

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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Elizabeth A. Brown
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Supreme Court No. 85137

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:

Coyote Springs Investment, LLC

Emilia Cargill (Wingfield Nevada Group)
William L Coulthard (Coulthard Law PLLC)
Bradley J. Herrema (Brownstein Hyatt Farber Schreck,
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Kent R. Robison (Robison, Sharp, Sullivan & Brust)
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DATED this 27th day of December, 2022.

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

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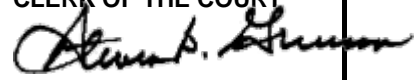
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

SOUTHERN NEVADA WATER)
AUTHORITY,)
)
Plaintiff,)
)
vs.)
)
NEVADA STATE ENGINEER,)
DIVISION OF WATER RESOURCES,)
)
Defendant.)
)
AND RELATED CASES & PARTIES)

CASE NO. A-20-816761-C
DEPT NO. I

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE BITA YEAGER, DISTRICT COURT JUDGE

WEDNESDAY, FEBRUARY 16, 2022

PETITION FOR JUDICIAL REVIEW - DAY 3

SEE NEXT PAGE FOR APPEARANCES

RECORDED BY: LISA LIZOTTE, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

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FOR THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS:

SEVERIN A. CARLSON, ESQ.

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1 **LAS VEGAS, CLARK COUNTY, NEVADA, FEBRUARY 16, 2022, 8:30 A.M.**

2 * * * * *

3 THE COURT: All right. So starting with the
4 Las Vegas Valley Water District and Southern Nevada Water
5 Authority.

6 MR. TAGGART: Good morning, Your Honor. Here on
7 behalf of the District and the authority, Paul Taggart.

8 THE COURT: Thank you.
9 Nevada State Engineer?

10 MR. BOLOTIN: Good morning, Your Honor. Senior
11 Deputy Attorney General James Bolotin for the Nevada State
12 Engineer. And once again Micheline Fairbank from The Division
13 of Water Resources.

14 THE COURT: Okay. Great. Thank you.
15 Lincoln Valley Water District.

16 MR. KLOMP: Good morning, Your Honor. Wayne Klomp on
17 behalf of Lincoln Water District with Wade Poulsen. That's the
18 general manager with me.

19 THE COURT: Okay. Thank you.
20 Vidler Water Company.

21 MS. PETERSON: Thank you, Your Honor. Karen Peterson
22 from Allison MacKenzie law firm. And Ms. Palmer is here. She
23 is in the hallway right now on a phone call, but Mr. Bushner
24 and Mr. Hurth are here also.

25 THE COURT: Great. Thank you.

1 Nevada Cogeneration Associates No. 1 and 2.

2 MR. FLAHERTY: Good morning, Your Honor. Frank
3 Flaherty, Dyer Lawrence, LLP, here on behalf of NCA.

4 THE COURT: Okay. Thank you.
5 Muddy Valley Irrigation Company.

6 MR. DOTSON: Good morning, Your Honor. Rob Dotson.
7 Doubling on tech support again here today.

8 THE COURT: Thank you.

9 MR. DOTSON: For Muddy Valley Irrigation District
10 along with Steve King, and we have Scott Middleton and maybe
11 members of the board online.

12 THE COURT: All right. Thank you.
13 Center for Biological Diversity.

14 MR. LAKE: Good morning, Your Honor. Scott Lake for
15 the Center for Biological Diversity. I also have Patrick
16 Donnelly and Lisa Belenky on BlueJeans.

17 THE COURT: Okay. Thank you.
18 Republic Environmental Technologies.

19 MR. FOLETTA: Good morning, Your Honor. Lucas
20 Foletta for Republic Environmental Technologies and
21 Georgia-Pacific.

22 THE COURT: Thank you.
23 Let's see. Dry Lake Water and Apex?

24 MR. BALDUCCI: Good morning, Your Honor. Christian
25 Balducci appearing on behalf of Apex and Dry Lake. Also

1 appearing on BlueJeans is a client representative and
2 consultant is Lisa Cole.

3 THE COURT: Thank you.

4 Let's see. Did we ever get anyone from Western Elite
5 and Bedroc?

6 UNIDENTIFIED SPEAKER: No.

7 THE COURT: No. All right.

8 Let's see. Moapa Valley Water District.

9 MR. MORRISON: Good morning, Your Honor. Greg
10 Morrison on behalf of Moapa Valley Water District.

11 THE COURT: Okay. Thank you.

12 Coyote Springs.

13 MR. ROBISON: Good morning again, Your Honor. Kent
14 Robison, Emilia Cargill, Brad Herrema and Hannah Winston, and
15 our technician Mark Ivie (phonetic) for CSI.

