White River Flow System, and then he uses
14 the words muted, lagged, obscured by climate response or
15 compromised by low resolution data.

16 And again, he indicates and makes a finding
17 acknowledging that the hydrographic response pattern -- I'll
18 show you the hydrograph, is different between Kane Springs
19 wells, Kane Springs Valley and the rest of the Lower White
20 River Flow System.

21 And then in the next sentence he acknowledges, the
22 State Engineer recognizes these differences.

23 Then he does an about-face and goes on to the next
24 sentence and indicates, however, you know, he's looked at the
25 evidence from the National Park Service witness. He finds that

1 to be persuasive, and then he uses the word -- well, he's
2 characterizing that evidence that,

3 While it's attenuated, he concludes the
4 general hydrographic pattern observed in
5 southern Kane Springs Valley reflects a response
6 to Order 1169 pumping consistent with a closed
7 hydraulic connection.

8 And again it's very curious language that the State
9 Engineer used, and we brought this up in our brief, and I'm
10 going on to slide 7 now, but the consistent with the zone of
11 low permeability -- permeability, and I think this is in our
12 brief, a definition of it, it means the ability to pass through
13 generally. So he's saying there the ability of water to pass
14 through in that first sentence is low.

15 The second sentence, the muted lag obscured by
16 climate response data, he cites to our closing brief and CSI's
17 closing brief, and so there he's explaining why the hydrographs
18 are different between Kane Springs and the Lower White River
19 Flow System.

20 And then we believe that the State Engineer -- the
21 last part of that was referring to the 1 foot data error from
22 CSVM-4, and I'll walk you through that too, is the compromised
23 by low resolution data because that's what CSI cited in their
24 closing brief there at pages 5 and 6.

25 And then attenuated, again we put this in our brief,

1 it means reduced in force, effect or value. Is weak. It's
2 weak.

3 And so turning to the next slide, which is Slide 8,
4 is a hydrograph. And when the State Engineer is talking in his
5 ruling about -- or in the order about hydrographic patterns and
6 responses, he's talking about these hydrographs, and he uses
7 the word hydrograph in the criteria. So that's why I wanted to
8 show that to you.

9 And if you look on the left axis, there is the 1 foot
10 increments for the water level elevations. And then the blue
11 there is the KMW-1 hydrograph. And the red is the CSVM-4
12 hydrograph that's on the bottom.

13 And if you look at the text on the left-hand side of
14 the slide, it came out at the hearing that CSVM-4, which is
15 that well that's in northern Coyote Springs Basin that's
16 2.5 miles from KMW, that there's a data error of a 1 foot or so
17 associated with that, the data from that well, because the -- I
18 guess it's warm, and the (indiscernible) failed, had a high
19 rate of failure.

20 And again, that's in one of the SNWA reports.

21 And so the SNWA report tells you that what the data
22 with regard to CSVM-4, fluctuations of a foot or less should
23 not be used to infer an absolute response.

24 So again we're talking about how important the CSVM-4
25 is because CSVM-4 was used by the State Engineer to correlate

1 with Kane Springs, the hydrograph in Kane Springs, and he also
2 used CSVM-4 to correlate with the hydrographs in the Lower
3 White River Flow System. And the gray or the -- or the blue,
4 sorry, in the CSVM-4 red hydrograph on the bottom there,
5 that -- that blue that's over the red bars in the hydrograph,
6 that's the 1-foot error. It could be -- the error bar could be
7 1 foot above, or it could be 1 foot below. They don't say.
8 They just say there's an error of 1 foot.

9 So any correlation, and again we're talking about
10 6 inches. Any correlation of a foot or less cannot be inferred
11 from this data because of the data failure.

12 And then turning to page -- Slide 9. We asked the
13 SNWA witness at the hearing, and again we've cited this in our
14 brief, and the citations are there, has anybody that's given
15 expert opinions on these hydrographs, have they taken this
16 1-foot error into consideration for CSVM-4, and the SNWA
17 witness said, no, not that I heard. And then again we asked,
18 and the drawdowns or the impacts or the effects that everybody
19 has been talking about this week with regard to CSVM-4 are in
20 the 1-foot range, aren't they? Yes. So again, unrefuted
21 evidence on the record that the data from CSVM-4 was
22 compromised.

23 And then turning to Slide 10, again that's the six
24 criteria. And we agree with Mr. Foletta, you know, that our
25 due process rights were violated, and I think Mr. Klomp talked

1 about that also. We had no input into what the criteria were.
2 But let's just talk about the criteria that the State Engineer
3 laid out.

4 And so you're probably familiar with the six
5 criteria, but let's go back to the next slide, Ryan -- or
6 Mr. Hirth, if you could. Slide 11.

7 Which is the language from the State Engineer's order
8 discussing the criteria, the six criteria.

9 So the first was -- the first sentence is again the
10 water level elevations, and that deals with Criteria 1 and
11 Criteria 4.

12 Criteria 1 is that if the water elevations are --
13 they have a relatively uniform water elevation level. That's
14 how I interpret that, that that's consistent with a close
15 hydraulic connection. And the State Engineer is saying here
16 that our water elevations fall under Number 4. There is a
17 relatively steep hydraulic gradient consistent with a poor
18 hydraulic connection and a potential boundary. So for criteria
19 1 and 4, we don't satisfy that there's a close hydrologic
20 connection.

21 Turning to the second sentence -- and again we're
22 talking about that muted, lagged, obscured data where the State
23 Engineer recognizes that the hydrographic patterns are
24 different compared to Kane Springs and the Lower White River
25 Flow System. He's talking about criteria Number 2 there, and

1 he's saying they're different. They're not well-to-well
2 comparisons that demonstrate a simple similar temporal pattern.
3 And so he's saying there under Criteria 2, no, we don't qualify
4 under that criteria as a closed hydrologic connection.

5 We turn to the third criteria, which is the next
6 sentence when he's talking about the National Park Service
7 evidence. And again, he says that there's a similarity in the
8 hydrographic patterns and the responses although it's
9 attenuated. And again, attenuated is weak, less in force, of
10 less value.

11 And when we go back to what the National Park Service
12 testimony is, because he cites to the national park service
13 testimony that he relied on to find persuasive, and there's 30
14 pages of testimony that he cites to, and five slides from the
15 NPS presentation there at the hearing.

16 And the State Engineer doesn't tell us in those 30
17 pages what he relied on or the five slides what he relied on.

18 And when you read the 30 pages and you look at the
19 five slides, most of them don't relate at all to testimony
20 about hydrographic patterns or any kind of similarity or you
21 don't even know what the NPS witness is referring to. You
22 don't know in his testimony if he's referring to the slides
23 when he's talking about certain things because there is no
24 indication in the record, like you're having us do here that
25 he's talking about whatever slide he's talking about. So we

1 have no basis to know what the State Engineer found to be
2 persuasive in this 30 pages of testimony or these five slides.

3 And that doesn't allow you to properly judicially
4 review what the State Engineer looked at to determine whether
5 there's a rational connection between the facts that the State
6 Engineer found and his conclusion. So that's one objection.
7 We're left to guess what the State Engineer relied on in those
8 30 pages.

9 And then the other thing with regard to that is that
10 the criteria specifically says that the water level hydrographs
11 have to demonstrate an observable increase in drawdown that
12 corresponds to an increase in pumping and an observable
13 decrease in drawdown or recovery that responds to the decrease
14 in pumping.

15 And the State Engineer doesn't quantify or doesn't
16 say that it's observable -- sorry. He just says that there's a
17 general hydrographic pattern that's attenuated. So he doesn't
18 even follow his own criteria in responding to that criteria.

19 And then when you look at the NPS witness testimony,
20 and again we've cited this in our brief. It's at page 30 to 31
21 in our brief, the NPS witness failed to consider the 1-foot
22 measurement error in the CSVM-4 well, and he was talking about
23 the CSVM-4 well in his testimony. He doesn't -- he doesn't say
24 that the connection between CSVM-4 and the other wells in the
25 Lower White River Flow System is attenuated. He says it's

1 greatly attenuated.

2 And he doesn't testify that there's -- the
3 connection -- it's well-connected between CSVM-4 and the Lower
4 White River Flow System. He just would only opine that it's
5 connected. He doesn't say it's well-connected, like the State
6 Engineer made the finding with regard to all the other basins
7 in the Lower White River Flow System.

8 And again, the State Engineer, if you look at the
9 language that he used, he says that he finds that the general
10 hydrographic pattern observed in southern Kane Springs Valley
11 reflects a response to the order 1169 pumping, but the State
12 Engineer didn't look and rely on the NPS witness's testimony.
13 The NPS witness was testifying about CSVM-4. He wasn't
14 testifying about the Kane Springs well.

15 And so for all those reasons, Your Honor, we submit
16 that that's not substantial evidence that satisfies the
17 standard in *Revert versus Ray*.

18 And I do need to take a sip of water here.

19 And then turning to the next slide, which is slide
20 12, the State Engineer made the further determination that the
21 basins, like the Black Mountain area and the Kane Springs
22 Valley should be included because there would be an opportunity
23 for conducting additional hydrographic -- hydrologic studies in
24 these subbasins to determine the degree to which water use
25 would impact water resources in the Lower White River Flow

1 System.

2 And then he also made the conclusion, again without
3 citing to any evidence, that these subbasins and other portions
4 of the Lower White River Flow System may benefit from
5 additional hydrologic study, and they can be managed more
6 effectively and fairly within the Lower White River Flow
7 System.

8 And he doesn't cite to any evidence of record that
9 supports that conclusion.

10 And the other reason that we have a problem with this
11 is that he's leaving to -- he's including Kane Springs in the
12 Lower White River Flow System, but he's not made any
13 determination that any pumping from Kane Springs has any impact
14 to any other water sources in the Lower White River Flow
15 System.

16 And so we're -- his analysis is backwards, and it's
17 different than what he did for all of the other water right
18 holders and all the other basins in the Lower White River Flow
19 System.

20 He -- he had the pump test. The State Engineer had
21 the pump test 1169. Based on the pump test, he included those
22 six basins at that time in the Lower White River Flow System
23 because he found that there were impacts from pumping, and
24 therefore they needed to be jointly managed.

25 In this case, there's no evidence on the record of

1 any pumping from Kane Springs that's going to impact the Muddy
2 River Springs. Yet he's forced us to be jointly managed with
3 the other basins in the Lower White River Flow System without
4 having conducted or having any evidence on the record that
5 there is any impacts from the Kane Springs pumping.

6 And again, that's backwards. It's backwards under
7 the statutes.

8 All the statutes that we've been talking about
9 earlier today, they all require the State Engineer to find that
10 there's decreasing water levels; there is a reduction in the
11 groundwater basin levels, that there's not enough precipitation
12 that can serve all the water right holders in the basin or that
13 the basins have been continually over pumped for years, and
14 therefore we need to designate it as a critical management
15 area.

16 So make's the determination with regard to impacts
17 first, then is allowed to manage under those statutes.

18 Again, that's not the process that was followed with
19 regard to Kane Springs.

20 And if you go to the next slide, Slide 13. We did
21 ask every expert at the hearing if there was any evidence or
22 they had conducted any kind of an analysis, if Kane Springs,
23 any pumping from Kane Springs would impact the Muddy River
24 Springs.

25 And we've cited this in our brief too, and all the

1 cites to the record are there. No evidence at all from any
2 experts that any pumping from Kane Springs would impact the
3 Muddy River Springs.

4 And that's the other reason that we have such a big
5 problem with this is that right now, in Kane Springs, there's
6 no decreasing water levels. There's no -- there is no finding
7 that the groundwater basin is being depleted. There's no
8 finding that the average annual replenishment has not met the
9 needs of the water right holders.

10 There's no finding that groundwater withdrawals
11 consistently exceed the perennial yield of the basin.

12 And so right now the State Engineer could not
13 designate or manage Kane Springs because there's none of this
14 going on hydrologically in that basin, yet he's thrown Kane
15 Springs, that he can't designate -- everybody acknowledges he
16 would have the authority to designate basin by basin, but he
17 can't designate Kane Springs. He can't manage Kane Springs
18 because none of those things are happening. Yet he's thrown us
19 into the mega mess. It is a mega mess. He's thrown us into
20 the mega mess, and now is trying to manage us and throw us into
21 that mess doing something he can't do on a basin by basin
22 approach, and not allowing us to pump our water rights.

23 When there's no -- there's been no showing that
24 pumping our water rights would impact any other water sources
25 of the Lower White River Flow System. That's discriminatory.

1 That's against the law. That's illegal.

2 And then turning to Slide 14, this is -- there is
3 evidence in the record during the Kane Springs pump test, and
4 this shows the water elevations of the monitoring, well, in
5 Kane Springs, KMW-1, and CSVN-4 during the aquifer tests for
6 the production well, KPW-1. And the blue line shows the water
7 levels in KMW, which is the Kane Springs well.

8 THE COURT: That's the monitoring well?

9 MS. PETERSON: The monitoring well. And the red
10 lines shows the water level elevations in CSVN-4.

11 And again, CSVN-4 is 2.5 miles away, but it shows
12 during the pump test that the water level elevations in CSVN-4
13 were going up. And the pump test is that period in the blue
14 line, you know, where there's that -- the big dip there.

15 So you can see the water elevation's going up, Your
16 Honor. The pump test, it looks like it was held between
17 January 3rd, 2006, and January 13, 2006. And you can see the
18 water elevations going up between -- on the left axis it would
19 be 1865 up to, if you use that same left axis, it would be
20 about 1869.

21 THE COURT: But this is a different pump test than
22 the pump test everyone else is talking about?

23 MS. PETERSON: Yes. Yes. So when Lincoln and Vidler
24 put in their well, their production well, they -- it's
25 standard. They did a pump test at that time.

1 THE COURT: Okay.

2 MS. PETERSON: So that's the only evidence of record
3 with regard to pumping.

4 And again, it shows the well 2.5 miles away. The
5 water level elevations are going up.

6 And then turning to the next slide, which is Slide
7 15, there's been a lot of talk about the carbonate, and the
8 basin in range, I think somebody brought up the basin in range.
9 And so one of the earliest studies, and it's cited in order
10 1309 at the beginning of the order, and this Dettinger report
11 is in the record, and the cite to the record here is on Slide
12 15.

13 But it just describes the general geologic setting of
14 the basin and range province, the great basin province and the
15 carbonate rock province, and turning to the next slide, which
16 is Slide 16, it shows you the extent of the basin and range
17 province. And again, this is from Dettinger's report.

18 And it shows that that extends, you know, Oregon,
19 Idaho, Nevada, Utah, Arizona, New Mexico and down into Texas.

20 And then if you go turn to the next slide, which is
21 Slide 17, that shows the actual carbonate rock aquifer, and
22 again, it's from that Dettinger report. And you can see that
23 the carbonate rock aquifer extends there from Nevada. You've
24 got Nevada listed there, Utah and even a little bit up into
25 Idaho.

1 So if we're talking about -- and I know Mr. Klomp
2 talked about this connectiveness and the carbonate rock
3 aquifer, I mean, it's a huge expansive area that everyone has
4 known about for a long time, including when our water rights
5 were created in 2005.

6 And then turning your attention to Slide 18, I asked
7 you to remember the Lower Meadow Valley Wash in that one slide
8 and where it was situated to the Muddy River Springs.

9 And if connection is to be considered -- and again,
10 Mr. Foletta was talking a little bit about this, but there's
11 been evidence in front of the State Engineer from the 1960s
12 from these water resources reconnaissance reports that talk
13 about the influence and the inflow from the Lower Meadow Valley
14 Wash into the Muddy River area. And again, there is some
15 excerpts there on page -- Slide 18 from the reconnaissance
16 report from Russia (phonetic) in 1968. And then turning to
17 page 19 -- and again, these are in the record -- turning to
18 page 19, there's some excerpts there from the Eakin (phonetic)
19 report in February 1964 with regard to Meadow Valley Wash and
20 that contributing to the Springs.

21 And so if we want to tie it up with the Muddy River
22 and Mr. Dotson being concerned about all the sources that are
23 flowing to the Muddy River, that those being accounted for and
24 those being looked at, you know, we believe that the State
25 Engineer should have looked at Meadow Valley Wash and from the

1 scientific records that were before the State Engineer with
2 regard to that flow -- inflow into the Muddy River area, as
3 Mr. Foletta said, and that evidence being ignored because it
4 just wasn't part of the six criteria.

5 So the other thing I was going to talk about a little
6 bit was the 8,000 pumping cap. And --

7 (Pause in the proceedings.)

8 MS. PETERSON: And again, as Mr. Foletta said, there
9 wasn't any cite of evidence to the record to support that
10 8,000-foot pumping cap. What evidence the State Engineer did
11 cite to was the NV Energy report, and the NV Energy witness and
12 the report at that section was talking about the 7- to
13 8,000 acre-foot number as correlating or using that figure to
14 determine that there was no one-to-one depletion ratio from
15 groundwater pumping to impacts to the Muddy. He wasn't talking
16 about that that was a safe -- that could be a safe number that
17 can be pumped from the Lower White River Flow System. He was
18 doing a different analysis.

19 And we also brought up in our brief about the 8,000
20 pumping cap, that it was arbitrary and capricious with regard
21 to Lincoln and Vidler because we are compliant.

22 The State Engineer used that 8,000 acre-foot pumping
23 cap to show that there were -- or to try to show that there
24 wouldn't be any take with regard to the dace, that that was a
25 safe amount that could be pumped. But Lincoln and Vidler are

1 compliant with the Endangered Species Act because, number one,
2 we entered into the amended stipulation with the U.S. Fish and
3 Wildlife where we are -- where the U.S. Fish and Wildlife
4 agreed that we were allowed to -- we would be allowed pump our
5 water rights with monitoring and with all the triggers in place
6 so that we wouldn't affect the dace. And also we had the
7 biological opinion issued by the U.S. Fish and Wildlife that
8 with the plan that was in place, the pumping from the Kane
9 Springs project would not likely impact the dace at all.

10 And we also wanted to bring to your attention, and
11 this is Slide 23, and this is cited in the Georgia-Pacific
12 brief. There's some testimony there, and we've given you the
13 cite on Slide 23 here.

14 Mr. Miller was the U.S. Fish and Wildlife attorney,
15 and Dr. Schwemm was the expert biologist from the U.S. Fish and
16 wildlife at the hearing, and Mr. Miller, the U.S. Fish and
17 Wildlife attorney clarified in the record because he says it
18 could be inferred from the Center for Biological Diversity's
19 cross-examination that essentially any or all pumping is just
20 inherently take, and Dr. Schwemm said likely not, and indicated
21 as Mr. Foletta did that, well, he -- I'll just read what it
22 says here.

23 And it's -- take is more nuanced. It would -- it
24 would take a very sophisticated explicit analysis to analyze
25 take because of the other features or the other attributes that

1 are at work, it's difficult.

2 So here on the record in front of the State Engineer,
3 notwithstanding his determination that he made, is evidence
4 from the U.S. Fish and Wildlife itself that pumping is not in
5 and of itself inherently a take.

6 The Muddy River Decree observations that we made in
7 our opening brief, and again we talked about the headwaters and
8 the tributaries, but what we also wanted to point out to Your
9 Honor that the adjudication was to the waters in Clark County.
10 That's what it sets forth specifically in the adjudication.
11 It's not an adjudication --

12 THE COURT: Oh, you mean the Muddy River Decree
13 itself. I see.

14 MS. PETERSON: The Muddy River Decree itself. It's
15 not an adjudication with regard to any waters in Lincoln County
16 or in Kane Springs. And again, as we already set fourth, the
17 decree specifically says, and again we cited this in our brief,
18 that only the Springs and the waters developed by the
19 plaintiff, the claimants and as adjudicated by the decree were
20 granted under the decree.

21 And we'd also point out that there is no evidence in
22 the record before the State Engineer in Order 1309 that Muddy
23 Valley Irrigation Company has not gotten all the water that it
24 is entitled to under the decree. They have never claimed that
25 they've not gotten their water under the decree. They've never

1 made any call for their water under the decree. They've never
2 filed to enforce anything under the decree. This isn't an
3 action. This Order 1309 proceedings are not an action to
4 enforce the decree.

5 The Muddy River Decree, that's not an issue that's
6 before the Court.

7 And finally, the last thing we brought up in our
8 opening brief was the management practices of Order 1309 are
9 discriminatory, and that would be Slide 20.

10 And what we've done here, Your Honor, is we have
11 taken from the references that are cited on the slide and shown
12 where the pumping was during the pump tests, the 1169 pump test
13 and who -- who was pumping. And you'll see that closest to the
14 Muddy River Springs are the red -- are the red squares there,
15 and that was pumping by Nevada Power of about 7300 acre-feet.

16 And then you'll see the yellow circles down there in
17 the Muddy River Springs area, and that was the pumping by Moapa
18 Valley Water District, which is about 4400 acre-feet.

19 And then turning west on the slide, the green, again
20 Slide 20, the green circle, that was the SNWA and the Las Vegas
21 Valley Water District pumping, which was about 9200 acre-feet.

22 And again, those are centered in -- those basins are
23 the Muddy River Springs area basin and then a portion, the
24 southern portion of the Coyote Spring Valley basin. And the
25 State Engineer has already made determinations in Order 1309

1 that pumping from those basins are -- is what has impacted the
2 spring. He's already made that determination. And so our
3 point is why doesn't he manage those basins? And if the
4 pumping from those basins is impacting the Springs, he could
5 take care of that right now under his basin-by-basin authority
6 and manage those impacts or figure out a management plan for
7 those basins.