16 THE COURT: Okay. Thank you.

17 Let's see. Sierra Pacific Power Company --

18 MR. HERREMA: Brad Herrema for CSI on the BlueJeans
19 as well.

20 THE COURT: Great. Thank you.

21 Sierra Pacific Power Company and Nevada Power
22 Company?

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

1 THE COURT: Thank you.

2 Church of Jesus Christ of Latter-day Saints?

3 MR. CARLSON: Good morning, Your Honor. Sev Carlson
4 on behalf of the Church.

5 THE COURT: Okay. Thank you.

6 Have I missed anyone?

7 (No audible response.)

8 THE COURT: All right. So I think we were in the
9 middle of Mr. Taggart's answering.

10 (Pause in the proceedings.)

11 THE COURT: Ready.

12 MR. TAGGART: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. TAGGART: I just want to say I appreciate the
15 timekeeping. I think that's worked really well. We've had to
16 handle it different ways at different times. This has worked
17 out really well.

18 THE COURT: Okay. Well, I'm glad. You can get it
19 right on Amazon if you need to.

20 MR. TAGGART: Yeah.

21 **ARGUMENT FOR SNWA AND LVVWD**

22 MR. TAGGART: So yesterday I concluded the day for us
23 by starting my argument on behalf of the District and the
24 authority. That is our respondent intervenor's argument, which
25 is in favor of the State Engineer's decision. So these are the

1 arguments that we're presenting on the points that the decision
2 that we agree with, which is mostly all of the decision. And
3 anything related to the conflicts determination I will talk
4 about in a reply, and also I'll reserve some time for that, but
5 not a lot.

6 So just so people, you know, who want to -- I'm going
7 to go probably an hour and a half, right, this morning.

8 THE COURT: Okay.

9 MR. TAGGART: Okay.

10 THE COURT: It's your time. Do with it what you
11 will.

12 MR. TAGGART: All right. And I just want Kent to
13 know so that he doesn't get anxious after five minutes and
14 wonder why I'm still talking.

15 So, yeah, I covered some points yesterday. And so
16 today I'm going to get back into that. We have a presentation.
17 And as you know, there's two main points that we're getting
18 into here, and that is the authority to delineate the Lower
19 White River Flow System and then the finding that the area
20 within that Lower White River Flow System is hydrologically
21 connected and has a single source.

22 The first is a legal. The second is a factual
23 question. Different standards of review with respect to those
24 two I'm not going to go into detail there on what those are
25 because I think we've talked about that enough. So the first

1 one I'm going to talk about is the delineation again.

2 So the first thing I just wanted to bring up, and if
3 you just bear with me, I'm trying to respond to a lot of
4 different arguments, and I've tried to coordinate as much as I
5 could.

6 So one of the first I think questions that you asked
7 CSI had to do with, you know, how should the State Engineer
8 have done it and so fourth, and out of that came some
9 discussion about where does it end? Where does the basin
10 boundaries and if you're going to find these are connected, and
11 I think it was even said that these criteria the State Engineer
12 used, if you applied them, the whole state would be one basin.
13 I think you asked questions about where does it end. Does this
14 mean all water rights in Nevada don't have finality because the
15 State Engineer could apply this rule across the State. I
16 think --

17 THE COURT: Well, you know, that he could redraw or
18 redelineate the lines of the basins.

19 MR. TAGGART: Right. Right. And I think that that
20 was amplified a little bit by Vidler's arguments about the
21 extent of the carbonate aquifer. They put up a slide that
22 showed, you know, a large area that's called a carbonate
23 aquifer; I think intending to imply that that could be -- it
24 could be that large. I think that Mr. Klomp put up the Max
25 Eakin 1966 report I keep talking about, that statement out of

1 that report.

2 I've got here on the Slide 10. I cited to this
3 earlier in argument, but he showed you a map of the White River
4 Flow System. We're in the Lower White River Flow System here.

5 So I think it's a fair question of, well, where does
6 it end? And I think the science controls what's connected, and
7 not everything is connected scientifically. And if you look at
8 the water levels and you look at the effect of water levels
9 from testing, from pump testing, if you look at the effect on
10 water levels from time after that, if you look at the effect of
11 climate on water levels and you see similarities or you see
12 differences, that tells you what's connected and what's not
13 connected.