8 And, I mean, it's discriminatory, again, as I brought
9 up, that he can't designate Kane Springs under the statutory
10 criteria right now because there is no deplete -- you know,
11 there's no groundwater levels that are depleting or anything.
12 Yet he's refused to take action and pulled us into this mega
13 mess when he knows what the sources of the pumping are that are
14 impacting the springs.

15 And so we would reserve the rest of our time for our
16 answering and our closing.

17 THE COURT: Okay. Great. Thank you.

18 (Pause in the proceedings.)

19 THE COURT: So I think it's now time for our lunch
20 break, and then when we get back at 1:30, I think it's
21 Mr. Bolotin.

22 Are you -- I assume then you're taking the full
23 four hours; is that right? Or --

24 MR. BOLOTIN: No, Your Honor.

25 THE COURT: Oh, okay.

1 MR. BOLOTIN: It will -- I think we'll likely get
2 into some of the intervenors today too I would guess.

3 THE COURT: Okay. So, you know what, and I did not
4 take a look to -- what is the order of the intervenors?

5 MR. BOLOTIN: I'm pretty sure, Your Honor, that it's
6 the Church followed by Moapa Valley Water District, followed by
7 NV Energy. It might be NV Energy ahead of Moapa Valley Water
8 District, but we --

9 THE COURT: Okay. All right. Great. Right. Thank
10 you everyone. So we'll see everyone back at 1:30.

11 (Proceedings recessed at 12:22 p.m., until 1:32 p.m.)

12 THE COURT: Okay. Tell me when you're ready.

13 MR. BOLOTIN: I'm ready.

14 THE COURT: Okay.

15 **ARGUMENT FOR THE STATE ENGINEER**

16 MR. BOLOTIN: Good afternoon, Your Honor. May it
17 please the Court. For the record, my name is James Bolotin,
18 Senior Deputy Attorney General, representing the Nevada State
19 Engineer in defense of Order 1309.

20 I brought with me a demonstrative exhibit, Your
21 Honor. I gave one to the clerk, but may I approach if you
22 wanted a smaller version too?

23 THE COURT: Yes, please. Thank you very much.

24 MR. BOLOTIN: And also with me today, Your Honor, I
25 have Adam Sullivan, the Nevada State Engineer, Micheline

1 Fairbank, who I introduced earlier. And judging by the
2 BlueJeans, we have a large number of people from the Nevada
3 Division of Water Resources watching the hearing who worked
4 very hard on putting together the hearing proceeding Order 1309
5 and in drafting and issuing it.

6 I'm going to give a little bit of roadmap first.
7 First I'm going to do a little bit of an introduction, go
8 through some initial facts. I know we've heard a lot of it,
9 but I want to just hit the high points. I'm going to touch on
10 the standard of review, then go through the central questions I
11 think that people have talked about over the last few days, the
12 State Engineer's authority, substantial evidence, due process
13 and some other legal issues that have come up in the briefing
14 and in the arguments.

15 Order 1309 is the latest decision in the State -- of
16 the State Engineer in a long line of administrative processes
17 related to this area of Nevada located just north of Las Vegas
18 in Clark and Lincoln counties.

19 The main point here is that scientifically speaking,
20 the Lower White River Flow System acts as one hydrographic
21 basin underlain by a single carbonate rock aquifer and all
22 groundwater pumping in the LWRFS shares the same supply of
23 water, as do the springs that form the headwaters of the Muddy
24 River.

25 The Muddy River is a decreed surface water source

1 that has the oldest and most senior water rights in the LWRFS,
2 and is home to an endangered fish called the Moapa dace.

3 Pumping groundwater at unsustainable levels leads to
4 drops in groundwater across the LWRFS and drops in spring
5 discharge, which can negatively affect more senior rights, as
6 all the surface water rights are senior to all of the
7 groundwater rights in the area as they were established in the
8 decree in 1920, and I don't believe there are any groundwater
9 rights that predate the surface water decree.

10 It is also -- unsustainable pumping also negatively
11 impacts the habitat at the Moapa dace, which its only habitat
12 is the headwaters Springs of the Muddy River.

13 And we don't have to guess if this is the case.
14 There's been a pumping test that shows definitively this is
15 true. And on the demonstrative I have up here and that I've
16 handed to Your Honor, the green charts are spring discharge,
17 and then the ones that have blue dots are the groundwater
18 levels at the various different parts, subbasins of the LWRFS.

19 THE COURT: Okay. Say that again. The green is?

20 MR. BOLOTIN: The greens one in the upper right-hand
21 corner are the spring discharge.

22 THE COURT: So that's the surface water?

23 MR. BOLOTIN: That's the surface water source.

24 THE COURT: Okay.

25 MR. BOLOTIN: And then the ones with the blue dots

1 reflect monitoring wells for the groundwater levels.

2 THE COURT: For the groundwater, okay.

3 MR. BOLOTIN: And you can see the part that's
4 highlighted in red, and we brought this from SNWA. Most of
5 these graphs are from -- I think they're all from SNWA's
6 reports just because they were the most consistent and clear.
7 And the area that's highlighted in red was the period of the
8 1169.

9 THE COURT: So 2011 through almost 2013 is what
10 you're talking about?

11 MR. BOLOTIN: Yeah. Yeah.

12 While many parties have asked this Court to shield
13 its eyes and argued that science does not show this
14 interconnection of all of these basins -- subbasins, which it
15 clearly does, a primary argument advanced by a group of
16 petitioners is that despite the substantial evidence showing
17 the interconnectivity of these -- this groundwater system, the
18 wash should nonetheless prevent the State Engineer from being
19 able to do anything about it.

20 Stated slightly differently, despite clear evidence
21 showing uniform drops and groundwater levels and spring
22 discharge when quantities in excess of 8,000 acre-feet are
23 pumped from the Lower White River Flow System and despite the
24 State Engineer being required to administer all water in the
25 State of Nevada, water which belongs to the public and has duty

1 to protect existing rights, he should be prevented from taking
2 the necessary steps to do so. This cannot be the case given
3 the State Engineer's responsibilities under the law.

4 The science here is clear, and it is the State
5 Engineer's duty, as is both explicitly and implicitly set out
6 in the water law as the Supreme Court said in the *Pahrump Fair*
7 *Water* case, to protect existing rights and to consider the
8 public interest. That is exactly what the State Engineer has
9 done here with Order 1309. The water law has brought
10 provisions that both expressly and implicitly delegate power to
11 the State Engineer.

12 The legislature cannot possibly envision each and
13 every scenario that may occur with the State's water resources,
14 and that is why they establish the water law with broad
15 authorities for the State Engineer.

16 It's also important to note at the onset that
17 Order 1309 is not the end of this process either. The State
18 Engineer envisions additional public administrative proceedings
19 to determine how the LWRFS is best managed within these
20 boundaries and within the 8,000 acre-foot or less perennial
21 yield established through Order 1309, but we aren't there yet.

22 Parties alleging curtailment or reprioritization of
23 their rights are just plain wrong. These are buzzwords to try
24 and persuade the Court to find that the State Engineer is
25 overreaching or acting inappropriately when in reality the

1 State Engineer is doing what the legislature has asked him to
2 do.

3 THE COURT: Let me ask you. You're saying that this
4 is not a reprioritization of their rights. If you're going to
5 be managing all of these seven basins together as one, how is
6 that not reprioritizing their rights?

7 MR. BOLOTIN: Well, Your Honor, the priority date is
8 the same before Order 1309 as after Order 1309 was issued, and
9 I'm going to get into a little --

10 THE COURT: But it's in a -- it's in a whole huge
11 basin with a whole lot of other entities; right?

12 MR. BOLOTIN: That's correct, Your Honor. And I'm
13 going to get into it a little bit more, but the fact is that
14 the prior appropriation doctrine is first in time first in
15 right, and I understand that historically, before the pumping
16 test especially, these separate subbasins were treated
17 separately, but there is no caveats in the prior appropriation
18 doctrine that say first in time, first and right except if
19 you're over here, except if you're separated by a basin
20 boundary, except if -- no caveats for except if it's
21 groundwater that causes the effect on surface water.

22 What has happened here is that through the pumping
23 test --

24 THE COURT: Well, I mean, I think you're talking
25 about a general principle of first in time, first in rights

1 versus how the statutory framework is regarding those rights;
2 correct?

3 MR. BOLOTIN: Correct. And the State Engineer
4 doesn't disagree that historically speaking it's a basin by
5 basin process, and I'm going to get into that.

6 THE COURT: Sure.

7 MR. BOLOTIN: And that's kind of why I said at the
8 beginning that the facts and science show this is one basin,
9 and it needs to be managed as one basin.

10 The State Engineer is doing what the legislature has
11 asked him to do, and that's follow the best available science
12 to conjunctively manage Nevada's precious water resources while
13 honoring existing rights and the public interest.

14 In these types of proceedings, under NRS 533.450, the
15 Court's review is in the nature of an appeal, and the State
16 Engineer's decision is prima facie correct, and the burden of
17 proof is on petitioners.

18 The State Engineer's factual findings cannot be
19 disturbed if they are supported by substantial evidence, which
20 is defined as the amount of evidence that a reasonable mind
21 would accept as adequate.

22 The Court is prohibited from reweighing the evidence
23 or passing upon the witness's credibility, and the Court must
24 be at its most deferential, where like here is reviewing
25 complex scientific determinations.

1 And I wanted to touch on something that some of the
2 petitioners have said in their arguments where the brief says
3 peak deference. That is just related to the scientific
4 determinations as affirmed in the *Pahrump Fair Water* case.
5 Peak deference was an argument from us in the brief, but it's
6 not -- it's basically a way of explaining that in this case,
7 where it involves complex scientific determinations, that's
8 when the Court should be at its most deferential, and it wasn't
9 intended to be any kind of slight on the Court at all. We
10 understand --

11 THE COURT: Oh, no. We all know that I'm not a
12 scientist. So that is not anything that is a slight on the
13 Court.

14 MR. BOLOTIN: And the State Engineer also recognizes
15 that as legal interpretations may be reviewed *de novo*, but the
16 case law does say that its interpretations are persuasive when
17 it's in the language of the statute, and that's all we tried to
18 say when we were arguing that in the brief. It is in the case
19 law.

20 And now to move on to some of the facts, even though
21 we've heard a lot of it over the last few days.

22 The story goes back decades here. A key stop along
23 that time line was Order 1169 issued in March of 2002 which
24 held in abeyance all pending applications in the area while
25 stakeholders conducted a pumping test of the aquifer. For a

1 variety of reasons that some of the other parties have touched
2 on, that pumping test didn't actually start until over eight
3 years after it was ordered, starting in November 2010 and
4 declared complete in December of 2012 via Order 1169A.

5 One of the reasons for the delay included the
6 implicit recognition that the pumping could impact the Muddy
7 River such that SNWA, the U.S. Fish and Wildlife Service, CSI,
8 the Moapa Band of Paiute Indians and the Moapa Valley Water
9 District entered into a memorandum of agreement, or what some
10 parties have called the MOA, that required monitoring and set
11 triggers for spring flow such that if spring flow dropped to
12 certain levels, pumping would be reduced or ceased, all in an
13 effort to protect the surface flows of the Muddy River and the
14 endangered Moapa dace.

15 While this pumping test was meant to pump 50 percent
16 of the then existing rights in Coyote Spring Valley which were
17 8,050 acre-feet per year would be 50 percent of what existed at
18 the time for two consecutive years along with the other
19 existing pumping in the LWRFS, that did not ultimately happen
20 due to mechanical problems with certain wells and other issues.

21 But approximately 5,290 acre-feet were pumped from
22 Coyote Spring Valley during the pump test, along with pumping
23 from 30 other wells in the other 1169 study basins, including
24 Black Mountain's area, Garnet Valley, Hidden Valley, Muddy
25 River Springs area, Lower Moapa Valley and California Wash for

1 a cumulative reported total average between the two years was
2 14,535 acre-feet during the pump test.

3 3,840 of that was pumped from the alluvial aquifer
4 near the Muddy River Springs area, and the balance 10,695
5 acre-feet were pumped from the carbonate rock aquifer.

6 And data was recorded from a total of 79 monitoring
7 and pumping wells.

8 This pumping, which again did not equal the amount
9 originally ordered from the pumping test, resulted in dramatic
10 effects that I don't think a lot of people anticipated at the
11 time the pumping test was ordered. Water level declines were
12 seen across over 1100 square miles, from Southern Kane Springs
13 Valley, Northern Coyote Springs Valley, through the Muddy River
14 Springs area, Hidden Valley, Garnet Valley, California Wash and
15 the northwestern portion of Black Mountains Area. And that's
16 indicated on the demonstrative that I have here. These
17 declines were estimated to be between 1 to 1.6 feet throughout
18 the area, and major drops in the headwater springs of the Muddy
19 River were also observed, which again is the decreed surface
20 water source and the only habitat of the dace.

21 Based on these findings from the pumping test, the
22 State Engineer issued various rulings. These are Rulings 6254
23 through 6261 found at the ROA from 726 to 948. These rulings
24 denied all pending applications in these then individual
25 basins.

1 Importantly, these rulings also put the writing on
2 the wall that existing water rights were in question based on
3 the findings of the pumping results. The results were
4 undeniable and dramatic despite only pumping one third of the
5 water rights already granted in Coyote Spring Valley. In those
6 rulings, which were never challenged or overturned, the State
7 Engineer determined that, and this is verbatim from one of the
8 rulings,

9 These basins share a unique and close
10 hydrological connection and share virtually all
11 of the same source and supply of water, unlike
12 other basins in Nevada. These five basins will
13 be jointly managed. The perennial yield of
14 these basins cannot be more than the total
15 annual supply of 50,000 acre-feet. Because the
16 Muddy River and Muddy River Springs also utilize
17 the same supply and are the most senior water
18 rights in the region, the perennial yield is
19 further reduced to an amount less than 50,000
20 acre-feet.

21 The State Engineer finds that the amount
22 and location of groundwater that can be
23 developed without capture of and conflict with
24 senior rights on the Muddy River and springs
25 remains unclear, but the evidence is

1 overwhelming that unappropriated water does not
2 exist.

3 And that's in the ROA at 749.

4 It's important to note that in that 50,000 acre-feet,
5 that includes the whole flow of the river, which we've heard
6 various arguments about 30, 33,000 acre-feet. So this is
7 essentially the starting point of the administrative process
8 that led to Interim Order 1303 and Order 1309 that is
9 challenged in this case.

10 Based on this, a lot of petitioners' positions kind
11 of defy reality, as it's been known at least since 2014 when
12 the State Engineer issued these rulings that the State Engineer
13 would be jointly managing the basins that showed this
14 interconnectivity, the subbasins that now make up the LWRFS and
15 that there would be one perennial yield for these basins that
16 had to be far less than 50,000 acre-feet.

17 THE COURT: So let me stop you there. I need you to
18 walk me through the -- and it doesn't have to be right this
19 minute, but sometime during your argument, exactly where the
20 State Engineer derives its power to, one, conjunctively manage;
21 and two, jointly manage.

22 MR. BOLOTIN: Okay.

23 THE COURT: So sometime in your argument, if you
24 could really touch upon that and be very specific as to
25 referring to the statutes and what parts of the statutes, that

1 would be very helpful for me.

2 MR. BOLOTIN: Yes, Your Honor. And I have a little
3 bit more of the --

4 THE COURT: No, no. Yeah, and I don't want to
5 interrupt.

6 MR. BOLOTIN: Yeah.

7 THE COURT: I just want to make sure at some point in
8 your argument that you really -- you're going to really have to
9 spell it out for me.

10 MR. BOLOTIN: Okay. Yeah. We get to the authority
11 portion after a little bit of this background.

12 THE COURT: All right. Thank you.

13 MR. BOLOTIN: Again, the State Engineer in these
14 orders said the amount and location of groundwater that can be
15 developed without capture and conflict with senior water rights
16 of the Muddy River and springs remains unclear.

17 1309 was the first step in figuring that out by
18 setting the boundaries of the LWRFS. That's the location --
19 and the 8,000 maximum -- 8,000 acre-foot maximum amount of
20 water available. That's the amount. Those are the things that
21 he discussed in those rulings as things we didn't know and
22 why -- and in 1303 he said these are the things we're going to
23 figure out now.

24 The State Engineer was well aware of the due process
25 implications at play in these decisions and therefore ensured

1 that all stakeholders had notice and ability to be heard in the
2 process leading to Order 1309.

3 The State Engineer entered Interim Order 1303 to
4 begin the public process to address strategies related to the
5 existing water rights in the region. The State Engineer again
6 made it clear that if the pumping returned to the level during
7 the pumping test, which again is a very realistic possibility
8 based on the volume of existing rights that are on the books
9 already, that would adversely affect the Muddy River, including
10 senior rights and the Moapa dace therein, and that's from the
11 ROA at 644.

12 The State Engineer issued Interim Order 1303 on
13 January 11th, 2019. Interim Order 1303 included the initial
14 identification of the boundaries of the LWRFS as a single unit,
15 which is very similar to the eventual final boundaries found in
16 1309 with the exception that in 1303 it didn't include Kane
17 Springs Valley, and the border with the Black Mountains Area
18 was a little bit different at that time.

19 Interim Order 1303 solicited reports from any
20 stakeholder with interest that may be affected by water right
21 development within the LWRFS and with the reports to address
22 five topics. These topics or the boundaries of the connected
23 groundwater and surface water system, data from the 1169
24 aquifer pumping test and subsequent data on the recovery since
25 the test, the long-term annual quantity of groundwater that may

1 be pumped considering the Springs in the Muddy River, effects
2 of moving water rights between alluvial and carbonate wells on
3 the Muddy River decreed rights and any other matter believed to
4 the party to be relevant.

5 Interim Order 1303 also anticipated a hearing would
6 be held and instituted a moratorium on approval of plans for
7 construction development in the area pending the administrative
8 process with an exception where adequate water supply could be
9 shown for the life of the subdivision other construction for
10 development and held in abeyance permanent change apps
11 (phonetic) while providing an allowance for those applying for
12 extensions of time to avoid cancellation or forfeiture of their
13 water rights.

14 Almost all participants in this case, including
15 petitioners and intervenors filed reports solicited by order
16 1303 with the exception of Apex and Dry Lake.

17 During the prehearing conference, the State Engineer
18 explained that this would be a multitiered process with the
19 purpose of this first hearing being to determine exactly what I
20 said earlier, the where, the boundaries of the LWRFS and the
21 amount. The volume of water available for pumping without
22 interfering with senior rights in the river.

23 What tools to ensure that pumping was limited to a
24 sustainable amount is a question for the future proceedings, as
25 any potential -- as was any potential allegations of conflict.

1 The hearing lasted for about two weeks in the fall of 2019, and
2 every petitioner and most intervenors presented expert
3 testimony subject to cross-examination except again Apex and
4 Dry Lake. This included those parties that raised due process
5 issues in this case, including CSI and Lincoln County Water
6 District and Vidler, who put on cases raising their various
7 concerns, including their arguments that Kane Springs should
8 not be concluded in the LWRFS.

9 The participants were also entitled to submit written
10 closing arguments, and 13 participants did so.

11 I want to note that it's a little questionable about
12 these due process concerns given the notice and process that
13 was provided to the State Engineer that the parties took
14 advantage of, and this is especially true with Apex and Dry
15 Lake, who were afforded the same due process as others, but
16 just decided not to participate.

17 About six months after this hearing, the State
18 Engineer issued Order 1309, finding a direct hydraulic
19 connection between the subbasins that now make up the LWRFS and
20 delineated the boundaries of the LWRFS accordingly. It also
21 established 8,000 acre-feet or less as the maximum sustainable
22 amount of water that could be developed in the LWRFS without
23 conflicting with senior rights in the Muddy River. I like to
24 call that, to use another term for basins, the perennial yield
25 of the LWRFS, 8,000 acre-feet or less, all other aspects of

1 Order 1303 not specifically retained in 1309 were rescinded.

2 And that brings us to where we are today. Eight
3 different petitions were filed with varying challenges that
4 include those who say the State Engineer had authority to issue
5 Order 1309; that found too much water available; those who say
6 the State Engineer didn't have authority to issue Order 1309,
7 and even if he did, he didn't find enough water available;
8 those who say the boundaries are incorrect, and those who
9 challenge Order 1309 insofar as it relates to the Muddy River
10 Decree. There are also intervenors who will be arguing after
11 me who support Order 1309, among other miscellaneous legal
12 arguments that have made throughout these arguments so far in
13 the briefs.

14 So I want to start out with the authority question
15 because I think the authority is very clear. The State
16 Engineer had authority to issue Order 1309. The State
17 Engineer's interpretation is persuasive under Nevada law, even
18 if it's not controlling, but for some petitioners to argue it
19 has no weight, again, defies the case law that's existed in
20 this State that says that the State Engineer's interpretation
21 is persuasive even if the Court can conduct a *de novo* review of
22 his authority.

23 The persuasive character of the State Engineer's
24 interpretation is also built into the statute that authorizes
25 this very proceeding. NRS 533.450, Sub 9, provides that the

1 decision of a State Engineer is prima fascia correct, and the
2 burden of proof is on the parties attacking the State
3 Engineer's decision.

4 I know a lot of the petitioners don't like it --

5 THE COURT: I need you to slow down. Hold on. So
6 you're saying 533.450, Subsection 9.

7 MR. BOLOTIN: Provides that the decision of the State
8 Engineer is prima fascia correct and that the burden of proof
9 is on the parties attacking the State Engineer's decision.

10 THE COURT: Do you mean Subsection 10?

11 MR. BOLOTIN: Subsection 10, yeah.

12 THE COURT: Okay. Thank you.

13 MR. BOLOTIN: I know a lot of the petitioners don't
14 like it, but this is the truth. The question of whether the
15 LWRFS is a single administrative unit or basin from a water
16 resources perspective is a factual or scientific question, not
17 a legal one. NRS 533.024(1)(c) mandates that the State
18 Engineer consider the best available science in rendering his
19 decisions, and the scientific finding of the LWRFS acting as
20 one basin rather than separate basins is based on the best
21 available science and guided the rest of the State Engineer's
22 decision-making.

23 This finding that it acts as one basin was the
24 primary basis behind Order 1309. The State Engineer is
25 responsible for managing all water resources in Nevada, both

1 groundwater and surface water, and this precious resource
2 belongs to the public.

3 The legislature has made it the policy of the State
4 to conjunctively manage the waters of the State, regardless of
5 source.

6 THE COURT: So let me just stop you there for a
7 minute because then you're talking about 533.024, which talks
8 about using the best available evidence, but that is under a
9 legislative declaration. Are you saying that that legislative
10 declaration basically gives him the authority under using the
11 science to then jointly manage everything?

12 MR. BOLOTIN: I'm saying that the legislative
13 declaration provides the lens that the State Engineer is
14 supposed to look through when he reads the rest of his
15 authority under the statute.

16 THE COURT: Okay.

17 MR. BOLOTIN: So he has an obligation to protect
18 existing rights, not impaired decrees and --

19 THE COURT: Right. All of the --

20 MR. BOLOTIN: All of the other things.

21 THE COURT: Right.

22 MR. BOLOTIN: So when he's using his other powers, he
23 should keep in mind what the legislature told him the policy of
24 the State should be. So it's not an independent source of
25 authority. It's, like I said, the lens that he should look

1 through when looking at his individual types of authority.

2 THE COURT: So basically when this is the directive
3 that he is given under the declaration that he still has to
4 have the authority based on other statutory provisions, and
5 that's what you're talking about; is that correct?

6 MR. BOLOTIN: Correct.

7 THE COURT: Okay.

8 MR. BOLOTIN: And so under the policy declaration
9 regarding conjunctive management, it says that to manage water
10 regardless of a source, and that means managing surface and
11 groundwater as interconnected sources of water and to utilize
12 the best available science in doing so. And again, that
13 informs how he manages the other requirements, such as
14 protecting existing rights, not impairing decrees, considering
15 the public interest, et cetera.

16 Yes, as we've heard a lot over the last few days, the
17 water law often refers to basin management, but what
18 constitutes a basin is naturally a scientific finding. The
19 State Engineer found all of these basins at one point in time,
20 and I don't think anybody has challenged the State Engineer's
21 authority to say that --

22 THE COURT: So I guess my question is if the water
23 engineer has found these basins to exist as a scientific
24 finding, and now there are 233 basins, how can he then say that
25 there are six basins -- seven basins that are actually now one

1 basin if he's already -- I mean, if he's already made that
2 decision based on a scientific finding that it's a singular
3 basin, how does he then change it to seven basins as one?

4 MR. BOLOTIN: That requires going back and
5 understanding how these original basins were laid out. A lot
6 of these basin boundaries were drawn in the '50s, '60s and
7 '70s through reconnaissance reports. The State Engineer
8 worked hand-in-hand with the U.S. geological survey, and they
9 were based mostly at the time on topographic features, such as
10 there's a valley here, that's a basin; there's a valley here,
11 that's a basin. But the State Engineer is not bound by *stare*
12 *decisis*, despite what some other parties have said earlier.
13 That is in Nevada case law, and it -- the State Engineer, the
14 science says this is one basin, and it doesn't make sense for
15 the State Engineer to not be able to update the scientific
16 findings he's found.

17 Up until the pumping test, people thought that these
18 were separate basins. The fact is that pumping even a fraction
19 of the existing water rights out there show water levels that
20 dropped almost uniformly in response to that pumping stress on
21 the system.

22 THE COURT: So, but you would concede though there's
23 not any specific framework within the statute that its
24 direction as to how the Nevada State Engineer would determine
25 whether or not singular basins should be managed jointly?

1 MR. BOLOTIN: I would point, and I haven't gotten
2 there yet, to NRS 532.120.

3 THE COURT: Okay. And that's the area one that I
4 talked about earlier?

5 MR. BOLOTIN: No. This is -- you were talking about
6 534.

7 THE COURT: Did you say -- oh, 532. Sorry.

8 MR. BOLOTIN: Uh-huh.

9 THE COURT: Sorry. 532.

10 MR. BOLOTIN: And I don't have the exact statutory
11 language in front of me, Your Honor, but that --

12 THE COURT: The rules and regulations regulating and
13 governing --

14 MR. BOLOTIN: Yes. The --

15 THE COURT: -- contest.

16 MR. BOLOTIN: The first part of the statute provides
17 that the State Engineer can create reasonable rules and
18 regulations I think to exercise the rest of his powers issued
19 under the --

20 THE COURT: Well, it says, As may be necessary for
21 the proper and orderly execution of the powers conferred by
22 law. So if those original powers are conferred on him or her,
23 that within that they can make -- they can make such reasonable
24 rules and regulations regarding those. Right?

25 MR. BOLOTIN: And that's where -- yes. And so by

1 laying out basically the rules of the road with LWRFSS, that
2 brings it into its one basin, and the rest of his authority
3 does apply to managing on a basin by basin basis, but the
4 basins are a scientific finding, Your Honor, and he didn't
5 think -- I don't know how else to say it, Your Honor. They
6 weren't -- they were treated separately until we figured out
7 these are not separate basins, and we have to protect senior
8 rights, and we have to protect the river.

9 THE COURT: And I understand -- I understand the
10 reasoning. I understand the --

11 MR. BOLOTIN: And those are in the, yeah.

12 THE COURT: -- the scientific basis. What I'm stuck
13 on is what confers on him the authority now to then just
14 decide, okay, I'm going to treat these all as one joint basin
15 because, I mean, it does not appear that there is anything
16 explicitly in the statute that allows him to make a decision
17 about joining together basins and then figuring out how to
18 manage those existing rights within those basins.

19 MR. BOLOTIN: And I think -- I do touch on that a
20 little bit later, but, yeah, I'll touch on that in a second. I
21 promise, Your Honor.

22 THE COURT: That's okay. I realize I'm asking for a
23 lot, but I really just need you to spell it out.

24 MR. BOLOTIN: And it's -- it hinges mostly on he
25 can't impair decrees, and he has to protect existing rights,

1 and that is in the statute. That's the main charge of the
2 State Engineer's office in general.

3 So again, the water law does often refer to basin
4 management, but what constitutes a basin is a scientific
5 finding.

6 The pumping test, the best available science here
7 reveal that these subbasins that were formerly treated as
8 separate basins are underlain by one single highly transmissive
9 carbonate aquifer that shares the same supply of water. This
10 can be seen in demonstrative. And the ground water levels and
11 spring flows, and this is important, have never fully recovered
12 to where they were before the pumping test. This is from a
13 little over 14,000 acre-feet on average over those two years
14 pumped, which is far less than the volume of water rights that
15 exist on paper in this area. This is one basin.

16 The petitioners' descriptions of the mega basin or
17 super basin should not persuade the Court otherwise. The
18 number of basins in the State or what constitutes a basin is
19 also not dictated by the legislature. This is a factual
20 scientific finding that is within the State Engineer's
21 specialized area of expertise, and the finding that the LWRFS
22 is a single basin is supported by the evidence in the record.

23 The prior appropriation doctrine requires that all
24 water rights are granted subject to existing rights and cannot
25 interfere with more senior rights. In times where the volume

1 of water available is less than needed to serve all rights and
2 curtailment is necessary, the prior appropriation doctrine
3 requires that senior rights get all of their water first before
4 juniors get any of their water.

5 The prior appropriation doctrine first in time, first
6 and right has no limits between surface water or groundwater or
7 geographic location. The doctrine's fundamental holding is
8 that older rights are protected from conflicts caused by newer
9 rights.

10 The doctrine says nothing about limiting its
11 application based on hydrographic area or proximity between
12 rights.

13 A lot of the petitioner's arguments regarding a basin
14 by basin approach ignores that most basins in the State of
15 Nevada are underlain by single aquifers and therefore, at the
16 very least, have less transmissivity between separate basins
17 such that, yes, who is junior, who is senior can usually be
18 determined on a single geographic basin.

19 But here, substantial evidence in the record
20 following the 1169 aquifer test that subbasins making up the
21 LWRFS are similarly underlain by a single highly transmissive
22 carbonate aquifer. Therefore, delineating this as a single
23 basin and administering it accordingly is in compliance with
24 what petitioners would call basin by basin management because
25 it is one basin.

1 The scientific fact is that these formerly -- these
2 subbasins that were formerly treated independently do not have
3 independent supplies of waters. They share --

4 THE COURT: Oh. So then is it your position that all
5 of the water rights holders in Nevada are -- don't really have
6 any sort of finality or ability to reasonably rely on where
7 they are because at some point in time in the future the Nevada
8 State Engineer might determine that the basin actually needs to
9 be jointly managed with another basin?

10 MR. BOLOTIN: No, Your Honor. This is a very unique
11 area of Nevada. It is unlike all of the other areas.

12 Most of the basins proximity to each other does
13 matter. Seniority can be determined on a basin by basin basis,
14 but to turn your question on your head, Your Honor, if it was
15 shown that someone with a 2020 water right in Reno was causing
16 a well to fail with a 1920 water right in Las Vegas, the State
17 Engineer would have to have the power to shut off the one in
18 Reno. That's not the case here. There isn't a single long
19 aquifer that stretches from Reno to Las Vegas.

20 THE COURT: Right.

21 MR. BOLOTIN: But --

22 THE COURT: But there's a curtailment procedure to do
23 that; right?

24 MR. BOLOTIN: Correct.

25 THE COURT: Okay.

1 MR. BOLOTIN: And I'm going to get to it in a second,
2 but the State Engineer hasn't instituted curtailment here.

3 THE COURT: Okay.

4 MR. BOLOTIN: Doing what the State Engineer did in
5 Order 1309 fully complies with the legislature's policy
6 objectives. In NRS 533.024(1)(e) to manage water conjunctively
7 regardless of source, and the State Engineer's duty to honor
8 prior appropriation and protecting existing rights under
9 NRS 533.430, sub 1 and 534.020, sub 1.

10 THE COURT: Wait. Slow down. Say that one more
11 time.

12 MR. BOLOTIN: Yep. 533.430, sub 1 is the surface
13 water, where it is in the surface water statute. 534.020 1 is
14 where protecting existing rights exists in the groundwater
15 statute.

16 And again, this protection that's required by law is
17 not limited in the manner argued by some petitioners. It is
18 not limited based on proximity or source.

19 While petitioners attempt to completely jump the
20 legislature's policy declaration regarding conjunctive
21 management, this declaration of policy is entitled to great
22 weight.

23 While the State Engineer doesn't argue that it's an
24 independent source of authority, it does provide the policy
25 goals for how the State Engineer utilizes the rest of his

1 authority in NRS 532 through 534, and it was under that
2 authority through the lens of the legislature's policy
3 declarations that the State Engineer appropriately rendered
4 Order 1309.

5 Again, at the center of this case and the LWRFS is
6 the decreed Muddy River. The State Engineer is prohibited by
7 law from carrying out his duties in a manner that conflicts
8 with the decree, and that's in NRS 533.0245.

9 Full stop. There is no caveat that he can't -- that
10 he can let decreed systems be harmed by more junior water
11 rights holders if the harm is caused by groundwater pumping or
12 caused by water use that's far away. These carve outs are what
13 many petitioners essentially request in this case, and these
14 carve outs don't exist in the law.

15 Further, NRS 534.110, sub 6, authorizes the State
16 Engineer to conduct investigations in groundwater basins where
17 it appears that replenishment of groundwater supply is
18 inadequate to serve the needs of all vested and permanent
19 rights holders.

20 That statute also explicitly provides that the State
21 Engineer can order withdrawals be restricted to conform to
22 priority rights or what it is called curtailment. And again,
23 curtailment hasn't happened in this case, but the investigation
24 was nonetheless allowed before such a decision is made.

25 And as I said earlier, 534 -- 532.120 provides the

1 authority for the State Engineer's actions to create the rules
2 and regulations needed to properly administer the rest of his
3 powers provided by the statutes, and the best available science
4 dictates that Order 1309 is necessary in order for the State
5 Engineer to comply with his duties regarding senior rights and
6 the water resources in this region.

7 THE COURT: So let me just ask you then because, you
8 know, a lot of the statutes that you're referring to refer to a
9 singular basin, right. So is it your contention then that it
10 is the Nevada State Engineer's ability based on the scientific
11 evidence to then redesignate what a basin is and then manage it
12 accordingly that way? Even though there are already these 230
13 some odd established basins?

14 MR. BOLOTIN: I think if I understand your question
15 correctly, Your Honor, that is the -- the State Engineer's
16 position is that he needs to treat the areas that are -- the
17 legislature doesn't define what a basin is anywhere in the
18 statute.

19 THE COURT: So that is something that the State
20 Engineer can do and that he can change at any time?

21 MR. BOLOTIN: It needs to be supported by substantial
22 evidence, and the State Engineer does -- he has had hearings
23 where he adjusts perennial yields of basins. He moves a
24 boundary here. He moves the boundary there. There are areas,
25 such as in the Death Valley Flow System, where multiple basins

1 share a perennial yield. These are scientific determinations
2 that the State Engineer's office makes on a regular basis.

3 THE COURT: But this is the first time that the State
4 Engineer has actually determined conjunctive management and
5 joint management; is that correct?

6 MR. BOLOTIN: I believe so, Your Honor. This is --
7 like I said, there's other times where he's adjusted --

8 THE COURT: Yeah. He might adjust like a boundary
9 here and there, but if you're talking about putting multiple
10 already existing of the 230 some odd basins together, that's
11 the first time that he's done that for joint management, and
12 this is the first time that there's also the consideration of
13 conjunctive management for managing a surface rights and the
14 groundwater rights?

15 MR. BOLOTIN: Correct. The State Engineer has
16 considered on an individual basis groundwater pumping's effect
17 on surface water sources.

18 THE COURT: Sure.

19 MR. BOLOTIN: And other rivers and has denied
20 applications or approved them for less than they were asked on
21 the basis that they -- he's still doing conjunctive management
22 at that time because he's treating them as one source -- two
23 sources together that can affect each other, but this is -- I
24 would say the State Engineer's largest step into fully
25 conjunctively managing an entire source because the pumping

1 test was so undeniable that something needed to be done here.

2 And I did want to bring up one thing, Your Honor, if
3 I can go over to the map that CSI had.

4 THE COURT: Sure.

5 MR. BOLOTIN: I do think that there's a little bit
6 of -- the word designation has a few different meanings in the
7 law.

8 THE COURT: Sure.

9 MR. BOLOTIN: And in this map, that's kind of laid
10 out. So I think people have throughout the case have said
11 these are all the designated basins, and, yes, this is a basin,
12 this is a basin. But if you look at the key, the gray ones are
13 the ones that have been designated under 534.030.

14 THE COURT: Okay.

15 MR. BOLOTIN: And these are the ones no one doubts
16 that they're a basin themselves --

17 THE COURT: A basin. But they haven't actually gone
18 through a process where they've been declared a basin?

19 MR. BOLOTIN: No. They're basins because Coyote
20 Springs -- I mean not Coyote Springs. Kane Springs Valley, for
21 example --

22 THE COURT: Right.

23 MR. BOLOTIN: -- has not gone through the 534.030
24 process.

25 THE COURT: Okay. And remind me what the -- are you

1 talking about the 534 --

2 MR. BOLOTIN: Designated for further administration
3 so he can do assessments and other --

4 THE COURT: Oh, okay. Right. Right. Right. Okay.

5 MR. BOLOTIN: -- it opens up the tools, the toolbox
6 of other things that he can use.

7 THE COURT: Okay.

8 MR. BOLOTIN: But no one denies that it's a basin.

9 THE COURT: A basin. Okay.

10 MR. BOLOTIN: We say that it's a subbasin, part of a
11 bigger basin, but even Lincoln, Vidler and CSI, they call
12 Coyote -- Kane Springs Valley a basin.

13 THE COURT: Okay.

14 MR. BOLOTIN: There's just a difference between
15 what's designated and what's not, and in the general sense, all
16 of the basins have been designated. They're all basins, but
17 when it's -- in this map, where it's a gray, that means it went
18 through the 534.030 process either through the petition or the
19 State Engineer held a hearing in that basin saying these are
20 additional administration so that he can monitor all of the
21 wells. He can assess groundwater rights in those basins,
22 various other parts of the statute.

23 THE COURT: Okay. But there's also nothing
24 explicitly in the statute that allows for the Nevada State
25 Engineer to then decide if a designated basin can now be

1 treated as a subbasin of a larger basin; correct?

2 MR. BOLOTIN: There's nothing that explicitly says it
3 other than the State Engineer used the best available science
4 at the time to establish the 232 or --

5 THE COURT: Right. Or, yeah, whatever. Or now it's
6 231 with one larger basin with seven sub- or seven --

7 MR. BOLOTIN: Yeah, seven subbasins. Correct.

8 THE COURT: Okay. Subbasins.

9 MR. BOLOTIN: Or a part of, yeah. Six and part of a
10 seventh.

11 THE COURT: Okay.

12 MR. BOLOTIN: As to the evidence considered, once
13 again the parties' submissions varied in form and substance,
14 ranging from the 1169 pumping test water level data in the area
15 since the pumping test, modeling efforts, new geological
16 studies, climate information and other evidence submitted by
17 the various parties. The State Engineer considered all of
18 these submissions. And using his expertise, the actual results
19 from the pumping test and the data seen since then were given
20 the most weight by the State Engineer. We do not dispute that.

21 He didn't ignore anyone's evidence though. He just
22 gave the most weight to the evidence. Then his expertise
23 actually detailed what was actually happening when water was
24 pumped from the region and what recovery was actually observed
25 when the volume of pumping was reduced, which as we can see,

1 was not very much recovery at all.

2 Believe me, models and other studies presented have
3 value and were considered throughout the process. But when you
4 can see what the actual effects of pumping existing water
5 rights are, it makes some of these theoretical models and other
6 types of studies less persuasive. And it was this data related
7 to the actual 1169 aquifer pumping test and the monitoring of
8 groundwater levels and spring discharge since that showed that
9 even pumping a fraction of existing rights in the area causes
10 drastic results uniformly throughout the LWRFS; that is, during
11 the pumping test, similar groundwater responses were seen from
12 Kane Springs Valley to the northwest portion of Black Mountains
13 Area from Coyote Springs Valley and the California Wash and
14 everywhere in between, and significant drops in spring
15 discharges at the headwaters of the Muddy River.

16 Drops in spring discharge that have never fully
17 recovered since the aquifer test, and again, this is all
18 spelled out there, and I think it's most dramatically seen in
19 the headwaters Springs. They didn't even get close to
20 recovering to where they were.

21 THE COURT: So let me ask you because, you know,
22 Lincoln and Vidler contend that the pumping was never done in
23 Kane Springs Valley. So then how can you determine that the
24 drops occurred in Kane Springs Valley?

25 MR. BOLOTIN: So at the time that the pumping test

1 was done, there was no pumping in Kane Springs Valley at all,
2 and I do not think that it's working backwards as their counsel
3 said. If the data we had shows if the north -- right here is
4 the --

5 THE COURT: Yeah, the upper --

6 MR. BOLOTIN: -- the upper one. A very similar
7 response as the northern Coyote Spring Valley well, and even
8 though it was less severe than some of the other groundwater
9 basins, it followed the same pattern following the pumping. So
10 that indicated to the State Engineer that it did share the same
11 source.

12 And I would suggest, Your Honor, that the 8,000
13 acre-foot or less and the continuing process, the State
14 Engineer is never going to be allergic to additional testing or
15 information. The State Engineer would welcome the parties of
16 interest in Kane Springs Valley to do a pumping test, prove
17 that the State Engineer is wrong or that the boundary is not
18 what it should be. Maybe it's a part of Kane Springs Valley.
19 Maybe it's just the southern part, but the geology indicates
20 that the carbonate rock aquifer does extend in the Kane Springs
21 Valley, and it had very similar responses to the pumping tests
22 as the other areas that were pumped as part of the pumping
23 test.

24 And again, these responses to the pumping test are
25 the main problem here. The Springs feed the Muddy River. The

1 Muddy River is a decreed system, meaning that all water rights
2 in the river predate 1905, and are therefore senior to all the
3 groundwater rights in the LWRFS.

4 Further, the Muddy River is the only known habitat
5 and the Moapa dace, an endangered fish. Therefore, under the
6 State Engineer's duty to protect existing rights based on
7 seniority, his duty to protect decrees and his duty to consider
8 the public interest, the State Engineer not only had authority,
9 but had a duty to follow the science here, and that means
10 finding that the LWRFS with the boundaries identified shares a
11 single supply of water and therefore must be managed as one
12 basin with a perennial yield that is far less than what exists
13 on paper and must be 8,000 acre-feet or less.

14 It's true that during the hearings preceding
15 Order 1309 there was no consensus among the participants as the
16 volume of sustainable groundwater in the LWRFS.
17 Recommendations range from as low as zero acre-feet allowed, as
18 high as 30,000 acre-feet allowed; however, most experts agree
19 that the right amount that could be pumped without hurting
20 senior rights or the dace was somewhere between the extreme
21 ends of that range.