14 So --

15 THE COURT: So I guess my question is, you know,
16 science -- I guess I should say the technical aspects of
17 science can change, meaning, you know, being able to figure out
18 what water is connected. I assume, you know, in the future
19 that will get more accurate or that kind of thing, that there
20 will be different ways to measure or that kind of thing. So I
21 guess my question is if the science is dictating where these
22 boundaries should be, where is the finality for those water
23 right holders who, at the time that they get their water rights
24 are getting those water rights with the understanding that they
25 are within this delineated basin and not knowing that they

1 could then get lumped in based on the science as it evolves and
2 changes as a later date?

3 MR. TAGGART: Well, I'm going to talk a little later
4 about what you do when the science changes and how the State
5 Engineer can act, and there's a process that he has to follow.
6 And I think that it's important to look at the specific
7 situation we're involved in here as opposed to the general kind
8 of abstract notion of if someone were to get something and not
9 be at notice, to these people in this case --

10 THE COURT: Sure.

11 MR. TAGGART: -- know that this might happen in the
12 future. I think that's --

13 THE COURT: True, but, I mean, I think everyone said
14 this is a matter of first impression at this point, whether or
15 not there is conjunctive management or joint management powers
16 that the Nevada State Engineer has; right?

17 MR. TAGGART: But it's not.

18 THE COURT: Okay.

19 MR. TAGGART: And I'm glad I got to sleep on it.

20 THE COURT: Okay.

21 MR. TAGGART: Because when I thought about this, and
22 I mentioned this this morning to some people is that the last
23 20 years of my career, basically every case has been either
24 conjunctive management or it's been joint management.

25 We didn't call it that, but we were forced to look at

1 multiple groundwater basins and the flow between those basins,
2 and in many, many cases, and I'm going to talk about those.

3 THE COURT: Okay.

4 MR. TAGGART: And we also have had case after case
5 after case of groundwater impacting surface water. And I've
6 had cases that have gone on for the last 15 years, and there's
7 Supreme Court decisions about them that involve groundwater and
8 surface water conjunctive management.

9 THE COURT: Okay.

10 MR. TAGGART: And then we have other cases where
11 we've been required to look at the impact of developing water
12 in one basin on a series of basins in the Lower White River
13 Flow System.

14 So you might be aware of the -- the groundwater
15 project that SNWA tried to develop from Eastern Nevada down
16 here to Las Vegas. And in that case, we went up to District
17 Court, and Judge Estes remanded it --

18 THE COURT: I see -- I see --

19 MR. TAGGART: -- it went to the Supreme Court in a
20 published decision.

21 THE COURT: I see Mr. Robison.

22 MR. ROBISON: Your Honor, we have to object. This is
23 not in the record. Mr. Taggart's history with other cases is
24 not in the record. And to be arguing his involvement in
25 another case and what was done in those other cases, which is

1 not covered by the briefs, is improper.

2 THE COURT: I appreciate you're trying to help me
3 with that issue, and I see Ms. Peterson is also making an
4 objection for the record for the same --

5 MS. PETERSON: Yes. Thank you.

6 THE COURT: -- for the same purpose, and I will
7 sustain that objection.

8 So I realize that you're trying to help me, but I do
9 think that I need to probably stick to the record and what's
10 been in the briefs.

11 MR. TAGGART: Well, I appreciate that, and let's keep
12 a clean record.

13 THE COURT: Sure.

14 MR. TAGGART: But the Court shouldn't be misled.
15 This is not an issue of first impression. 1976, the *Cappaert*
16 case came out from the United States Supreme Court and told the
17 State Engineer if groundwater pumping affects the surface water
18 right, Justice Burger said you cannot allow that. And that was
19 in 1976. And so to say today that we've never dealt with
20 conjunctive management in Nevada is just wrong. The
21 legislature's policy declaration recognized that point.

22 I think of those policy declarations as essentially a
23 reboot of the water law. We have to assume that when the
24 legislature made those policy declarations it was aware of the
25 entire set of laws in the water code, and it was saying that,

1 you know what, in 1955, in 1939, we created a statute, and it
2 may not have been clear about conjunctive management at that
3 time. It may not have been clear about best available science,
4 but we're today saying that when those statutes are
5 interpreted, when those statutes are executed, they need to be
6 done with those things in mind.