22 Substantial evidence supports the finding of 8,000
23 acre-feet or less, and the State Engineer was not required to
24 disprove every other potential figure between 30,000 acre-feet
25 and zero. We know that it cannot be over 8,000 acre-feet

1 because we've seen what happens when more than 8,000 acre-feet
2 are pumped from the area.

3 Since the end of the 1169 pumping test, pumping has
4 decreased from over 12,000 acre-feet a year to about an average
5 of 8300 acre-feet per year. This has led to groundwater levels
6 and spring flow nearly stabilizing; however, neither has
7 returned to the pretest levels before the pumping test;
8 however, the 8,000 acre-foot or less number also recognizes
9 that other nonLWRFS basins have seen increasing groundwater
10 levels in line with increased precipitation. Thus if it were
11 to become drier, it's possible that the current level of
12 pumping over 8,000 acre-feet could once again lead to drops in
13 groundwater level and spring flows.

14 Thus, based on all the evidence in the record, the
15 State Engineer came to the supported conclusion that 8,000
16 acre-feet is the maximum amount that can be developed. And
17 ultimately this number may need to be reduced further to
18 protect people's interests and their senior rights. And again,
19 the State Engineer stated that monitoring is necessary. So
20 this number could be further reduced if the conditions so
21 indicate that doing so is necessary to protect senior rights or
22 the habitat of the fish, which are essentially one and the
23 same, Your Honor.

24 Importantly, in setting the boundaries of the LWRFS
25 and the sustainable pumping volume, it's also important to

1 explain what the State Engineer did not do here. This is
2 important because many petitioners accuse Order 1309 of
3 containing provisions that are nowhere in the text of the
4 order.

5 Order 1309 did not change the priority date of any
6 water right, for example.

7 THE COURT: So it may not have changed the priority
8 date, but if they're all in one basin now, it does change the
9 priority order?

10 MR. BOLOTIN: Not necessarily. We haven't gotten to
11 the point of what to do with -- we're setting up the facts of
12 the boundary and the perennial yield, but the State Engineer
13 hasn't said he's going to do strict curtailment by priority.
14 There's a lot of water rights that are senior but aren't
15 necessarily being pumped. There's water rights that are being
16 pumped, but are more recent. It's -- I know a lot of people
17 used the word mega mess throughout the last few days. The
18 State Engineer is trying to -- the mega mess exists, 1309 or
19 no. The State Engineer's 1309 is the first step in solving the
20 mega mess by laying out what the ground rules are, and then
21 we're going to have another hearing or hearings to see what the
22 next steps are. One of those might involve, for example, the
23 534.030 designation hearing to designate the one basin in need
24 of additional administration.

25 THE COURT: But you agree that, it's your position

1 that it's the Nevada State Engineer that decides what all those
2 rules are?

3 MR. BOLOTIN: The State Engineer --

4 THE COURT: Is --

5 MR. BOLOTIN: He has rule-making authority under the
6 law in order to make his powers --

7 THE COURT: No. You talk about the statutes,
8 which --

9 MR. BOLOTIN: Such reasonable rules and regulations
10 as may be necessary for the proper and orderly execution of
11 powers conferred by the law.

12 THE COURT: Okay. So there's nothing in the statute
13 that explicitly gives authority for joint management. So
14 there's nothing explicitly in the law that gives direction as
15 to how to reprioritize those rights; correct?

16 MR. BOLOTIN: Correct. Other than I do think if the
17 parties -- say we reached 534.030 designation, things get worse
18 out there, something like that, I do think the State Engineer
19 would have authority to do the worst -- the worst result which
20 would be curtailment by priority.

21 THE COURT: Curtailment. Okay.

22 MR. BOLOTIN: We hope we don't reach there. The
23 State Engineer does not like to curtail. He's not in the
24 business of ruining people's livelihoods or businesses. That's
25 not what he wants to do, but if things don't get figured out,

1 pumping were to increase, the river is going to go down, that's
2 the conclusion if there's not some other resolution reached
3 before then.

4 Order 1309 also did not grant or revoke any water
5 rights, and Order 1309 did not curtail anyone's water rights.
6 Order 1309 basically found that the LWRFS is one basin that is
7 overappropriated and has been overpumped, but it did not
8 curtail anyone's water rights.

9 I think somebody else said this earlier today. There
10 are basins across the State that are both overappropriated and
11 overpumped, and yet they're not curtailed. And they won't be
12 until the State Engineer specifically says withdrawals will be
13 restricted to conform to priority rights, have a hearing, give
14 people due process and move down that path, but that has not
15 happened yet here in the LWRFS, and for now that LWRFS is
16 simply another overappropriated and overpumped basin in the
17 State of Nevada, the driest state in the nation.

18 Order 1309 also did not designate the LWRFS as a
19 critical management area or a CMA. There is currently only one
20 CMA in Nevada, and that's in Diamond Valley in Eureka County.
21 And while that remains an option in the LWRFS during some of
22 the next phases, Order 1309 did not designate the LWRFS as a
23 CMA. And if the Court has another week or two, I can tell it
24 all about Diamond Valley and everything that's gone out there.

25 Rather, Order 1309 was a basic exercise of the State

1 Engineer's authorities and duties as prescribed by the
2 legislature to create the rules and regulations he needs to use
3 his powers to protect existing rights and consider the public
4 interest in doing so and not allowing impairment of decreed
5 sources. And substantial evidence in the record on appeal
6 supports the State Engineer's finding in Order 1309, and this
7 is when the Court should be at its most deferential with these
8 scientific findings.

9 Again, I may have already said this, but I want to
10 repeat it because it's in the briefs over and over again.
11 Simply because the State Engineer was not persuaded by some
12 evidence does not mean that he ignored that evidence. And the
13 Court should reject the repeated invitations to reweigh the
14 evidence and request from the petitioners that the Court
15 substitute its judgment for the State Engineer on these
16 scientific findings. Doing so would violate the standard of
17 review that's been laid out in the case law of the water law of
18 Nevada.

19 As to the specific substantial evidence, I don't want
20 to go through everything we've argued in the briefs or
21 everything I've already touched on or everything everybody else
22 has touched on, but I do want to hit some of the high notes
23 that we've heard over the last couple of days.

24 The State Engineer did consider climate, and
25 substantial evidence in the record disproved this theory that

1 climate alone caused the drops in water levels and spring
2 flows. The State Engineer is entitled to give more weight to
3 certain witnesses and evidence than others, and this does not
4 mean the State Engineer ignored that evidence. Substantial
5 evidence in the record supports the State Engineer's findings
6 that even if they run counter to some of the evidence
7 presented, this is natural considering that people have their
8 own interests they want to advance in these types of hearings.

9 Some parties suggest that the State Engineer should
10 have followed their modeling or water budget analysis rather
11 than placing more weight on the results of the aquifer pumping
12 test. This is an example of petitioners asking the Court to
13 improperly reweigh the evidence.

14 The water budget is basically an estimate based on
15 how much water flows in and out of an area. The pumping test
16 shows real-world effects of pumping on the system, and those
17 real-world effects were dramatic and showed groundwater levels
18 and spring flows throughout the LWRFS 1100 square miles
19 falling, and they've never fully recovered.

20 I wanted to touch on the argument that said what's
21 stopping the State Engineer from making a Nevada wide mega
22 basin. it's in the Order 1309 itself, Your Honor. The State
23 Engineer found that some basins that border the LWRFS did not
24 meet the criteria to be included in the LWRFS. The State
25 Engineer could not, as CSI and some others allege, combine

1 every basin into one basin for management. There would need to
2 be a defensible basis for treating formerly separate basins as
3 one basin, and there is substantial evidence supporting how the
4 State Engineer did so here in the LWRFS.

5 Multiple parties had experts testify that Kane
6 Springs Valley should be included in the LWRFS. So it's not
7 like the State Engineer pulled that conclusion out of thin air
8 either. There's evidence in the record showing that the
9 geology of Kane Springs is consistent with the rest of the
10 LWRFS and hydrographs from the 1169 pumping test showed similar
11 patterns between the monitoring well and Kane Springs Valley
12 and the rest of the LWRFS.

13 I think there's some discussion about attenuated, and
14 I think that can be attributed to the fact that Kane Springs
15 Valley is further away from the other pumping. So it takes a
16 little bit longer for the pumping effects to reach there, but
17 the pattern is the same: Even if it's not as quickly to drop,
18 it follows the same pattern. It shares the same source of
19 supply as the other water -- as the other subbasins that make
20 up the LWRFS.

21 And again, simply because certain parties like CSI
22 and Lincoln County Water District and Vidler would have
23 preferred that the State Engineer rely on their other evidence,
24 including the CSAMT geologic studies that they supplied, it was
25 the State Engineer's prerogative to be persuaded by other

1 parties like the federal government's analysis and the findings
2 from the -- and finding that the findings from the aquifer test
3 were more credible.

4 This is especially true since this data provided by
5 these parties said nothing about the permeability of the
6 alleged faults such that there's no real evidence showing that
7 these was actually act as a barrier to flow; whereas the
8 aquifer test results showed clearly that the groundwater levels
9 in Kane Springs Valley reacted to pumping in a similar fashion
10 as the other areas of the LWRFS.

11 I also wanted to touch on Ruling 5712 that we heard
12 Lincoln County and Vidler talk about before lunch. It's
13 important to note that was issued before the pumping test
14 commenced at all. And in its own language it acknowledges
15 strong hydrologic connection between Kane Springs Valley and
16 the other LWRFS subbasins such that the State Engineer actually
17 awarded less water than what Lincoln County Water District and
18 Vidler actually asked for in the applications that led to that
19 ruling.

20 Lincoln and Vidler's arguments concerning that what
21 occurred before 2010 are deserving of little weight in light of
22 the pumping test results that have been seen since.

23 These findings are -- one second. I did want to also
24 touch on the *Mineral County* case that Lincoln-Vidler talked
25 about before lunch too. It's the State Engineer's position

1 that for lack of a better word -- term, they cherry picked the
2 language from the case and argued that their permitted rights
3 that the Court is focused on protecting in that case. That
4 case dealt with the finality of a decree and the inability to
5 reopen a decree to send more water down the Walker Lake in
6 Northern Nevada.

7 The better analogy, if we're going to talk about
8 Mineral County here, is that the State Engineer must protect
9 decrees certainty. That would be the Muddy River and the
10 decreed rights in there, and that would be the junior
11 groundwater rights would have to fall subservient to the Muddy
12 River rights.

13 Your Honor, would it be okay if I take a five-minute
14 break?

15 THE COURT: That's okay.

16 (Proceedings recessed at 2:31 p.m., until 2:36 p.m.)

17 THE COURT: Okay. Back on the record.

18 THE COURT RECORDER: On the record.

19 MR. BOLOTIN: I want to go back and make a point of
20 clarification regarding the individual priorities in the
21 subbasins. It's important to note that as of right now, as we
22 stand here today, the water rights do retain their individual
23 priorities in those subbasins. It's just what to do with that
24 and whether that stays the case is for the next phase of the
25 administrative process, and I think there's some confusion

1 about this because in Interim Order 1303, I think there was
2 either an exhibit or an attachment that did say here's all the
3 priorities in a bucket. This is who would be senior, and this
4 is who would be junior, but that was not one of the things that
5 was retained over from Order 1309. That was one of the things
6 that was rescinded because it was not specifically retained in
7 Order 1309.

8 And again maybe that's where things head. Maybe
9 that's what has to happen, but right now everybody's individual
10 water rights are still in their --

11 THE COURT: As they are within the basin, but that
12 may change depending on what the water engineer decides will be
13 the process.

14 MR. BOLOTIN: When he follows the correct process for
15 what needs to happen, whether we head towards curtailment, CMA
16 designation, something else to protect senior rights still
17 based on priority. But as we stand here today, he has not
18 thrown them all into a bucket and said seniority from top to
19 bottom. But he's basically --

20 THE COURT: No, but, I mean, the order is that
21 everything is going to be jointly managed in one basin;
22 correct?

23 MR. BOLOTIN: That these are the boundaries as one
24 basin, and it has a perennial yield of 8,000 acre-feet or less.

25 And one other thing related to the King Springs

1 Valley stuff that I was talking about before the break. The
2 State Engineer's findings are not undermined by his
3 acknowledgment that more data will be helpful going forward.
4 Substantial evidence supports Kane Springs inclusion in the
5 LWRFS. But, of course, more data to further hone these
6 findings is helpful. And, in fact, the State Engineer would
7 welcome Lincoln County Water District or Vidler Water Company
8 or CSI or others to try additional aquifer tests in the Kane
9 Springs portion of the LWRFS or elsewhere (video interference)
10 further refine the data; however, based on some of the
11 arguments, it seems as though some parties would rather rely on
12 their models and that say what could happen rather than what
13 actual pumping shows happens, and this is likely because the
14 substantial evidence that exists shows that there is a
15 connection.

16 In the meantime, the State Engineer should not be
17 required to sit on his hands and let potentially irreparable
18 harm be done to the resource when he already has substantial
19 evidence supporting the decisions made in Order 1309.

20 And that's one more point regarding -- this is an
21 estimate. Perennial yields around the State are explicitly
22 estimates. The State Engineer cannot get it down to the last
23 drop of what an exact number is. There's a reason why most
24 perennial yields, if not all of them, end in round numbers like
25 50 or a hundred or a thousand, et cetera.

1 But the most important thing is that his estimate is
2 based on substantial evidence.

3 Similarly, the geological and hydrological evidence
4 support the finding that Nevada Cogenerations well locations
5 are also within the LWRFS.

6 Their primary reliance is on the SNWA model that many
7 participants found inaccuracies with. This was the multiple
8 linear regression model; however, the geology is very similar
9 to the rest of the LWRFS, and the monitoring in this area
10 showed the groundwater reacted very similarly to the 1169
11 pumping test, as did the other parts of the LWRFS. And this is
12 also -- the State Engineer did find that parts of the Black
13 Mountains Area are not part of the LWRFS because he did give
14 credence to the -- there is a fault that the State Engineer
15 identified was low permeability structure, and therefore did
16 not allow the same level of transmissivity as the -- I think
17 it's the northwest portion of Black Mountains Area.

18 I also want to touch on Nevada Cogeneration's
19 argument regarding Assembly Bill 51 in 2019. To be honest,
20 Your Honor, this argument is completely off base. First,
21 failed legislation is deserving of little to no weight
22 regarding legislative intent. It could mean, as the parties
23 argue, it means the legislature didn't want to give the State
24 Engineer this power, but it could just as also mean that the
25 legislature thought that it was an unnecessary because the

1 State Engineer already had enough power to do what he needed to
2 do.

3 Additionally, NCA has failed to make any showing that
4 the legislature's policy direction to conjunctively manage
5 Nevada's water resources is vague or ambiguous such that the
6 Court should even be looking at legislative history in
7 determining what was meant by those policy declarations.

8 THE COURT: So then what about the testimony that was
9 presented that the State Engineer doesn't feel that they have
10 the tools or equipment or the power to do the management,
11 the -- I just forgot the word for a second, the co-

12 MR. BOLOTIN: Conjunctive management.

13 THE COURT: Conjunctive management.

14 MR. BOLOTIN: You read my mind, Your Honor, because
15 that's the next thing I was about to talk about.

16 But again, we shouldn't get there because there's
17 been no finding or showing that the text was vague or
18 ambiguous, but even if it was shown, obviously additional
19 guidance on how to conjunctively manage water resources would
20 be helpful in effectively implementing the legislature's policy
21 direction.

22 As the State Engineer testified in that hearing, it
23 would be helpful to have more direction on how to effectively
24 implement conjunctive management. And, in fact, that might
25 prevent the State Engineer from being sued by eight different

1 people if there's more specific guidance in the law moving
2 forward; however, the policy declaration is still in the law,
3 and it is the State Engineer's duty to adhere to it in managing
4 these State's water resources.

5 Lastly, and this is important, AB 51 has nothing to
6 do with this case. It was a case that was very -- it was
7 proposed legislation that was very specifically tailored to the
8 Humboldt River in Northern Nevada, and a major portion of
9 Assembly Bill 51 dealt with compensating senior water right
10 holders with money instead of water for conflicts caused by
11 junior groundwater use, and that is something that the law does
12 not provide for as it stands right now, and that was a major
13 part of the testimony in opposition to that bill and a likely
14 major reason that the legislation failed.

15 This compensation with money for conflicts with
16 senior rights is not part of Order 1309. Order 1309 rather
17 leans on the long-held doctrine of prior appropriation: First
18 in time, first in right, protecting senior rights, which
19 remains the law of Nevada.

20 Substantial evidence likewise supports the finding in
21 1309 that carbonate and alluvial aquifers are also connected
22 while supporting the idea that there may be discrete pockets in
23 the LWRFs that do not have the same close connection, hence why
24 Order 1309 held that change applications will still be
25 considered on a case-by-case basis and denials or approvals of

1 those individual change applications also can be challenged
2 under 533.450 on a case-by-case basis.

3 Lastly, there's this issue raised by SNWA and MVIC in
4 regards to Order 1309's effects on the Muddy River Decree.
5 Substantial evidence supports the State Engineer's conclusions
6 that 8,000 acre-feet or less is sufficient to maintain the
7 current spring flow and could allow additional aquifer recovery
8 in greater spring flow in the future, but the State Engineer
9 also put in place substantial monitoring requirements that left
10 the door open to further reduce the maximum sustainable amount
11 of pumping if necessary to protect these senior rates. These
12 parties primary concern is they allege that Order 1309's
13 language regarding the current flow being sufficient to serve
14 decreed rights is an impermissible reduction or
15 requantification of the Muddy River's decreed rights.

16 Order 1309 did not requantify the decreed rights.
17 The decreed rights are the same as they were when the decree
18 was entered in 1920. The State Engineer simply applied a
19 common method of calculating that irrigation water requirement
20 to estimate the actual water needed to satisfy the vested
21 rights in the decree. This doesn't recalculate the values in
22 the decree for acreage or diversion rates and cubic feet per
23 second. The tables, everything that's in the decree is still
24 there today. The State Engineer didn't go through and try to
25 edit that.

1 THE COURT: But what about the argument that
2 consumption testing can't be used for any of the waters that
3 have to do with the Muddy River Decree?

4 MR. BOLOTIN: Can you repeat that, Your Honor. I
5 missed the first part.

6 THE COURT: So there's the argument that was made
7 that a consumptive water test, like the Nevada State Engineer
8 used with the alfalfa, you know, alfalfa crops is not the kind
9 of test that is allowed when you're dealing with the Muddy
10 Water Decree rights.

11 MR. BOLOTIN: Basically what the State Engineer did
12 here was just try to find what the volume would be for the
13 beneficial -- because beneficial use is still required even
14 under a decree. You can't waste water or have -- just say I
15 have water without any purpose to beneficially use it.

16 But regardless, Your Honor, I wanted to get to the
17 next part though.

18 THE COURT: Okay.

19 MR. BOLOTIN: The part of Order 1309 is nowhere near
20 as important to the long-term sustainability of the LWRFs as
21 the ultimate determination that 8,000 acre-feet or less is the
22 maximum possible sustainable amount of pumping and the
23 boundaries of the LWRFs that are delineated in Order 1309.

24 And again the State Engineer said that this 8,000
25 acre-feet might need to be reduced in the future to protect

1 those rights in the Muddy River Decree.

2 The State Engineer's goal here was actually to
3 protect SNWA and MVIC's senior rights on the river and to
4 protect the Moapa dace. Therefore, if the Court is inclined to
5 find that this section of Order 1309 exceeded the charge of
6 Order 1303 or the State Engineer's legal authority under the
7 law regarding decrees, the State Engineer respectfully requests
8 that rather than use this issue as a basis to overturn or
9 remand all of Order 1309, that the Court instead affirm
10 Order 1309 while striking these paragraphs from the order found
11 at the bottom of ROA 61, going to the top of ROA 62.

12 This section was not core to the where, the
13 boundaries, and the how much the 8,000 feet or less. And 1309
14 can stand on its own without these paragraphs in Order 1309.

15 Finally, as to due process, and other legal issues,
16 various petitioners also argue that there was a due process
17 violation because the State Engineer spelled out his criteria
18 for whether there was a close hydrologic connection between the
19 LWRFS subbasins in Order 1309 rather than spelling it out prior
20 to the hearing.

21 But in determining the boundary of the LWRFS, aka
22 which basins were connected, that was the main question of the
23 1309 administrative proceedings. Parties presented a number of
24 different types of evidence to answer this question. These
25 criteria were based on what the parties submitted into the

1 record, and it indicates the evidence that the State Engineer
2 found persuasive in finding what was a connection.

3 THE COURT: So let me ask then, you know, when the
4 State Engineer proposed these are the four, you know, plus the
5 catchall five things that I'll be looking at or things that I
6 wanted to know information about, why would the State Engineer
7 not also say, you know, also information as far as what kind of
8 criteria should be used to decide whether or not there's a
9 close hydrological connection?

10 MR. BOLOTIN: So I think it went from broad to
11 specific between 1303 and 1309. And he said we think all of
12 this stuff is connected. Please give us your evidence on
13 what -- whether there's a connection and to the extent of the
14 connection.

15 THE COURT: Right. But not what do you think -- what
16 criteria should be used to determine that.

17 MR. BOLOTIN: No. And he got a variety of answers
18 with a bunch of different findings for how people thought it
19 was connected or why people thought it wasn't connected. And
20 in weighing all of the evidence using his expertise, that's why
21 he laid out the criteria of how he -- those are pieces that he
22 found in the various pieces of evidence that people submitted,
23 but it wasn't a predeterminative criteria some people have
24 alleged.

25 THE COURT: No, I understand that, but I think what's

1 alleged in -- as far as the due process violation is that they
2 were not notified as far -- well, notified as to what criteria
3 would be used, but that that was even on the table, that there
4 was certain specific criteria that was going to be -- you know,
5 that there was -- that was up for, I guess information
6 gathering to figure out what would be the most accurate
7 criteria to use in order to determine whether or not there's a
8 close hydrological connection.

9 I mean, I think that's what part of the due process
10 argument is. If I'm wrong, let me know, but that was my
11 understanding, that it was sort of a -- it was more than just
12 we didn't receive the criteria beforehand, but also that we
13 didn't have any -- we didn't even know that it was going to be
14 considered for criteria, and we didn't have any input as to
15 what kinds of things should be used in order to find, you know,
16 to define what the criteria should be.

17 MR. BOLOTIN: And what I would say is that the State
18 Engineer said, please tell us what you think is connected here,
19 and he got a variety of different things. Those criteria were
20 in there, but that's just what he found persuasive in his
21 expertise as to what the connection was. Every party was on
22 notice that he was determining this ultimate question of which
23 areas are connected and why, and that's what many of the
24 parties' reports said, and I'm not sure that that would have
25 changed.

1 And to the -- and to the extent some petitioners
2 accuse the State Engineer as ad hoc rule making, it's important
3 to note that this concept does not apply to the State Engineer
4 in Nevada. Ad hoc rule making applies solely to the rule
5 making procedures under the Nevada Administrative Procedures
6 Act, NRS Chapter 233B. However, no ad hoc rule making
7 complaint can be made against the State Engineer as he is
8 exempt from 233B, as seen at NRS Chapter 233B.039 sub 1.

9 THE COURT: Okay. Slow down. I'm taking notes.
10 233B.

11 MR. BOLOTIN: 039, sub 1, sub I. And this was also
12 reaffirmed in the Nevada Supreme Court's decision in *Wilson*
13 *versus Pahrump Fair Water*.

14 And once again, many of the due process attacks are
15 framed in the context of alleging that Order 1309 does things
16 that it doesn't actually do. It doesn't modify priority dates.
17 It doesn't curtail anyone's water rights. It certainly doesn't
18 curtail senior water rights. Order 1309 does not reprioritize
19 anyone's water rights, and it makes no distinguished -- it
20 makes no attempt in the text of the order to distinguish
21 between junior and senior groundwater rights.

22 I'm not sure if this is the place to do it, but I did
23 also want to distinguish the *Eureka County* case. That was a
24 unique situation based specifically on applications to grant
25 additional water. And in that case the Supreme Court said the

1 State Engineer cannot grant new water rights based on a
2 mitigation plan that he hasn't seen yet. That is not the same
3 thing as saying 8,000 or less is an unknown. The State
4 Engineer knows you cannot go over 8,000 acre-feet here.

5 THE COURT: Because it's a cap.

6 MR. BOLOTIN: It's a cap. It is known, even if
7 it's -- he hasn't told anybody to stop pumping over that amount
8 right now, but he knows that the sustainable amount of the
9 system cannot support over 8,000 acre-feet. So there is
10 certainty as to that number.

11 Let's see, I think I already had on this in the
12 answer to your question.

13 Before the hearing, the State Engineer provided
14 notice that he would be considering the geographic boundary and
15 the hydrologically connected groundwater and surface water
16 systems now comprising the LWRFSS and the long-term annual
17 quantity of groundwater that may be pumped from the LWRFSS.

18 The parties had the opportunity to be heard on these
19 exact topics. Order 1309 made conclusions on these exact
20 topics. The policy tools that will be used to manage the LWRFSS
21 within the sustainable pumping volume are for the next phase or
22 phases, and for that phase, the State Engineer will also
23 provide notice and an ability to be heard.

24 The State Engineer had discretion to decide the scope
25 of the proceeding and to the extent parties like

1 Georgia-Pacific argue that he was required to make those policy
2 decisions now, they point to no authority that would require
3 him to do so. Rather it makes perfect sense that the State
4 Engineer would first conclude what the conditions are and then
5 in the next step decide how to manage the rights within those
6 conditions.

7 The State Engineer's administrative process and
8 hearing satisfied due process. Everyone had notice and the
9 ability to be heard, and the State Engineer even allowed
10 posthearing briefs so that they heard what other parties
11 evidence were and were able to tie a knot and add additional
12 evidence if they wanted to.

13 Nothing required the State Engineer to hold a hearing
14 of a certain length, and the procedures and evidentiary rules
15 are more relaxed in an administrative setting. Due process
16 requires notice and an opportunity to be heard. Everyone in
17 this case had the notice and had the ability to be heard if
18 they wanted to use it.

19 Finally, Order 1309 did not effect a taking. Such a
20 claim is inappropriately raised in the context of a petition
21 for judicial review process, and parties that allege this, such
22 as CSI know the proper vehicle to assert such a taking of claim
23 is in a separate civil action, and they've already done that.

24 Further, there is just no taking here. No one's
25 rights are being taken for public use. All parties own the

1 same water rights with the same priority dates today as they
2 did before Order 1309 was issued.

3 Also to the extent CSI raised a judicial estoppel
4 argument in its reply brief and in its oral argument, such an
5 argument does not make sense in this case. The *Pyramid Lake*
6 *Paiute Tribe* case is completely different than this case and
7 dealt with a specific granting of a change application that the
8 Paiute Tribe sued the State Engineer for approving. This one
9 sentence from that case completely distinguishes that case from
10 this case.

11 Additionally, the Tribe's own expert testified that
12 the change use application would not interfere with the Tribe's
13 water rights under the Orr Ditch decree, and that's from the
14 *Pyramid Lake Paiute Tribe of Indians versus Ricci* case, 126
15 Nevada 521 at 527. Here there's evidence that shows that
16 existing rights at their existing points of diversion would
17 interfere with the decree if fully pumped. There's no
18 comparison between the issues in that case and this case.

19 Lastly, the State Engineer had the right to consider
20 the endangered species act in issuing Order 1309. The Center
21 for Biological Diversity does a good job of explaining this in
22 depth in their briefing, but simply put, it is reasonable for
23 the State Engineer to be cognizant of possible State liability
24 for a take under the ESA. Even on top of that, Nevada water
25 law requires the State Engineer to consider the public interest

1 when administering water rights, and that's from the *Mineral*
2 *County* case.

3 While the public interest alone is not a permissible
4 basis to reallocate water rights, Order 1309 did not reallocate
5 water rights. Protecting the State's biodiversity and
6 preventing the violation of the federal statute are public
7 interest considerations the State Engineer must take into
8 account when he's administering water rights. Failing to
9 protect the Moapa dace could result in legal liability to the
10 State.

11 And even on a more basic level, the Moapa dace's only
12 home is the Muddy River. It is completely reasonable that the
13 State Engineer would simultaneously seek to protect senior
14 rights in the Muddy River while also preventing its depletion,
15 which would unquestionably lead to devastating consequences for
16 the dace.

17 So to conclude, Your Honor, the State Engineer
18 respectfully requests that the Court affirm Order 1309. It
19 consists at its core of a series of highly scientific factual
20 findings that this Court should defer to. Substantial evidence
21 in the record supports these determinations, including the
22 findings that the LWRFBS is one basin with the boundaries
23 identified in Order 1309 with a maximum sustainable pumping
24 amount of 8,000 acre-feet or less, and that's on an annual
25 basis.

1 The State Engineer had legal authority to issue
2 Order 1309, and he's empowered to regulate all water within the
3 state of Nevada and is obligated to take the necessary steps to
4 protect senior existing rights and step in when supply is
5 inadequate to do so.

6 Order 1309 is essentially a set of factual
7 determinations that allow him to perform his legal duties.

8 Lastly, the State Engineer provided notice that he
9 would be determining these factual issues and allowed all
10 participants in this case to be heard, whether or not they took
11 advantage of it.

12 The State Engineer did exactly what he provided
13 notice that he was trying to do, and therefore, the State
14 Engineer's actions in issuing Order 1309 complied with
15 constitutional due process requirements.

16 Nevada is the driest state in the nation, and it is
17 important that the State Engineer can adequately manage the
18 State's scarce water resources. Doing so requires the factual
19 findings, like those in Order 1309.

20 Accordingly, the State Engineer again requests that
21 this Court affirm Order 1309. Thank you.

22 THE COURT: Thank you.

23 All right. Does everyone want like a five-minute
24 break, or are you good? Anyone? Anyone?

25 UNIDENTIFIED SPEAKER: Five-minute break is good.

1 THE COURT: Okay. Why don't we do a five-minute
2 break. Back at 3:05.

3 (Proceedings recessed at 3:00 p.m., until 3:08 p.m.)

4 THE COURT: Okay. Mr. Carlson, whenever you're
5 ready, let me know.

6 THE COURT RECORDER: We'll be on the record again.

7 **ARGUMENT FOR THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS**

8 MR. CARLSON: Thank you, Your Honor. Good afternoon.
9 Sev Carlson, for the record. I'm here on behalf of the Church
10 of Jesus Christ of Latter-day Saints.

11 I've represented the Church corporation since 2011 on
12 water rights issues, not only with respect to their holdings in
13 the Lower White River Flow System, but also with respect to
14 their branch operations and water rights in White Pine County,
15 and we want to thank you for your time and reading our
16 briefing.

17 And I won't be using a whole lot of time today as an
18 intervenor, but do want to highlight in particular some
19 historical points not only in terms of the Church's water
20 rights but also in terms of Nevada's water law.

21 As an introduction, the Church corporation owns both
22 surface and groundwater rights in the Lower White River Flow
23 System. The Church corporation owns approximately 2,000
24 acre-feet of surface water rights and a little more than 2,300
25 acre-feet of groundwater rights in the Muddy River Springs

1 area. Those groundwater rights have significant priority
2 dating back to 1947, 1949 and 1965, and I'm going to go back to
3 those points in time a little bit later, but I think it's
4 important to keep in mind, particularly the 1947 and the 1949
5 groundwater rights.

6 In terms of the State Engineer's authority, there's a
7 1992 case from the Nevada Supreme Court called *Eureka versus*
8 *the State Engineer*, and the Pacific Reporter cite is 826 P.2d
9 948. And in that case, the Supreme Court talks about Nevada
10 enacting its first comprehensive water law in 1913, and that
11 case talks about the 1913 law that provided language subject to
12 existing rights.

13 Fast-forward a little bit to 1939, we have
14 NRS 534.020, Subsection 1, which reads,

15 All underground waters within the
16 boundaries of the State belong to the public and
17 subject to all existing rights to the use
18 thereof are subject to appropriation for
19 beneficial use only under the laws of this State
20 relating to the appropriation and use of water
21 and not otherwise.

22 So again that statute was adopted in 1939. That
23 statute has never been amended. When you take that
24 consideration of subject to existing rights, you can look at
25 other statutes that talk about that as well, and I don't know

1 that I need to go through all of those examples, but I think
2 it's important for the Court to keep that in mind when looking
3 at both express and implied powers of the State Engineer, that
4 we have these statutes that have been on the books talking
5 about subject to existing rights.

6 And I think it's safe to say that for the water
7 practitioners in this room, something that we always see in a
8 permit term from the State Engineer is that a water right
9 permit is always granted subject to existing rights. The State
10 Engineer's counsel today offered argument that it's the duty of
11 the State Engineer to protect those existing rights. When you
12 combine that duty with these historical references in the
13 statutes, you need to combine that then ultimately with the
14 legislative policy of conjunctive management, with the
15 legislative policy of encouraging the use of best science in
16 the context of subject to existing rights.

17 Now, we've had some discussion about well, how have
18 we gotten here, and we've looked at some historical documents
19 that talked about the potential interplay of surface and
20 groundwater, and we have the history with Order 1169 and the
21 pump tests. We have the January -- or January 2014 rulings of
22 6254 to 6261 that denied numerous applications that dated as
23 far back as 1989, and those rulings concluded that the basins
24 at issue share a unique and close hydrological connection and
25 share virtually all of the same source and supply of water,

1 unlike other basins in Nevada. And that's at the record at
2 749.

3 So there again, we have a unique circumstance, and I
4 know Your Honor asked counsel for the State Engineer, well, are
5 we going to go back to first in time, first in right and
6 destroy all of the boundaries on Mr. Robison's map? I don't
7 think we have to go that far, but the concept is we are first
8 in time, first in right. We do have statutes that say you take
9 subject to existing rights. So everyone who comes to the
10 table, before we get into any of these boundaries comes to the
11 table knowing they're applying to be next in line, that if
12 there is any water right in front of them they are next in
13 line.

14 Now, that doesn't mean that a senior right in the
15 Muddy River Springs area, one of the church's rights, for
16 example, could necessarily claim an impact or a conflict with a
17 right outside of its basin.

18 But what if the science ultimately, I hate to say it,
19 bears witness to there being an impact. I think these other
20 statutes and the command to the State Engineer of protecting
21 existing senior rights, if the science shows interference,
22 impact, a conflict, and this order doesn't get there, but it's
23 setting that up. If we have that ultimate interference impact
24 or conflict, what's going to take control, and prior
25 appropriation can and is harsh that we probably haven't seen

1 the reality of how that law is carried out because generally
2 society tries to get along.

3 So going back to the Church corporations groundwater
4 rights and the map of basins which through argument it sounds
5 like the regions in the hydrographic basins on the map came to
6 fruition as a result of work from The Division of Conservation
7 and Natural Resources, the State Engineer and the USGS in the
8 1960s.

9 So what does that mean for groundwater appropriations
10 that were approved and that have priority dates prior to those
11 basins being drawn? On the one hand you have plenty of parties
12 who say we're in this basin. Here's our priority date in this
13 basin. Now you've moved us into this super basin. Our
14 priority date shifts, and we don't know what the outcome of
15 that potential shift will be.

16 But what about for those water rights holders who are
17 here before the map was drawn? And I think the important part
18 is I don't believe anyone has contested the State Engineer's
19 ability to delineate -- I'll use that word rather than
20 designate -- groundwater basins, that the statutes over the
21 years have allowed the State Engineer to administer the waters
22 of the State. They're a public resource subject to
23 appropriation.

24 And if the State Engineer in the 1960s could draw
25 these lines, and I understand there could be negative impacts

1 if a line has to be erased or redrawn, but I think from a
2 practical standpoint the State Engineer has looked at basins in
3 the past. We haven't had the collective group of seven. We
4 haven't had so many water resources at issue and contentions of
5 development versus existing businesses that have been using the
6 water for decades, but if the State Engineer has the power to
7 draw the lines in which we've all operated, if science shows a
8 connection -- and I'm going to defer to the State Engineer's
9 briefing on it, I don't think the State Engineer can sit on his
10 hands or her hands and just say, well, we're out of luck,
11 particularly as water resources have become I'll say more
12 scarce, and I'm not making a judgment as to the science.

13 There may be plenty of water available, but looking
14 at it just generically as I walked into the courthouse this
15 morning, security asked me, oh, what are you here for? And I
16 said, oh, I'm here for a water case, and he says, oh, Lake
17 Mead's going dry.

18 And I said, well, I said, you know, he says, do you
19 have a jury? I said no, I don't have a jury, but I think we
20 have to put on that kind of hat of the citizens of Nevada who
21 own this water, they're the ones who own it. The Church
22 corporation has a right to appropriate it, just like all the
23 parties in this case do.

24 The State Engineer can't sit on his or her hands when
25 we know that science changes. We have all of these historical

1 reports of saying, look, there's something going on here. And
2 at a minimum, when you have those historical reports, and if
3 parties are going to the great lengths of looking at what can
4 we appropriate? What do we need to have to make this business
5 venture function? I venture to say they're aware of those
6 historical documents. They're aware of that potential
7 uncertainty of, well, where did this mysterious Muddy River
8 come from in the middle of the desert in Nevada? That it just
9 suddenly appears? It's unique. Everyone is aware that it's
10 unique.

11 And if it's unique, I think we have to be straight
12 faced and say it can be subject to change.

13 Now, I don't know where the State Engineer is going
14 to take the next step. A main driver for why the Church
15 corporation has been involved is that it has significant senior
16 rights. We want a seat at the table to protect those rights,
17 but at the end of the day, I think everyone has been on notice
18 that the Muddy River is unique.

19 And if the Muddy River is unique and you know that
20 from historical documents, relying on lines that for whatever
21 reason were finally drawn in the 1960s that weren't there
22 before when other groundwater was approved for appropriation,
23 that's a change in itself. And the Church corporation isn't
24 taking a position on, well, gosh, State Engineer, you drew
25 these lines in the 1960s with the USGS. How does that impact

1 us? But we've lived through that change, and as science
2 becomes better, and we have more knowledge, the State Engineer
3 is charged with taking care of this public resource.

4 In that line, I would also point -- I know there was
5 some discussion relative to NRS 534.120. And of course that
6 was enacted in 1955, and so prior to the maps being drawn as
7 well.

8 When we look at the term basin or basins, I think
9 there's another statute that's worth keeping in mind out of
10 Chapter 534, and that's aquifer, and it's not used a whole lot,
11 but aquifer means a geological formation or structure that
12 stores or transmits water or both. That was adopted in 1987,
13 so after a lot of the groundwater law had been adopted, again
14 showing that science and information evolve over time.

15 But not being the scientists, it appears that the
16 aquifer -- we know more about it today after the proceedings
17 that we're on judicial review for than we did prior to those
18 proceedings.

19 And then I would also look at -- one more statute to
20 keep in mind is 533.030, Subsection 1, which again talks about
21 existing rights; 533.430, which again talks about permits and
22 certificates of appropriation subject to existing rights.

23 And then in closing, I think it's just important to
24 kind of paint a picture in terms of those senior groundwater
25 rights. And it really touches upon what Mr. Dotson discussed

1 with respect to the decreed surface rights, but it's the
2 similar notion that if we have a senior groundwater right,
3 particularly a senior groundwater right before any of the
4 mapping was done, ultimately if we have some form of
5 interference with those senior rights, the Church certainly has
6 the ability of filing we'll call it a complaint with the State
7 Engineer to say we believe our rights are being interfered
8 with, but we need to I think come back to that.

9 The existing right component I think is the real
10 driver for that explicit direct authority for the State
11 Engineer, and the implied authority comes from that, right.
12 What does the State Engineer have to do in order to protect
13 existing rights, whether it's a decreed right, whether it's a
14 senior groundwater right, a senior groundwater right before the
15 maps were drawn up to draw out all of these basins, but that's
16 really the direct authority of protecting senior rights. And
17 we have implied authorities that stem from that. How is the
18 State Engineer going to carry out that obligation that he or
19 she is charged with by the legislature?

20 So in closing, Your Honor, we would ask that you
21 affirm the State Engineer's order in its entirety.

22 Thank you for your time this afternoon.

23 THE COURT: Thank you.

24 I think -- is NV Energy next?

25 MS. CAVIGLIA: I'm here.

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

2 MS. CAVIGLIA: I'm ready.

3 THE COURT: Okay. Please proceed.

4 ARGUMENT FOR SIERRA PACIFIC AND NEVADA POWER

5 MS. CAVIGLIA: Thank you, Your Honor. Good
6 afternoon, Your Honor. My name is Justina Caviglia, and I
7 represent both Sierra Pacific Power Company and Nevada Power
8 Company. We do business here in the state as NV Energy. We
9 provide power to 2 million customers throughout the State, and
10 I almost want to just say ditto to Mr. Carlson's statement.

11 Very much like the Church, NV Energy's water rights
12 start in 1948. The majority of our water rights are 1948, 1950
13 to '59, in 1962 and 1966. We do have some junior water rights
14 as well, and we also own decreed water rights on the Muddy
15 River. So we are that weird party that conflicts with
16 ourselves. We have water rights in Coyote Springs Valley,
17 Muddy River Springs area, Garnet Valley. All of it serves our
18 various generation plants, and so this case has been very
19 difficult for us because we're stuck in the middle.

20 THE COURT: And you're in conflict with yourself.

21 MS. CAVIGLIA: We're in conflict with ourselves. And
22 I think that's what comes as unique and why we've also kept a
23 seat at the table. Because no matter what happens in this
24 decision, whether the decision is upheld, if it's sent back to
25 the State Engineer, our water rights are going to be impacted

1 some way or another, which will also impact our ability to
2 serve our customers with our electric resources.

3 One of the big issues and one of the big themes that
4 we saw with the State Engineer's argument is the protection of
5 those senior water rights. As Mr. Carlson just stated, there
6 are water right holders, like the Church and myself or the
7 company, that our water rights existed prior to the designation
8 of these basins, and that's the one thing that is interesting
9 in the statute is there is no definition of a basin. There is
10 no definition or rules on how a basin is created.

11 The basins have come and gone through reconnaissance
12 reports. They've been amended. They've gone to subbasins.
13 And so this idea and this concept that the State Engineer
14 cannot change his mind over time based upon scientific evidence
15 is -- it's sort of hard to deal with, especially when you're an
16 older water holder.

17 We've seen the progression of these basins. We've
18 seen how our water rights have changed because of it, but at
19 the end of the day, the State Engineer's job is to protect the
20 company's water rights over junior water appropriators.

21 The two week long hearing we had in this case showed
22 that there is connectivity between the Coyote Springs water
23 rights and Vidler's water rights that are much junior than NV
24 Energy's, but they're going to try to ensure that NV Energy's
25 water rights are not protected because of that. It's one

1 source that -- it's hard not to say that. This isn't a
2 situation where the river starts and ends and you can find it.
3 It's the same source of water.