7 So and even -- so if the State Engineer doesn't want
8 to, you know, manage conjunctively, then *Cappaert* tells us the
9 United States Supreme Court will knock him down. The Supreme
10 Court -- our State Supreme Court in a number of cases that
11 we've cited in our briefs have done the same thing, and so it's
12 just not accurate to say that this hasn't been done in Nevada.
13 It has been, and it's what we're all dealing with.

14 We cited in our briefs to the *Tikaboo* and *Three Lakes*
15 rulings. Those are four valleys kind of north of Nellis down
16 here, and that's what we started with in with the groundwater
17 project in 2003, 2004, 2005. There were four separate
18 groundwater basins. In order for us to develop water in one
19 groundwater basin, we had to look at the water budgets for all
20 four basins, and we went to the State Engineer twice on those
21 cases, and we've cited to those rulings in our brief.

22 MR. ROBISON: Your Honor, this is not on the record.
23 He's arguing other cases.

24 MR. TAGGART: I cited those rulings in our brief.

25 MR. ROBISON: But not what he argued in those cases,

1 Your Honor. This is way beyond the record.

2 THE COURT: I will make sure that I am very familiar,
3 before I issue any order, with all of the cases that have been
4 cited in the briefs. So...

5 MR. TAGGART: Okay. So when --

6 (Pause in the proceedings.)

7 MR. TAGGART: Like I said, we can go the traditional
8 route.

9 THE COURT: Okay.

10 MR. TAGGART: So what I want --

11 THE COURT: Oh, is it not working?

12 MR. TAGGART: What I want to bring up, and if we can
13 get it up, we'll talk about it, is that this is not a slippery
14 slope. If, you know, we base our decisions on science and
15 fact, we don't create an entire flow system across the State of
16 Nevada. And the point I want to make and the point that the
17 slide has on it, it's a page from our expert report, and it
18 talks about a thing called the Pahrnagate shear zone. And the
19 Pahrnagate shear zone is -- and the State Engineer knew about
20 this when he made his ruling because he had -- all this
21 information was in the record.

22 And it is an area to the north of Coyote Spring
23 Valley, again where Pahrnagat Valley is to the north of that.
24 And at that location, there's a water level measurement north
25 of that, and there's a water level measurement south of that.

1 There's 1500 feet. I mean, that ruler that Ms. Peterson had
2 with the 6 inches, there's 1500 feet of water level difference
3 between those two wells in those two locations. That's
4 something significant in the ground. That's what the witnesses
5 testified about, that that is a -- it's an underground dam
6 basically.

7 And most of the water that comes to the Lower White
8 River Flow System, according to the experts, comes through
9 that. But because there's so much water behind it, and there's
10 so much potential it's called, it's forcing some water through.
11 Well, that kind of barrier creates a barrier. So the Lower
12 White River Flow System is separated from the Upper White River
13 Flow System because of a barrier like that.

14 And so these things exist and have been measured and
15 tested and determined to exist. So we're not going to end up,
16 you know, with the slippery slope of running these basins
17 throughout the State. We're looking at the specific evidence
18 the State Engineer used to find that it exists here, and that's
19 where it exists and not forever.

20 (Pause in the proceedings.)

21 THE COURT: So do you want to take -- you want me to
22 stop the clock for a minute while you get that up and running?

23 MR. DOTSON: We got it back.

24 THE COURT: Oh, you got it?

25 MR. DOTSON: Yeah. I just need to know what page.

1 We've got to find the page.

2 (Pause in the proceedings.)

3 MR. TAGGART: Yeah, so we're on page 60. That's ROA
4 48396, and this was our report, and this is where we're talking
5 about a 1550-foot difference.

6 There was some discussion of a 75-foot difference or
7 a 50-foot difference between parts of Kane and parts of Coyote
8 Spring Valley. And this is a much, you know, (indiscernible)
9 magnitude larger difference that really does establish what a
10 barrier is. And that's the kind of evidence the State Engineer
11 relied upon.

12 So now I'd like to talk again about the basin.

13 And, Rob, if you could go to Slide 22, please.

14 (Pause in the proceedings.)