4 So if an upstream user is impacting NV Energy's water
5 rights, we do have the right, as Mr. Carlson said, to go after
6 them. And yesterday you did ask one of the parties, and I
7 can't remember which one, on whether it was pragmatic or
8 practical for the State Engineer to do this piecemeal.

9 One of those issues would be would it be practical
10 for NV Energy to go after every junior water right holder in
11 all of these upstream basins and file complaints with the State
12 Engineer? Because that is the other option.

13 And so I think from our perspective, you know, we do
14 support the State Engineer's order. Is it a hundred percent
15 perfect? No. But we think it's a good start. And as they've
16 stated, there will be future phases, which, from our
17 perspective as a senior water right holder, we are going to be
18 much more interested in.

19 I don't think I'll take much more of the Court's
20 time. The statutes have been brought forward by both the State
21 Engineer and Sev Carlson. So thank you.

22 THE COURT: Okay. Okay.

23 And then is it Moapa Valley that's next or --

24 Okay. Are you ready?

25 (Pause in the proceedings.)

1 MR. MORRISON: I'm ready whenever you are.

2 THE COURT: Tell me when you're ready -- okay. You
3 may start.

4 ARGUMENT FOR MOAPA VALLEY

5 MR. MORRISON: Well, good afternoon. I'm Greg
6 Morrison. I'm here on behalf of the Moapa Valley Water
7 District. You know, I had quite a few arguments to make, and
8 then I thought I would kind of cross them off as other
9 participants made those same arguments, and I found that
10 everything was crossed off of my list.

11 THE COURT: Well, if there are ones that you want to
12 highlight, you may certainly go ahead.

13 MR. MORRISON: Yeah. There are certain arguments
14 that I would like to highlight and talk a little bit about my
15 client as well.

16 So the Moapa Valley Water District, its service area
17 is entirely within what we now are discussing as the Lower
18 White River Flow System. The District was created pursuant to
19 NRS Chapter 477. It not only empowers the District to provide
20 adequate and efficient water service to its customers, but it
21 mandates it. Pursuant to that mandate, the District is the
22 municipal water provider to several communities in its 79
23 square mile service area. The towns of Warm Springs, Moapa,
24 Logandale, Overton, as well as the Reservation of the Moapa
25 Band of Paiutes. These are the only established communities in

1 the Lower White River Flow System.

2 So in sum, over 8500 Clark County citizens rely on
3 the District's water supply for their homes and drinking water.

4 So why is the District here? Why are we arguing on
5 behalf of the State Engineer here? You know, I try to stay
6 away from more of the bombastic elements of litigation, but I
7 did particularly like this mega mess concept that's been
8 brought up by a few petitioners, and I agree. We've got a mess
9 in the Lower White River Flow System, but that mess existed, as
10 Mr. Bolotin said, well before Order 1309 came out.

11 You've got a lot more water rights on paper than
12 there is water.

13 Right now, pumping is not grossly depleting the
14 aquifer. So now is the time to address how to manage the Lower
15 White River Flow System going forward, before pumping shoots
16 past any sustainable levels and then people have to be
17 curtailed.

18 So we are just here maintaining our seat at the
19 table, to make sure we have a say in the process of management
20 of the water of the Lower White River Flow System.

21 We do believe that Order 1309 is effective for what
22 it was intended to do, which was only defining the guardrails
23 that will allow the stakeholders and the State Engineer to
24 begin their discussions on how to conjunctively manage the
25 Lower White River Flow System within those guardrails, but

1 that's all it does; it sets guardrails.

2 With that in mind, there's a couple of realities that
3 I think we need to keep in mind in considering Order 1309.

4 One is every petitioner, every intervenor, every
5 shareholder, stakeholder here has a groundwater right or a
6 Muddy River Decree right. Everybody has a water right they are
7 trying to protect. Not every foot of permitted water can be
8 protected. Something is going to have to be changed as we go
9 forward.

10 So in light of that, we're litigating Order 1309,
11 which really just moved this process forward one small step,
12 but not much beyond that.

13 So Mr. Bolotin kind of stole my thunder on this as
14 well, but what did Order 1309 do and what did it not do? It
15 defined the boundaries of the Lower White River Flow System.
16 It declared it to be a basin, and the previous basins
17 subbasins. The order declared that the maximum quantity of
18 water that could be pumped is 8,000 acre-feet annually,
19 possibly less. That's it.

20 It did not create a management plan. It did not
21 designate who can pump from that 8,000 acre-feet. It did not
22 order curtailment by strict priority or otherwise. It did not
23 reprioritize water rights within the management area.

24 So I'm not going to go over the standard of review
25 again. That's been discussed plenty.

1 We'll get right into substantive arguments, and I
2 want to talk about three major categories. One, the State
3 Engineer's authority; two, substantial evidence in the record
4 supporting State Engineer's inclusion of Kane Springs Valley,
5 and third whether substantial evidence in the record supports
6 the determination that 8,000 acre-feet is the volume of water
7 that can be safely withdrawn.

8 So Mr. Bolotin touched on it briefly, and I wanted to
9 really kind of hammer it home, the concept of implicit
10 authority of the State Engineer. As recently as the *Pahrump*
11 *Fair Water case*, the Nevada Supreme Court has affirmed that the
12 State Engineer has implicit authority to govern Nevada's
13 water --

14 Excuse me. I'm jumping around a little bit to try
15 and skip some of my sections that I crossed out.

16 So a lot of petitioners are questioning the State
17 Engineer's statutory authority, again saying that the State
18 Engineer is constrained to 232 existing as of 1968 groundwater
19 basins. Interestingly enough, those petitioners, not one of
20 them identified any statutory authority that allowed the State
21 Engineer to designate those basins back in the '60s because
22 there was no statutory authority.

23 If you look at the designation orders of the basins,
24 they generally say at the top, By the virtue of
25 NRS Chapter 534, we're designating this basin. It's a general

1 statement. So it raises a really interesting question. If the
2 State Engineer didn't have the explicit authority to designate
3 groundwater basins in the '60s, was that somehow in error?
4 Was that somehow reversible? If there was no explicit
5 authority, was there implicit authority? And if there was
6 then, is that implicit authority no longer there?

7 The statutes haven't changed much. A few statutes
8 have been adopted mentioning basins, but to date, no statute
9 defines basin. So it's always been a concept that's -- I don't
10 want to let Mr. Dotson have all the pun fun here. So it's a
11 fluid concept, subject to change over time.

12 So as far as the concept of a basin, the State
13 Engineer and others have discussed a concept of what level of
14 deference is owed. I'll just echo the State Engineer, and I
15 believe this definition of what is a basin is within the realm
16 of the deference that the State Engineer should be able to
17 expect. So let's see. We'll go past with that.

18 All right. A lot of petitioners are predicating a
19 lot of their arguments -- it's a jumping off point. They're
20 saying 1309 reprioritize water rights.

21 Now, I'm not going to call that a strawman. I don't
22 think that's the accurate word. I think it's a reasonable
23 interpretation of Order 1309, but ultimately an incorrect
24 interpretation of Order 1309. I do not believe priorities are
25 affected at all by 1309 in and of itself, and that's not to say

1 that as this process moves forward priorities will come into
2 play.

3 So the order doesn't change the definition of any of
4 the subbasins it has designated. I want to bring up the fact
5 that there are subbasins in Nevada that are managed as distinct
6 basins despite their designation as subbasin. The Kings River
7 Basin, which is Basin 30, has the Rio King and Sod House
8 subareas. And the Quinn River Basin has the Orovada and
9 McDermitt subareas. And those are managed as discrete
10 hydrologic units despite the fact that they are lesser parts of
11 a whole hydrographic basin.

12 That's all I need to talk about on the basins I
13 think.

14 Let's get into Kane Springs Valley. The State
15 Engineer correctly concluded that Kane Springs is a part of the
16 Lower White River Flow System. There was myriad evidence to
17 support that. There was the propagation of the declines in
18 Kane Springs Valley as the result of the Order 1169 pumping
19 tests. Petitioners have stressed that Kane Springs wasn't
20 within the 1169 study area and that there was no pumping in
21 Kane Springs. Pumping in Kane Springs wasn't necessary to
22 determine that there's a hydrologic connection between the two.
23 The declines propagated into Kane Springs.

24 The hydraulic gradient between Kane Springs Valley
25 and the remaining Lower White River Flow System basins, as the

1 District's expert stated at the hearing, is remarkably flat.

2 Now a couple of petitioners are stressing that okay,
3 between these two discrete wells, one in Kane Springs Valley
4 and one in Coyote Springs Valley, there's a 50, 60-foot head
5 difference, and that's great. And that may indicate some sort
6 of isolated impediment to flows, but that's not how you
7 determine hydrologic connectivity among a large area. That
8 would be a gradient from the top to the bottom, and that
9 gradient between Kane Springs Valley and the Muddy -- or the
10 Muddy River Springs area, as our expert put it is remarkably
11 flat. It indicates hydrologic connectivity.

12 Every stakeholder agreed that the carbonate aquifer
13 extends into Kane Springs Valley to some extent. Some have
14 posited a fault or subterranean structure, but everybody agrees
15 that carbonate aquifer does extend up there. I think it's a
16 matter of possibly degree and speed of flow, but the water from
17 Kane Springs ultimately ends up, I believe the State Engineer
18 correctly determined, at the Muddy River Springs area.

19 No one yet has really brought up the Zollen
20 (phonetic) report that was cited by both CSI and Lincoln
21 Vidler, and I don't want to argue the merits of that evidence.
22 I think the State Engineer properly discounted that evidence.
23 There were some serious issues with reliability that were
24 pointed out over the course of that hearing. So I don't think
25 any request to revisit that evidence would be appropriate. The

1 State Engineer handled it properly.

2 And then finally on Kane, Order 5712 and 1169, and
3 the fact that those did not include Kane Springs as part of the
4 study area that would become the Lower White River Flow System.
5 At the Interim Order 1303 hearing, former State Engineer Hugh
6 Ritchie and former Deputy State Engineer Bob Kochi (phonetic)
7 appeared as witnesses on behalf of one of the stakeholders.
8 Mr. Ritchie and Mr. Kochi were two of the parties very
9 responsible for both Ruling 5712 and Order 1169.

10 On cross-examination -- excuse me, cross-examination,
11 both of those men were asked, knowing what they know now, would
12 you have included Kane Springs in the Order 1169 study area?
13 Both men, without hesitation said yes, they would have included
14 Kane Springs in the Order 1169 study area, and the point to
15 that is the State Engineer is to rely on the best available
16 science.

17 The best available science changes over time. In
18 2006 and 2008, the best available science said Kane Springs
19 should not be included in this study area. In 2019, 2020, the
20 State Engineer determined, yes, the best available science does
21 support its inclusion, and the parties responsible for its
22 exclusion also agree with that.

23 So that's pretty much all I have to say. Anything I
24 wanted to say on the 8,000 acre-foot pump limit I think has
25 been said.

1 I don't want to argue anything further other than
2 Order 1309 is not perfect. The District doesn't argue that
3 it's perfect or flawless. It's legally defensible. It is
4 within the statutes. It is within the State Engineer's
5 authority, and it's the first step to getting this mega mess
6 under control.

7 Thank you for your time.

8 THE COURT: Thank you.

9 So who is next up?

10 Do you need a minute, Mr. Taggart?

11 (Pause in the proceedings.)

12 MR. TAGGART: Your Honor, so I have a PowerPoint, but
13 it's not physically here at the moment.

14 THE COURT: Okay.

15 MR. TAGGART: But it's on its way.

16 THE COURT: Okay.

17 MR. TAGGART: But I can get going anyway. I can talk
18 about some things, but when it does arrive, I might take a
19 little break. Is that okay?

20 THE COURT: Do you want to take a break now? Do want
21 to call them to see where they're at?

22 MR. TAGGART: Yeah, they're on their way over.

23 THE COURT: Like --

24 MR. TAGGART: I didn't know I was going to get up --

25 THE COURT: -- they're on their way over by a car,

1 by --

2 MR. TAGGART: No. They're driving, well, just from
3 the office across -- our office is right across the way here.
4 So I think they'll be here in 10 minutes, but I think I can get
5 started.

6 THE COURT: Well, we can take a 10-minute break if
7 you think that that would be more effective or not. If you
8 want to just get started, we can do that too.

9 MR. TAGGART: Okay.

10 THE COURT: I don't want to deny you your
11 opportunity.

12 MR. TAGGART: Right.

13 THE COURT: But I think we're moving at a faster pace
14 than anticipated.

15 MR. TAGGART: I think we are.

16 THE COURT: So does everyone want to have a break
17 or -- yeah, it looks like everyone wants a break.

18 MR. TAGGART: Okay. Let's take a break.

19 THE COURT: Why don't we take a 10-minute break, and
20 then let me know where you're at.

21 (Proceedings recessed at 3:46 p.m., until 3:58 p.m.)

22 MR. TAGGART: All right, Your Honor. I'm ready.

23 THE COURT: You're ready.

24 MR. TAGGART: I was prepared to do it the
25 old-fashioned way --

1 THE COURT: Oh, that's okay. You've got --

2 MR. TAGGART: -- with just the voice. This is the
3 presentation I'm going to give.

4 ARGUMENT FOR SNWA AND LVVWD

5 MR. TAGGART: Well, Your Honor, Paul Taggart again
6 for the Water District and the Water Authority.

7 And it's 4:00 o'clock, and I for one am usually not
8 sharpest at 4:00. So I'm going to do my best here, but I am
9 not going to do everything I have to say today. So I'll do
10 some today, and then I'll come back tomorrow and finish it if
11 that's okay.

12 THE COURT: That's fine.

13 MR. TAGGART: All right. And I have two main areas
14 that we'll cover. One has to with delineating the basin. The
15 other has to do with the 8,000 acre-foot cap. So we'll
16 definitely -- the 8,000 acre-foot cap will be tomorrow.

17 THE COURT: That's fine.

18 MR. TAGGART: And so now I'll get into the authority
19 to delineate.

20 We've talked about a lot today, and so I will get
21 into some of the things that were discussed and hopefully not
22 be repetitive.

23 Just a second.

24 I want to start by telling the story about a recent
25 case from the United States Supreme Court. It's called

1 *Tennessee versus Mississippi*, and it has to do with the ground
2 waters. It was decided in November of 2021, and
3 Justice Roberts wrote the opinion, and Mississippi claimed that
4 Memphis, Tennessee, was pumping too much water in a basin that
5 was shared with Mississippi. So Tennessee and Mississippi are
6 both on top of them, and Memphis is close to the border.

7 And what was argued by Mississippi was that's our
8 water. It's underneath our state. You can't take it. When
9 they pump it, it sucks it to Tennessee, and that's a violation.
10 That's a trespass, if you will.

11 And what Mississippi argued was that equitable
12 apportionment does not apply. And that's a doctrine that the
13 United States Supreme Court uses in water law when two states
14 share a water supply. So we don't have that here.

15 We have multiple basins, but when multiple states are
16 involved, the states -- or the United State Supreme Court
17 looked at that and said, well, when -- because really the pure
18 question was on surface systems that are shared between states,
19 the Supreme Court, the Colorado River, the Supreme Court has
20 always used equitable apportionment. It's different than prior
21 appropriation. It's a bit of a different animal, but that's
22 what they used.

23 And Mississippi was saying, wait, this is
24 groundwater. It's not surface water. Equitable apportionment
25 doesn't apply. The Supreme Court said, You're wrong, it does.

1 It's one aquifer. It's just like a surface system. And so
2 we're going to treat it like that, and your case is dismissed.
3 And that was like seven years and I don't know how many
4 millions of dollars and special masters later, but the point is
5 that these aquifers aren't just here. They're everywhere.

6 The Ogallala Aquifer underlies Colorado, Kansas,
7 Nebraska. There's people here who know a lot more about other
8 parts of the country than I do, but I do know that there's many
9 places with large aquifers like this.

10 So the -- you know, we've heard that the State
11 Engineer is the primary authority over water in Nevada. That's
12 in dispute -- undisputed, but if anyone is going to do anything
13 about this situation, who's going to do it? And Mr. Robison
14 said, we'll go to the legislature and ask them for a fix.
15 Okay.

16 We'll talk a little bit about AB51 and how that went
17 and how difficult it is to get legislation through our
18 legislature. And if we're going to wait for that, then, you
19 know, we've got bigger problems, and I don't think we need to
20 wait. I think it's clear that the State Engineer is the
21 authority over groundwater, particularly the rights that he
22 granted, and a lot of the rights that we're talking about, the
23 groundwater rights we're talking about are rights that he
24 granted -- and that's really important -- as opposed to the
25 decreed rights, that came about before his office existed.

1 So if anyone is going to do anything, it's the State
2 Engineer, and is it bad that he's doing it piecemeal? I mean,
3 is it bad that he said, you know what, I'm going to decide the
4 facts first, and then I'm going to decide the policy later. I
5 mean, isn't that good? I mean, everyone now is on notice that
6 there's a problem out there. There's a number out there, and
7 when we go to the second phase of this, maybe folks will sit
8 down and make deals. Maybe there'll be decisions made. Maybe
9 there'll be management plans decided. Maybe people will
10 negotiate ways of resolving their issues when they know what
11 the facts are.

12 And somebody once, you know, told me a long time ago
13 that if you can solve the facts, solve the facts first, and
14 then everyone will know what the rules are when they move
15 forward. And so I think it's prudent for the State Engineer to
16 have said I need to decide what these facts are first based on
17 the science and based on the evidence. And, you know, I
18 challenge the State Engineer a lot. I end up in court against
19 him a lot.

20 And so this peak deference idea, I don't particularly
21 love because I don't always agree with the State Engineer, but
22 when the State Engineer is looking at hydrographs and measuring
23 correlations statistically between drawdown and flow, I think
24 that's his bailiwick. I think -- I mean, if I were -- I mean,
25 I know where I get nervous. I'm not an engineer. I spend a

1 lot of time with them. I am raising two and I have -- my dad
2 is one, but I skipped it I guess. And I know when I tread into
3 that area that's a little bit not comfortable, and that's when
4 I think those are the facts hydrologic decisions the State
5 Engineer made. So we want him to do that. We need him to do
6 that. And so for him to say I'm going to make those decisions
7 first I think is really important.

8 Now, there's been a lot of discussion about where
9 these lines came from originally, and I've spent years trying
10 to figure it out myself.

11 THE COURT: And you're talking about the lines
12 delineating the different basins?

13 MR. TAGGART: Yes. And let's choose some words,
14 because words -- since we are lawyers --

15 THE COURT: Words matter.

16 MR. TAGGART: -- words matter, right. And that's
17 what we can -- that's what we can feel comfortable with. And
18 "delineate" and "designate" are two different words with two
19 different meanings in what we have going on here, and I think
20 it's really important for us to think about that.

21 Because when those lines were originally drawn on
22 that map, they delineated -- let's call that they delineated
23 lines. They selected basins. They identify areas that they
24 would treat as an area. They didn't designate them. Designate
25 is a different animal altogether. That's 534.030. The State

1 Engineer can designate a basin. Obviously when they made that
2 map in 1968, they did not designate those basins, but they did
3 something. Let's call that they delineated them. They drew
4 them.

5 Now, what did they base it on? I mean, again I've
6 had cases where we challenged whether someone's in or out of a
7 basin. When we say topography, all topography means is that if
8 a drop falls out of the sky, which direction does it flow? So
9 water on one side of the Continental Divide flows to the
10 Mississippi. Water on the other side flows to the Colorado or
11 the Snake unless you're in the great basin where it flows to
12 one of our terminal lakes. But the idea is that it's where
13 they -- it's where surface water falls and would flow if there
14 was enough of it, and that's topography. It has nothing to do
15 with groundwater. I mean, it has nothing to do with
16 groundwater. It had to do with these high points.

17 And sometimes, sometimes these lines, if you were to
18 go out there and walk, and I will say that I think Kane Spring
19 and Coyote Spring is one of these, if you were to go out and
20 walk there and look around, you wouldn't see any hill or
21 mountain. Some of them it's obvious. Some of them, you know,
22 it's Mt. Charleston style, you know, divide, but some of them
23 is it's -- like in Carson City, there is a divide between
24 Carson City and Eagle Valley. And I forget the name of the one
25 to the east, but it's like a road I drive over every day, and

1 that's a hydrologic divide on that map.

2 So they, you know, they carved up the State. They
3 did analysis, the USGS did, and we call them reconnaissance
4 reports. And what does reconnaissance mean? Reconnaissance
5 means you kind of do the best you can with what you've got.
6 They didn't -- I mean, literally, literally they drove out for
7 a couple weeks to one of these basins. They looked up on the
8 mountains. They figured out what the elevations were. They
9 tried to estimate snowpack. And then they -- I mean, they
10 literally spent a couple weeks in each one, and then they wrote
11 a report. And based upon that reconnaissance level analysis in
12 the typography, they came up with these lines.

13 And so I don't think there's anything magic about
14 them. I'm not going to -- I will not try to say that people
15 haven't relied on them the way they are, and that's a different
16 question, but from a scientific standpoint, updating those
17 lines is critical when more science comes along.

18 How you can update them is what we're talking about.
19 What you have to do to update them is what we're talking about,
20 but that they have to be, you know, the State Engineer has to
21 be able to recognize that sometimes those lines are not on that
22 map correctly, and they need to be updated.

23 I refer to it as kind of upgrading the operating
24 system. I don't use Windows 95. I don't use DOS. I don't use
25 AOL anymore, you know. I use teams because it does a lot of

1 things that I couldn't do otherwise.

2 Well, they need to be able to update their operating
3 system on these basins when they get new science. And
4 certainly I couldn't agree more with the notion that the best
5 available science requirement or well, it's not --
6 encouragement is a lens through which everything the State
7 Engineer does should occur. I mean, don't we want that?

8 At federal level, there's a higher standard of best
9 available science, and we test things by it, and it is a
10 requirement. It's not an encouragement, but certainly,
11 certainly we want that.

12 So that's -- so those lines were done that way. And,
13 I mean, in fact, we've got this --

14 Oh. We've got a --

15 (Pause in the proceedings.)

16 MR. TAGGART: There we go. Okay.

17 THE COURT: All right. So Slide 3?

18 MR. TAGGART: Yes.

19 Do I have numbers on these?

20 THE COURT: Yeah. Are there --

21 MR. TAGGART: Here we go again, right?

22 THE COURT: Yeah. On the upper left, sort of like --

23 MR. TAGGART: Okay. Thank you.

24 THE COURT: Yeah.

25 MR. TAGGART: So we showed you this -- this is

1 page 4 -- already. And here's -- what I wanted to show is on
2 page -- this is page 11.

3 THE COURT: 11.

4 MR. TAGGART: This is the plate that's -- and the
5 plate is like a fold-out map that's at the back of these old
6 recon reports, and I don't think we can probably blow this up,
7 but it's Kane and Coyote Spring, and they were analyzed
8 together in the same hydrologic report, and there's no line
9 between Kane and Coyote Spring Valley. I mean, that was -- and
10 then after that, this map came out, and they were separated,
11 delineated separately. So sometimes it gets done as one group.
12 Sometimes it gets done as a delineation. So I guess my point
13 is that we have to update what was done 50 years ago.

14 So let me jump to -- I'm going to jump around a
15 little bit. I want to talk about whether priorities were
16 changed, and so -- so I think Mr. Bolotin covered this. So I
17 won't belabor it too much, but Order 1303 definitely said that
18 the priorities of the basins were going to be put into one
19 bucket. 1303 said that. And one of the draft -- I mean, the
20 State Engineer's office went through a lot. I don't know how
21 many meetings we had, but we had public workshops on the draft
22 order of 1303. They had a different 1303 originally. We had
23 meetings in Moapa. We had meetings in Las Vegas. I mean, I
24 remember going to I think at least four, and then we got here.
25 And people commented. People submitted information. They

1 changed the order from the way it was originally written, 1303.
2 And then we got the one we have now. So they said that.

3 Then we had the hearing, and then 1309, they said --
4 Is this Slide 29?

5 Okay. This is Slide 29.

6 Then in Order 1309 they didn't address the question,
7 and they said at the end of 1309 that everything in 1303 is
8 rescinded unless it's been repeated here essentially is -- I
9 mean, you can read the -- I think it says all other matters set
10 forth in Interim Order 1303 that are not specifically addressed
11 herein are hereby rescinded.

12 So they started doing it. They started thinking of
13 it that way. And then they stopped.

14 And so we've set it. No priorities were changed in
15 1309. I mean, should people be worried about their priority?
16 Uh, yeah, they should be. Has anybody been ordered to stop
17 pumping? No. Has anybody had their rights -- (indiscernible)
18 said this, their rights curtailed, no. So none of that's
19 happened. I don't think the State Engineer is, you know,
20 chomping at the bit to go out and do that. I mean, he'll do a
21 pumping inventory to see how much is pumped this year. If more
22 than 8,000 acre-feet is pumped, I'm not sure what they would
23 do, but there's no plans right now to go out and enforce the
24 8,000. People can't waste water, but there hasn't been any
25 action to actually say you can't pump now. You know, the who

1 of this whole process hasn't been established yet.

2 THE COURT: But it's kind of looming in the --

3 MR. TAGGART: Oh, it is, right.

4 THE COURT: In the --

5 MR. TAGGART: Right.

6 THE COURT: In the distance not too far.

7 MR. TAGGART: Uh-huh. So it sure is. And, I mean,
8 we have power plants that have junior water, right. That's --
9 we can't allow a power plant to not have water. I represented
10 a power company one time, and their water permit was going to
11 expire. They thought they were going to have to shut the plant
12 down. I mean, it was terrible. It was a fire drill, big time.
13 So that is, you know, a big part of what's going to happen
14 next, but we need to know the factual predicate so all the
15 parties can go back into their places and decide where do I go
16 now, now that I know. I mean, if there's less water than there
17 is water rights -- I think Mr. Morrison said it -- somebody is
18 going to get cut, and so we have to, you know -- so people know
19 that, but we don't know how it will be done.

20 I don't -- I mean, obviously the most senior rights
21 are in the Muddy River, but what I have down here at the bottom
22 is that the State Engineer may order that withdrawals be
23 restricted to conform to priority rights.

24 Mr. Bolotin referenced this provision, and it's kind
25 of two-part provision. It first allows the State Engineer to

1 investigate a basin if withdrawals are exceeding supply, and
2 then it says he may order withdrawals be restricted to conform
3 with priority of rights. How will that happen? I have a TBD,
4 to be determined. As a whole or basin specific? We don't
5 know. That's something we'll decide going forward. And that's
6 something that -- that just hasn't been determined.

7 So it was determined in 1303. It was expressly
8 rescinded in 1309, and it's something that will be decided in
9 the future. So it's right for people to be concerned, but to
10 come in here and say that I am now a junior is not accurate. I
11 mean, it may end up being accurate, and I think as a result of
12 us being here, I mean, we could ask you for an advisory opinion
13 to say how should the State Engineer divide up the 8,000, but I
14 don't think we're doing that.

15 THE COURT: I don't think you want that from me.

16 MR. TAGGART: Okay. But we're -- we need to make --
17 we need to get to where we can make those kind of decisions.

18 Okay. I wanted to talk about AB51. I'm skipping
19 around a little bit. So...

20 (Pause in the proceedings.)

21 THE COURT: This is Slide 25?

22 MR. TAGGART: Slide 25.

23 All right. So before I get into this, I think I want
24 to say that when I write briefs, I have this pattern where I
25 don't want to really get into it because once I get into it

1 real deep I get overwhelmed by the weeds, and I try to say --
2 before I start writing, I try to get up high and think about
3 what is this all really about, and I think here we get dug
4 down -- we get dragged down into a lot of little like lawyer
5 arguments, semantic arguments about statutes.

6 The statutes are important, and they're going to be
7 part of how we solve this, how we resolve this, but sometimes
8 we can compartmentalize things and not look at how it all fits
9 together, and I think that we know that prior appropriations is
10 the law of the state. It always has been. It's what the
11 legislature codified. It should be the overarching color to
12 everything that the State Engineer has power to do.

13 That's what he's trying to accomplish is the concept
14 of priority and controlling water usage based upon water
15 availability. That's been the role of Courts and now the State
16 Engineer. Courts before the State Engineer's office and now
17 the State Engineer. I said this I think in my earlier remarks
18 that how river systems control deliveries and shortages is the
19 same thing we're doing now. It's just that it's more
20 complicated because it's groundwater. But that whole concept
21 in the water law that was codified from common law is what
22 we're trying to accomplish.

23 And while I'm talking about that, I'll just describe
24 another situation where on the -- the Truckee River, runs
25 through Reno; that is under the Orr Ditch decree. It starts in

1 Tahoe. It starts in South Tahoe, runs into Tahoe, and then it
2 leaves Tahoe at Tahoe City, goes through Truckee, California,
3 and then it comes down into Nevada. We've been fighting over
4 that one since 1905, and an entity got a groundwater right
5 approved right next to the river.

6 And the State Engineer approved that water right, and
7 the case was filed in the river court, the Orr Ditch court, the
8 federal court. There's an appeal of the groundwater approval
9 by the State Engineer, but the parties alleged it was impacting
10 the surface water.

11 So you want to talk about conjunctive management,
12 again, when we look at it in isolation, it's one thing. But
13 when we look at what does it really mean, it means that you
14 can't ignore the hydrologic connection between ground and
15 surface water. In that case, the Ninth Circuit said if there
16 is an impact of a groundwater well on a surface water decree,
17 the decree court has jurisdiction.

18 That was the challenge at the time, was does the
19 decree court have jurisdiction over a State Engineer decision
20 on groundwater? That's not in the decree. The groundwater is
21 not in the decree. The groundwater is under the State
22 Engineer's jurisdiction. And the Court said if there's an
23 alleged injury that the decree court has jurisdiction over
24 that. So this isn't the first time we've run into, you know,
25 interference between ground and surface water.

1 I mean, there's a case called *Western RV Griffin* from
2 I think the '70s where pumping in Mason Valley was impacting
3 the Walker River, and the Supreme Court considered what the
4 State Engineer had to do there in terms of groundwater
5 interference with surface water. So it's not anything -- it's
6 not brand new, I mean.

7 So AB51, first of all, legislative interpretation
8 rules, they're clear. Failed legislation means nothing. I
9 mean, you cannot rely on failed legislation. It's too
10 dangerous. The reason why we are so careful with legislative
11 history is because people can cherry pick legislator comments,
12 like the one we saw earlier. I mean, one legislature doesn't
13 speak for the whole body. And the only thing that the whole
14 body says together is what they approve, and that's the only
15 thing we know about a legislative body and what it meant by its
16 action is when all of them, well, at least a majority, agree on
17 something and enact it. And that's what we can believe. So
18 when they fail -- when something fails, it has absolutely no
19 value. So that's one thing.

20 But AB51 didn't do what people are claiming. It
21 wasn't trying to do what people were claiming. I think it was
22 stated. I'll just go into it a little more is that we fought
23 over what you do about a conflict in a lot of cases, and one of
24 them is the *Eureka County* case that we talked about, about
25 substantial -- presently known substantial evidence. That was

1 the case that came up yesterday. And in that case the State
2 Engineer said as long as there's a mitigation plan for a -- so
3 I'm going to -- my client had water right that would impact
4 someone else's water right. If we designed a mitigation plan
5 for that, would that avoid being a conflict? That was the
6 question. The Court said, no, unless you have -- unless you
7 have the mitigation plan done ahead of time, you can't. No.

8 Well, my point is that this statute had to do with
9 the concept of what it might be, some would say force
10 mitigation. Can a senior be told, hey, here's money in lieu of
11 your water right. So now there's no conflict. That's what the
12 State Engineer was proposing on the Humboldt. That's what the
13 bill was looking into. It wasn't about conjunctive management.

14 Now, did the State Engineer get up and say some
15 things to the legislature like I don't have the powers I need?
16 Yeah, he did, but we don't know -- I mean, we shouldn't just
17 see that in the abstract and think about what he -- he was
18 saying I don't have the powers I need to do what I want to do
19 on the Humboldt River, which was impose a fee on folks that
20 were capturing river flow from their wells and take that money
21 and give it to the surface water users. So that's what that
22 was about. It wasn't about the concept -- I mean, he didn't
23 need that bill to do conjunctive management.

24 Conjunctive management has been something that he's
25 had to do since the groundwater law was enacted. Because as

1 Mr. Carlson said, one of the first statutes in the groundwater
2 law that was adopted in 1939 is these groundwater rights are
3 granted subject to existing rights. That includes every right
4 that existed before that time, ground and surface.

5 So AB51 I think is -- I think it's not valuable in
6 this case.

7 Now, while I'm talking about the Humboldt, and I know
8 that 1329 was discussed earlier. 1329 is an order of the State
9 Engineer involving the Humboldt.

10 I'm not going to get into that, the details of it,
11 except to say that this isn't the only place this is happening.
12 The State Engineer is trying to solve this problem in other
13 places where we have a -- where we have alleged interference
14 from groundwater pumping on a surface water system. And so I
15 just wanted to point that out.

16 Okay. So the criteria that the State Engineer relied
17 on --

18 THE COURT: Are you talking about the six or the --

19 MR. TAGGART: The six.

20 THE COURT: Okay.

21 MR. TAGGART: I'm going to go to --

22 So, yeah, there were six.

23 (Pause in the proceedings.)

24 So, yeah, there were six, and --

25 THE COURT: So we're on Slide 51. Is that --

1 MR. TAGGART: That's right. Slide 51. Thank you,
2 Your Honor.

3 So I'm going to go back to 50 actually first.

4 THE COURT: Okay.

5 MR. TAGGART: So first of all, these criteria have
6 been made into something that they're not. The State Engineer
7 might just regret calling them criteria. They just happened to
8 be what everybody looks at when they try to decide what they
9 were looking at. So if you were to ask an expert witness how
10 would you decide what to do or how would you decide whether
11 these basins are connected, this is the kind of thing they look
12 at. That's all it is. These are the scientific types of
13 principles that you would look at to see if things are
14 connected. And it happens to be kind of -- I think of it as a
15 summary of how all the experts looked at this problem, and the
16 State Engineer kind of summarized with all of these principles
17 were.

18 And it could have just as easily been a list of
19 factors or a list of reasons why they made the decisions they
20 made.

21 And so you asked Ms. Peterson about, you know, if the
22 water levels go up and down together in basins, you know, Basin
23 A versus Basin B, is that what we're talking about? I think
24 that is what we're talking about, that if you see a similar --
25 first of all, if you see a similar water level in all of the

1 basins, then that's a factor; right? You can look at the State
2 Engineer's, you know, blowup about that. And I think that's,
3 you know, number one. That's what they have there. It's a
4 relatively -- it's a similar -- that's what any hydrologist
5 would look at first. Oh, okay. You're going to ask me -- the
6 State Engineer says, I want to know whether these basins are
7 connected. Well, what's the water levels in each one? So they
8 have a well, a monitor well, in each one. They look at it.
9 They compare those numbers, and they look at it over time.

10 And then when they look at it over time and whether
11 it goes up and down, that's where -- that's number two, whether
12 the hydrograph's demonstrate a similar pattern over time.
13 That's all that is. That's what everybody did for any -- I
14 mean, if I put one of those experts on the stand right now and
15 said, hey, is this what you did, I mean, I think I know mine
16 would say this is what they did.

17 This is just -- and then the next one, whether the
18 water levels demonstrate a similar decrease or increase
19 corresponding to a change in pumping. That's just everybody
20 looked at the same thing the State Engineer asked them to.
21 There was a pump test. How did each one of these wells respond
22 to the pump test? That's all that is. And do they all respond
23 similarly to the same stress?

24 And if you look at the State Engineer's handout here,
25 that's sort of what, you know, that's what you see,

1 particularly -- like, I'm going to point out, you know, this
2 Pederson Spring, Warm Springs area, EH4, these four. This is
3 the critical area where the dace are located here at Warm
4 Springs and at Pederson. And EH4 right here, is a well, a
5 groundwater well, really close to the spring. And the point of
6 that well was to be able to compare changes in water level of
7 the well to changes in flow of the spring. So that was what
8 they tried to do here.

9 Well, you can see during the pump test -- I think
10 you've seen this from a lot of people here in this little pink
11 area, you can see similar reactions. That's all they did.
12 That's all this criteria was. It was nothing remarkable.

13 And to say that no one knew that this is what the
14 State Engineer was going to look at is just not what -- I mean,
15 every expert knew this is what the State Engineer was going to
16 be looking at, these --

17 THE COURT: Well, let me ask then, you know, what
18 about the criticism that there wasn't an opportunity to discuss
19 or present evidence about what criteria the State Engineer
20 should be looking at?

21 MR. TAGGART: That there was. So when he said I want
22 you to -- the five -- the 51303 instructions, when he said I
23 want you to tell me whether these basins are hydrologically
24 connected, every expert developed a method of how to analyze
25 that question with their scientific information, and they would

1 have looked at -- they looked at the data. That's like the
2 first step is they look at what's the data that I have
3 available. And then what's -- and then how am I going to
4 analyze the data. And then they analyze the data.

5 And so to say that they didn't know that this is what
6 the State Engineer was going to do, what else was he going to
7 do? I mean --

8 THE COURT: Well, I guess maybe more specifics of
9 what the criteria would be and if we had known that, you know,
10 criteria 5 is something that he was really going to be basing
11 it on, we would have focused our information that we would be
12 giving in the hearings in a different way. Do you think that's
13 a deprivation of due process?

14 MR. TAGGART: Well, I don't because, well, I think --
15 let me answer it this way. If that had been what happened, it
16 would be, but I don't think that's what happened. Because like
17 Number 5, whether geologic structures -- and this is page 50 --

18 THE COURT: No, I just picked five out of -- out
19 of --

20 MR. TAGGART: Well, yeah, but this came up the other
21 day; right? I think Mr. Herrera --

22 MR. DOTSON: Herrema.

23 MR. TAGGART: Herrema. Thank you, Bob.

24 I think he was talking about how they would have done
25 something different if they'd known Number 5 was there. Well,

1 but what they did was investigate geology. That is what they
2 did. They went out and tried to find faults that would form
3 barriers or that might be barriers between their wells and the
4 rest of the flow system.

5 THE COURT: Because that's one of the natural
6 principles that you would be looking at in talking about water
7 connectivity or hydrological connectivity?

8 MR. TAGGART: Right. And you asked a question about
9 what do faults do to water flow. Well, they do -- either they
10 are the edge of the bathtub like we talked about -- that's easy
11 to understand. The harder part to understand is a lot of times
12 these faults are where the water is. So folks who know where
13 to put wells, it's the edge of the fault where all this rock
14 has been crushed up and is more granular, and so there's more
15 water that flows along the fault. Some of the biggest wells
16 are along faults. Or -- so you look for those.

17 And anyway, I think the point that the State Engineer
18 was making is that if I had a well on both sides of the fault
19 and I pumped one, and I pumped Well A on this side, on the
20 right side of the fault, and I looked at a monitor well on the
21 left side of the fault, if I see a reaction over here, the
22 fault is not a barrier; right? But if I don't see a reaction,
23 it is. And so that's why well level data is so important, more
24 important than geology, and I think that's part of what the
25 State Engineer was saying.

1 So again, I think it's the way that we look at this
2 order, and if we're looking for ways to challenge the order,
3 oh, it's a post hoc, you know, it's post hoc rule making. We
4 didn't know about these criteria. And then if you dig into
5 what the experts actually submitted, this is exactly what they
6 all knew was coming, and this is exactly what they all
7 testified about.

8 So it's not -- and I don't think it's a card game. I
9 can't resist -- because, you know --

10 THE COURT: Yes, it's Vegas.

11 MR. TAGGART: Yeah, exactly. I mean, it was a
12 scientific exercise where you use scientific principles to find
13 the answer. And the State Engineer asked everybody to come in
14 and tell him what they knew. And then he put all that
15 information into one place and identified what he thought the
16 most important factors were based on that evidence that the --
17 based on the testimony that was provided to him.

18 Okay. I want to talk a little bit about joint versus
19 conjunctive versus critical management.

20 So I just want there to be, you know, crystal clear
21 clarity on this is that, you know, they're all -- they're all
22 distinctly different items. You've accurately identified the
23 two. First, the joint is the joint groundwater basins
24 together. Conjunctive is ground and surface. I talked a
25 little bit about that already because I think that came with

1 existing rights; whenever you're subject to existing rights
2 it's ground and surface.

3 And then there's critical management area.

4 So critical management area is a whole different
5 thing. I don't want it to be confusing, but it does exist in
6 one basin in Diamond Valley, and we may get there. We may not.
7 I don't know.

8 But for instance, it allows a groundwater management
9 plan to be developed by the water users that might be different
10 than what would happen to strict priority. And we have a case
11 in front of the State Supreme Court right now that we're
12 waiting for a decision on about whether a groundwater
13 management plan is valid. We -- you know, there's the one side
14 that I've represented is saying that you've got to follow
15 priority. You can't change priority with the groundwater
16 management plan.

17 And the other side's saying that the legislature
18 authorized that. That's my characterization. I'm sure no one
19 will agree with that, but that's -- so that's already
20 happening.

21 So in Phase 2 of this proceeding, maybe we'll get
22 direction from the Supreme Court on how a groundwater
23 management plan works, and maybe that's a path we end up going.

24 So a lot of these questions that were -- that we
25 don't know the answers to yet about policy, that's why they're

1 being left off to the next -- to the next point.

2 So that's -- I just wanted to clarify that for joint
3 management. Your question was where in the statutes does it
4 authorize the State Engineer to do joint management. So I will
5 endeavor to answer that question.

6 Okay. Page 12. And so I think that -- I think I
7 have to concede that there's no statute that says State
8 Engineer you can do joint management. The words joint
9 management are not in a statute.

10 But first of all, these are the three statutes that
11 I've started with, but before we even start there, I want to
12 remind, you know, the Court of this notion that prior
13 appropriation is the overlying color to everything the State
14 Engineer does. So every one of these statutes needs to be
15 interpreted, and this is how he's supposed to accomplish prior
16 appropriation; where a prior appropriation stays that's what
17 he's supposed to do. They're not -- they're not considered in
18 isolation. I call it a mosaic of powers in my brief, and if
19 you took each little -- each little tile and looked at it, it
20 wouldn't be anything, but when you look at them all as a
21 mosaic, it's something -- you know, it could be something --
22 you know, the sum is greater than the parts.

23 So that -- so I think we need to keep that in mind.
24 The first one being no conflicts. Groundwater cannot conflict
25 with other -- with senior groundwater rights or senior surface

1 water rights.

2 And then 532.120, Sub 1, the State Engineer talked
3 about this, that's the general authority. General police
4 power, it creates the implied authority you've heard some
5 people talk about. So, you know, the agencies can sometimes be
6 only limited or can be limited to only their express powers.
7 The legislature here has said you have your express powers, and
8 you have implied powers based on 532.120, Sub 1.