15 MR. TAGGART: So again we talked about this a little
16 bit yesterday too, and --

17 Can you go to the next slide, please.

18 So this compares the two statutes on the Slide 23.
19 This compares the two statutes we were talking about yesterday.
20 So 534.030 is the designation statute. That's not at issue
21 here. The State Engineer is not claiming that he designated
22 any basins. He's claiming that he has rules in six designated
23 basins, and then in Kane he has a rule in a nondesignated
24 basin. That's what Order 1309 is.

25 THE COURT: So I just want to make sure. He had

1 previously designated those basins in 1303; right?

2 MR. TAGGART: Well, no. In all -- they were
3 individual orders in each one of those six basins like back in
4 the -- I'm not sure, I think the '80s.

5 THE COURT: Okay.

6 MR. TAGGART: But it's listed in that order in 1309.
7 They go through that in the beginning. That's like the first
8 page, but they -- so they initially designated all those basins
9 except for Kane. And so 534.120, that is the statute that says
10 in a designated basin you can do more. That is essential for
11 the welfare is the key language we focus on there.

12 532.120 is the more broad police power of the State
13 Engineer that authorizes him to do what he did with Kane
14 Valley, Kane Spring Valley even though it's not officially
15 designated.

16 But in those designated basins, which is really the
17 meat of this area, I mean, really it's the main part of the
18 Lower White River Flow System. It's the part that was part in
19 1303 and then is again in 1309. In those basins, this language
20 about area and about basin appears -- I'd like to just kind of
21 compare .030 to 534.120, and 030 has this language, Any
22 particular basin or a portion thereof. And the arguments have
23 been made that that's the language that says he can't manage
24 beyond basins. I mean, quite frankly I think the notion that
25 we're going to parse out words so specifically when we really

1 know the purpose of what the legislature wanted the State
2 Engineer to do was to effectively manage groundwater, and that
3 should be how we interpret everything in the statutes.

4 But that seems to -- any particular basin or a
5 portion thereof, that seems to indicate a basin or smaller
6 area. But in 534.120, it says within an area that's been
7 designated or for the essential -- for the welfare of the area
8 involved. That seems to be broader. So I think it's a fair
9 reading that one ratchets up. One ratchets down in terms of
10 size from a basin.

11 So -- so that's -- that's it for that. I think that
12 we cited in our brief about there is a legislative rule that
13 the legislature has adopted that tells us how to interpret
14 statutes. It says that when they use a singular that it can be
15 interpreted to be plural. When they use plural, it can be
16 interpreted to be singular. That's NRS 0.030. And also we
17 know that we cannot interpret statutes in a fashion that will
18 lead to absurd results.

19 So if the State Engineer is required to abide by bad
20 science or old science, that's an absurd result. And so that
21 shouldn't be the way we interpret these statutes.

22 We've also cited to the Water Words Dictionary, which
23 is a document in the State Engineer's files. And I clipped out
24 a piece of it that I think is the most applicable, and it says
25 that a basin is a discrete hydrologic unit for water planning

1 and management purposes. It's a broad -- I think it's a broad
2 statement. It could be --

3 You asked about the 14 areas. What does that mean?
4 I think that the -- it -- it's whatever is meant -- it shares a
5 common source, and has a -- it has an area that can be managed
6 together as one, as this says, discrete hydrologic unit for
7 water planning and management purposes. So I think that's the
8 clearest definition we get that applies in this case, and we
9 get that from the Water Words Dictionary.

10 I talked a little bit about joint management before.
11 And without getting into items that I'll get an objection for,
12 I want to refer to Water for Nevada Number 3. It's a 1971
13 report.

14 And this is the last page that crashed it the last
15 time. So can you (indiscernible), please.

16 And what this is, and I think this is really
17 important, is water for Nevada Number 3 is when the Nevada
18 State Engineer took all of the reconnaissance reports --

19 THE COURT: Is this a slide that -- this is a map?

20 MR. TAGGART: Yes.

21 THE COURT: Okay.

22 MR. TAGGART: So this is the plate, the big foldout
23 map at the back of the report. And what the report did is it
24 brought together all of the prior reports that had been done in
25 individual areas. So we talked yesterday about the

1 reconnaissance reports that went throughout the State. So they
2 had little pieces of the jigsaw puzzle. And then they put the
3 puzzle together in Report Number 3.

4 And what's important to understand is when they did
5 those individual pieces of the jigsaw puzzle, they would create
6 a water budget, and a water budget is a, like we said
7 yesterday, a reconnaissance. It's an estimate of water that
8 comes in and water that leaves the system. How much water is
9 in the system. That's ultimately what the State Engineer is
10 supposed to figure out. Is there water available for
11 appropriation. That's like one of the key points he has to
12 decide whenever he's giving out more water. Is there water
13 available for appropriation? That's what these reports were --
14 that was the effort.