9 Now, here I'm going to vary a bit from the State
10 Engineer. I believe that 532.120, Sub 1, justifies the
11 inclusion of Kane Spring. And I think it -- but I think
12 there's more authority than that for the other basins. So I
13 think that everything he did is justified by 532.120, as he
14 argued.

15 But in the basins that were already designated, he
16 has more authority.

17 So let me get into that.

18 So we have seven basins, and six of them have
19 designation orders. Remember I talked earlier is there's
20 delineation, and there's designation, and designation is
21 534.030. It allows the State Engineer to designate a basin if
22 it's in need of additional administration.

23 Once he does that, 534.120, sub 1, gives him
24 additional power after he's designated a basin.

25 And that's where these words deemed essential for the

1 welfare in a designated area come from. In our brief, we point
2 out this is a police power, which means it's broadly
3 interpreted for the health, safety and welfare of the public.
4 It's a public resource. The State Engineer is supposed to
5 manage it for the public. It includes the dace. It includes
6 senior rights. It includes future generations. It includes
7 future residents of homes that need water, and they don't want
8 those homes to not have enough water. So that is part of that
9 mosaic of powers that the State Engineer has.

10 And that's where it gets -- in 534.120, sub 1, it
11 says that in an area, right, you asked about this, in the
12 judgment -- or in the judgment of the State Engineer, the
13 groundwater basin is being depleted.

14 Well, I think you found that as a fact question. He
15 determined that, that State Engineer in his or her
16 administrative capacity may make rules and regulations and
17 orders that as deemed essential for the welfare of the area,
18 okay. So 534.030, it talks about basin. This talks about
19 basin and area. I think there's a fair -- you know, Courts
20 will look at that language and have to interpret what that
21 language means.

22 THE COURT: Whether the area is outside or inside the
23 basin?

24 MR. TAGGART: Right. Right.

25 And I think it's a fair -- I think you can fairly

1 interpret that to mean that the area is bigger than the basin.
2 Or is it -- or does the legislature use the same word to mean
3 the same thing? That's not a legislative -- that's not a rule
4 of legislative interpretation. If they use a different word,
5 they mean something different.

6 And so I think this can be considered a larger area,
7 and that the State Engineer, when he thinks that the area is in
8 need of more protection, he can adopt the rules for that.

9 So here's the other interesting point is that in
10 those six basins that already have designated -- that have been
11 designated, the State Engineer could've entered six separate
12 orders. I don't think anybody can dispute he could enter six
13 separate orders, and each one of those six basins, based on
14 534.120, and in each one of those orders say you are all going
15 to live together as neighbors. I'm going to treat you all the
16 same. I'm going to -- I think you're all connected. And so
17 everybody in your -- I'm going to issue six separate orders
18 because I can issue an order in each one of these basins.

19 And what he did was he issued one order instead of
20 six. I think that's -- if there's any mistake, if that can be
21 considered a mistake, it would be that. That's form over
22 substance in my view, and certainly he could -- he could have
23 done that through the power he has in designated basins.

24 And so I want to clarify this too, is that if you
25 read the language of 1309, it says delineate. If you read

1 the -- so if you read carefully 1303, 1303 was based upon
2 534.0 -- 534 -- 534.120, and then in 1309, the State Engineer
3 continued to use 534.120 and 532.120. And so in our view,
4 that's enough authority for him to do what he did. That's
5 where he gets the power to jointly manage.

6 THE COURT: You said he used 534.120 and continued to
7 use --

8 MR. TAGGART: 532.120, right.

9 THE COURT: Okay.

10 MR. TAGGART: And to the extent Kane Springs isn't
11 designated, he can't use 534.120 in Kane Springs because it's
12 never been designated. So the authority for including Kane
13 Springs is 532.120.

14 Now, there's more though. Because again, the broader
15 picture, anything that happens in Kane Springs -- and my
16 client's testimony was -- Colby Pellegrino (phonetic) -- who's
17 here, her testimony was you don't need to change the boundary
18 from 1303, but you need to recognize through management rules
19 that there's pumping around the boundary that might impact this
20 area. And so you should not change the boundary, but you
21 should incorporate management rules that take into account
22 potential for harm from areas outside the boundaries. That's
23 sort of what the State Engineer did.

24 And even if the State Engineer didn't include Kane
25 Springs under 532.120 or didn't have the authority to, he's

1 still going to consider what happens in Kane Springs and how it
2 might impact Coyote Springs or the rest of the basin. If
3 there's a new appropriation application in Kane Springs, and I
4 think there is, whether this order exists, he can consider is
5 it going to conflict? Is there water available for
6 appropriation? I mean, he can do all the things that he talked
7 about here.

8 And I sort of think it's odd because it's almost like
9 the State Engineer is saying, hey, everyone, you're going to be
10 treated this way now. They're all yelling they didn't get
11 enough notice or they don't have enough notice of what's going
12 to happen. Well, they know now, and instead of them hearing it
13 through the denial of a water application in the future,
14 they're seeing it here in an order from the State Engineer. So
15 that I think is the basis of the State Engineer's authority to
16 jointly manage and -- and that is that topic I wanted to cover.

17 Can we leave it there?

18 THE COURT: Yeah, we can.

19 MR. TAGGART: Until tomorrow.

20 THE COURT: That is fine.

21 So let me stop the clock.

22 So let me just ask, what is the order that we
23 anticipate going in tomorrow? So I know, Mr. Taggart, you will
24 be --

25 MR. TAGGART: Right. I will start, and then it

1 depends on which petitioners are going to also argue as
2 respondent intervenor. So I'll kind of leave it to them. I
3 just --

4 THE COURT: Okay. So what other petitioners are
5 planning on arguing as respondent intervenors?

6 UNIDENTIFIED SPEAKER: Coyote Springs --

7 MR. ROBISON: Your Honor, this is Kent Robison on
8 behalf of CSI. We will argue tomorrow.

9 THE COURT: Okay.

10 MR. ROBISON: In response to what we just heard and
11 in response to the three intervenors' arguments that were given
12 to you today.

13 THE COURT: Well, so, okay. So hang on.

14 So I think what we had whenever our last management
15 type meeting that we talked about, we talked about at this
16 portion where it was the responding intervenors, it would have
17 to do with the support of the Nevada State Engineer.

18 So if you are talking about where you would be
19 supporting the Nevada State Engineer, then you would be in
20 this -- somehow I don't think that may be what you're thinking
21 about. So I think -- I think we would be saving that for the
22 reply portion.

23 So just to clarify, where are you between those two?

24 MR. ROBISON: Well, okay, Your Honor. I understand
25 what you're saying. And if you expect CSI to argue in favor of

1 the 1309 order, I think I'll stay in Reno and sleep in. That's
2 not going to happen.

3 THE COURT: Okay. So is there anyone else that is
4 also planning on presenting argument in support, or are we then
5 now moving to the reply portion after that?

6 MR. LAKE: Your Honor.

7 THE COURT: Yes.

8 MR. LAKE: I'd like to present in support.

9 THE COURT: Okay.

10 MR. LAKE: I don't anticipate taking a lot of time --

11 MR. DOTSON: Your Honor, I did not hear that. What
12 was that?

13 THE COURT: Oh. All right. So that's Biological
14 Diversity, Mr. Lake.

15 MR. LAKE: Yeah, this is Scott Lake, Center for
16 Biological Diversity.

17 Yeah, I plan on taking some time. I feel like a lot
18 of our points being covered today, but I do want to talk about
19 the ESA tomorrow.

20 THE COURT: Okay. So we have Mr. Taggart. We've got
21 Center for Biological Diversity. Is there --

22 MR. DOTSON: Yes, Your Honor. Rob Dotson on behalf
23 of Muddy Valley Irrigation Company. I think right now I have
24 seven slides.

25 THE COURT: Okay.

1 MR. DOTSON: Which I'll look at tonight, that were in
2 support of the State Engineer.

3 THE COURT: Okay.

4 MR. DOTSON: I may remove some and add some of those
5 based upon what I've heard today.

6 THE COURT: Okay. So so far we've got three,
7 counting Mr. Taggart. Is there anyone else?

8 MR. FOLETTA: So this is Lucas Foletta.

9 We're not going to argue in support of the order, but
10 I do want to clarify one point. So in our answering brief, we
11 answered the brief in support of the Center for Biological
12 Diversity --

13 MR. ROBISON: Your Honor, the people on BlueJeans
14 cannot hear because of the microphone.

15 THE COURT: Oh, do want to come up. Sorry.

16 THE COURT RECORDER: Please identify yourself.

17 THE COURT: Oh, yes. That's Mr. Foletta.

18 MR. FOLETTA: Yes. Lucas Foletta here.

19 So, Your Honor, in our answering brief we answered
20 the brief in support of the Center for Biological Diversity's
21 Petition for Judicial Review. So technically we are -- but we
22 filed an answering brief.

23 THE COURT: Okay.

24 MR. FOLETTA: I'm fine arguing a couple of points.
25 It's not much in the reply section.

1 THE COURT: In the reply portion. Okay.

2 MR. FOLETTA: But technically it's answering their
3 petition. So as long as it's okay with them, it's okay with
4 me.

5 THE COURT: And then, Mr. Klomp, did --

6 MR. KLOMP: Yeah, I think this issue came up at our
7 status conference about intervenors having to argue in support
8 of the State Engineer. For example, we filed three separate
9 answering briefs, and I don't think that we should be limited
10 necessarily to arguing in support of the State Engineer in this
11 portion of the oral argument. I think we should be limited to
12 those, you know, the contents or the topics of those answering
13 briefs, but I don't think that we would take very long in the
14 intervenor portion.

15 THE COURT: So let me ask then, does it hamper you to
16 make those points if we structure it for the reply?

17 MR. KLOMP: That's a good question.

18 THE COURT: So do you want to consult and see?

19 MS. PETERSON: No. I -- it doesn't hamper us, but it
20 might the Center for Biological Diversity or SNWA because we
21 filed answering briefs in response to their petitions. And
22 then we go last, last, last in the reply.

23 THE COURT: Right.

24 MS. PETERSON: And they're not going to be able to
25 reply to us.

1 MR. ROBISON: Perfect.

2 (Multiple parties talking, indiscernible speech.)

3 MR. KLOMP: So I think we're fine with that, Your
4 Honor. We may have a couple of points in a couple minutes even
5 in the intervention portion. We can make the rest of our
6 points in reply, but I just wanted to raise that issue because
7 this was discussed at the status conference.

8 THE COURT: Okay. So then let me ask, are there any
9 other parties that are in sort of similar situations with
10 Lincoln Vidler as far as answering other parties and those
11 parties would not have an opportunity to present argument
12 regarding those answering briefs?

13 MR. FOLETTA: Your Honor, that's --

14 THE COURT: Mr. Foletta.

15 MR. FOLETTA: Yeah, that's the same thing I was going
16 to articulate is that exact same position.

17 THE COURT: Okay.

18 MR. FOLETTA: So we answered their brief. We also
19 had a little content on SNWA's stuff, but not much, and I
20 wouldn't even anticipate addressing it.

21 THE COURT: Okay. So then why don't -- so then what
22 we could do is after Mr. Dotson, we could go Mr. Foletta, and
23 then we would do Lincoln Vidler on those short points, and then
24 we would go into the replies; is that correct?

25 MR. DOTSON: I think so, Your Honor. This is Rob

1 Dotson again for the record.

2 But that does raise an interesting point because
3 there would be some things that would be in what I would've
4 called like the rebuttal argument or the reply argument that
5 relates to Coyote Springs. And in fairness, my joke aside, I
6 probably shouldn't be saying that after Coyote Springs no
7 longer has a chance to reply to anything I would say in that
8 regard. So maybe I need to rejigger my -- because right now my
9 presentation for tomorrow is only in support of the State
10 Engineer.

11 THE COURT: I see what you're saying. So I guess --

12 MR. DOTSON: And so if the idea is to not leave
13 somebody without a -- I mean, this is the privacy recency
14 advantage that plaintiff has; right? You get to go last and
15 sit down. That's why you always get a conviction, and you
16 never lose, right, as a prosecutor.

17 THE COURT: I was going to say, as a former defense
18 attorney, I don't know if I agree with that, but --

19 MR. DOTSON: I just stopped after that. That's
20 right. (Indiscernible) I got one defense. I've got one
21 criminal defense and only took one criminal case, but, yeah,
22 that's -- that's why it's sometimes easier to be a prosecutor I
23 say as a former prosecutor.

24 THE COURT: Sure. Absolutely.

25 MR. DOTSON: So anyway.

1 THE COURT: So, well, then I guess in fairness it
2 would be those who support the Nevada State Engineer and also
3 would be answering to other parties. So that way in the
4 replies, those parties would also have an opportunity to
5 address that.

6 So by a raise of hands, how many people do we have
7 that we're talking about, okay. So Mr. Dotson, Mr. Foletta,
8 Mr. Lake, and then so I think we're still at the same number.
9 Okay. Is there anyone else that I missed?

10 MR. ROBISON: Your Honor, this is Kent Robison.

11 THE COURT: Yes.

12 MR. ROBISON: We did file a brief regarding the
13 intervenor brief, and then we discussed the Muddy -- the
14 decree. We discussed the Endangered Species Act and other
15 things. But really, Your Honor, that is more reply to the
16 arguments that you're going to hear this week, and we'd just as
17 soon keep our powder dry and argue all of our points in reply
18 because we, as you know, are not going to argue in favor of
19 anything the State Engineer has put in this case.

20 THE COURT: Well, let me ask then, are any of your
21 arguments touching upon any of the other petitioners?

22 MR. ROBISON: Yes. Yes.

23 THE COURT: So then I would say those arguments that
24 are addressing the petitioners themselves and not necessarily
25 the State Engineer is also you would be next in line in this

1 little batch of arguments.

2 MR. ROBISON: All right. We will be ready to go.

3 See you tomorrow.

4 THE COURT: Okay. So I guess I should figure out the
5 order that we're going in.

6 MR. TAGGART: Can I just clarify one thing though?

7 THE COURT: Sure.

8 MR. TAGGART: So, I mean, to put some -- because I'm
9 confused, but we challenged the conflicts decision of the State
10 Engineer. We did that in our opening argument. If anyone is
11 against us on that, we need to hear that. I think that's what
12 Ms. Peterson is talking about.

13 THE COURT: Right.

14 MR. TAGGART: If Mr. Robison has something to say on
15 that, we need to hear that now.

16 THE COURT: Sure. So that you can address it in your
17 reply.

18 MR. TAGGART: Exactly.

19 THE COURT: Right. So that's --

20 MR. TAGGART: So that's what I'm anticipating. So if
21 somebody gets up after me when I'm done in reply and starts --

22 THE COURT: Blasting you.

23 MR. TAGGART: -- taking me on and I hear my name, I'm
24 not -- you know, that's not -- I don't think that's proper
25 form.

1 THE COURT: And I would agree. And so that's why,
2 you know, the point is that everyone is aware of what all of
3 those arguments that are affecting their own position is and be
4 able to respond to that.

5 So with that in mind, are there any other parties
6 that need to, you know, make their argument in this next batch?

7 MR. FLAHERTY: Your Honor, this is Frank Flaherty. I
8 apologize. I too am now confused.

9 THE COURT: So it's basically supporting the State
10 Engineer or addressing all of the other petitioners and that
11 kind of thing.

12 MR. FLAHERTY: That part I get.

13 THE COURT: Yes.

14 MR. FLAHERTY: Just I got confused after
15 Mr. Taggart's comments. So, I mean, I've been making notes
16 here. He got up and spoke as an intervenor in support of the
17 State Engineer's decision.

18 THE COURT: Right.

19 MR. TAGGART: Right.

20 MR. FLAHERTY: My understanding is when I get up in
21 reply, I can reply to what the State Engineer or Mr. Bolotin
22 said.

23 THE COURT: You can reply to anyone.

24 MR. FLAHERTY: Right. Okay.

25 THE COURT: That you have in your -- yeah, that you

1 have in your briefing.

2 MR. FLAHERTY: Okay. All right. Thank you. My
3 confusion is resolved. Thank you. Okay.

4 THE COURT: So, yes, Mr. Lake, do you want to come
5 up?

6 MR. LAKE: Well, I just wanted to clarify something.
7 This is Scott Lake for Center for Biological Diversity for the
8 record.

9 As far as our arguments go, I feel like the issues
10 that we will be arguing in support of the State Engineer
11 coincide with arguments against other petitioners as well. So
12 I personally don't have a concern about the order in which
13 things go tomorrow, but I just wanted to clarify if other
14 parties do. Are we still following the same order that we
15 followed?

16 THE COURT: Well, that's what I was going to talk
17 about right now.

18 MR. LAKE: Okay.

19 THE COURT: So if we want to follow the same order
20 that we did with like the petitioners or -- which makes logical
21 sense, I guess, to me. So let me just look to see what the
22 order is. All right. So we would be looking at -- well,
23 Mr. Taggart, you're already halfway on. So then we would be
24 looking at CSI. And then we would look at Center for
25 Biological Diversity.

1 MR. ROBISON: Apex.

2 THE COURT: Well, I don't think Apex has anything to
3 say.

4 MR. BALDUCCI: Yeah, we don't have any answering
5 comments for the --

6 THE COURT: I mean, I don't want to speak for you,
7 but I -- since you didn't raise your hand, I figured --

8 MR. BALDUCCI: No. Apex and Dry Lake have no
9 answering comments for this portion of the case.

10 THE COURT: Okay. Then we'd be looking at Muddy
11 Valley with Mr. Dotson. And then, let's see, I think
12 Mr. Foletta, Georgia Pacific.

13 MR. FLAHERTY: No, Nevada Cogen, Your Honor.

14 THE COURT: Oh. Do you have -- wait.

15 MR. FLAHERTY: I'm sorry. We're talking about
16 replies now; correct?

17 MR. TAGGART: No.

18 THE COURT: No. We're not talking about --

19 MR. FLAHERTY: Oh, I apologize. I'm sorry.

20 THE COURT: No, we're not talking about replies.
21 We're talking about just this --

22 I know, Mr. Foletta, you had some, right? And you're
23 with Georgia-Pacific?

24 MR. FOLETTA: Yes.

25 THE COURT: Okay. So Mr. Foletta with

1 Georgia-Pacific. And then Lincoln and Vidler. Okay. So
2 that's all clear as mud. Does everyone --

3 And then we would be looking at going into the
4 replies, and the replies would be again in the order that I
5 think we started.

6 All right. Is everyone clear on that?

7 MR. TAGGART: I guess I'll ask this. I'm sorry. Am
8 I interrupting?

9 (No audible response.)

10 MR. TAGGART: Is -- does that mean like tomorrow
11 (indiscernible) get done, that's my kind of question. Because
12 then I might have to go again tomorrow. If we get through all
13 of the list you just came up with tomorrow, then I'm back up
14 again, and I'd rather not be back up again until Thursday, but
15 I also don't want to -- I think we're going to maybe get done
16 Thursday. I'm hoping.

17 THE COURT: Maybe.

18 MR. TAGGART: So I guess we'll see how it goes, but
19 I'd rather start all the replies on Thursday.

20 THE COURT: Well, I guess --

21 MR. TAGGART: If we can do that.

22 THE COURT: I guess here's a question for everyone.
23 How -- well, I guess we can -- how much time does each party
24 think that they would be taking up for the replies? Because
25 you all have -- not all. Not all, but, you know, many of you

1 have hours left. So I think that really kind of dictates. I
2 mean, I know that the majority of you have come from out of
3 town, and you probably want to get back sooner rather than
4 later, but, you know, I also don't want to deprive anyone of
5 their opportunity to be fully heard.

6 So, I mean, I'm -- it sounds like, just to be frank,
7 Mr. Taggart, it sounds like the points that are going to be
8 made in the intervenor portion sound like they're going to be
9 pretty short. So I think you might be up again.

10 MR. TAGGART: Okay. I'll be ready.

11 THE COURT: Just to give you a heads up.

12 MR. TAGGART: Okay. I'll be ready then tomorrow to
13 do that as well.

14 THE COURT: I mean, if you need a longer break, you
15 know, if we could do it like -- if we can manage everything in
16 the morning as far as the intervenor comments, and you want to
17 take a little additional time over the lunch break to start up
18 again, we can certainly do that, but, you know, I'd like to
19 keep it moving as much as possible.

20 MR. TAGGART: Yeah, okay. That's fine. I'll be
21 ready. I'll make sure I'm ready tomorrow to do my other reply
22 argument as well.

23 THE COURT: Sure. And, you know, I would also say,
24 you know, Coyote Springs, you're next in line after him. So,
25 you know, just make sure that you are ready to be making --

1 MR. ROBISON: We are ready right now, but we'll wait.

2 THE COURT: You were ready three years ago I think.

3 MR. ROBISON: Bring it on. Let's go.

4 THE COURT: Okay. All right. So with that in mind,
5 are there any other housekeeping matters that need to be taken
6 care of today?

7 MR. ROBISON: We lost you.

8 THE COURT: Oh. Are there any other housekeeping
9 matters that you have before we break for the day?

10 MR. ROBISON: Not for CSI. Thank you, Your Honor.

11 THE COURT: Okay. Great. Thank you. We will see
12 you all tomorrow at 8:30.

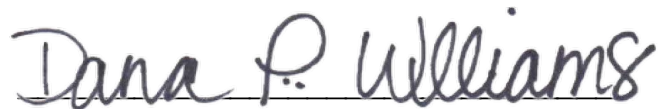
13 (Proceedings recessed for the evening at 5:02 p.m.)

14 -oOo-

15 ATTEST: I do hereby certify that I have truly and correctly
16 transcribed the audio/video proceedings in the above-entitled
17 case to the best of my ability.

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Dana L. Williams
Transcriber

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