15 And so they recognize that some water was leaving
16 basins, and some water was coming into basins. But once they
17 pieced all these pieces of the jigsaw puzzle together, they had
18 to reconcile these waters going in and out. And so --

19 I don't know, Rob, can you blow up the area that
20 we're talking about now.

21 Because what you'll see on this map, and this is in
22 the record, you'll see these arrows, and I guess my point is
23 joint management between groundwater basins has been happening
24 and recognized since this time. And, I mean, I'll fast-forward
25 to, you know -- well, I won't because, you know, it's in the

1 record. It's what we cited to, and these are the types of
2 things we had to recognize is that there's flow in and out of
3 basins.

4 So you remember -- so this is -- what I'm pointing at
5 is the last slide in our presentation, and it's page number --
6 I don't know. I'll tell you in a second. Because I don't --

7 (Pause in the proceedings.)

8 MR. TAGGART: But you can see where 210 is. And you
9 can see where there's an arrow coming in to 210 from Kane
10 Springs. Do you see that?

11 THE COURT: I do.

12 MR. TAGGART: And you can see arrows all kind of in
13 the area we're talking about towards the river. Some of those
14 arrows are about groundwater. Some of them are about surface
15 water. There's a legend I'll let speak for itself.

16 But the point is throughout this map you see these
17 arrows. So even at that time they were recognizing that basins
18 share water at some level. I think it's -- I don't know if
19 this is easy or hard to -- if water didn't go somewhere, we'd
20 have lakes everywhere. If the snow melt melted and went into
21 the groundwater and it couldn't go anywhere, it would fill up
22 the groundwater basin, and it would become a lake. It has to
23 be going somewhere. And so these maps were what the State
24 Engineer developed in 1971 and has been what has been the
25 guiding principle for how they manage groundwater basins and

1 how they determine how much water is available in a groundwater
2 basin.

3 So I'll leave it at that.

4 UNIDENTIFIED SPEAKER: (Indiscernible) for the record
5 the cite.

6 MR. TAGGART: Yeah, the cite is ROA 9295. It's
7 page 62 of the PowerPoint slide -- I'm sorry, 63.

8 Okay. All right. So the --

9 Could you go to Slide 30, please.

10 So now we're going to talk about the substantial
11 evidence to support the finding of the hydrologic connection
12 and a sole source of supply. So it's our -- you know, our
13 argument is, that those are the two factual findings that
14 underlie 1309 and that the Court has to focus on. Were those
15 correct? We know what the standard of review is. We know what
16 the deference is and all of that, but those are the two
17 questions: Is there close hydrologic connection? Is it the
18 same source of supply?

19 So what I wanted to say here is that a couple points
20 have been made by counsel for other parties here about evidence
21 and arguments have been made that appear, I think, to be
22 blurring the line between the standard of review here.

23 So the first one is -- and this is an example of why
24 factual findings should be deferred to the State Engineer. I
25 think there's enough that the Court has to take on *de novo*

1 here.

2 THE COURT: No, I'm not turning into any sort of
3 hydrologist or whatever any time soon.

4 (Pause in the proceedings.)

5 MR. TAGGART: And what I'm going to show, this is
6 just an example of --

7 So this is page 62, and this Ms. Peterson talked
8 about, and she said this is -- this is CSVN-4. So this is a
9 monitor well at the north end of Coyote Spring Valley. The
10 State Engineer has it on his chart too, and she said the
11 transducer was bad, and it showed an error. And that was part
12 of her argument.

13 Well, if you look at this hydrograph, it shows up in
14 the legend two things: Continuous measurements and periodic
15 measurements. The State Engineer understands what these things
16 mean. One of those is an automated system that reads a
17 transducer. It reads regularly the level of water. One of
18 them is a human who goes out and puts a tape down into the hole
19 and sees how deep the water is.

20 So if you have both, it doesn't matter if the
21 electronic measurement device is a little bit off if you've
22 got -- if you check it with a periodic measurement from a
23 person. The State Engineer knows that. So if this gets in
24 front of him and someone complains about the transducer, he's
25 going to be able to decipher what that means. You know, I

1 think my point is, let him do that.

2 And here's another example. Okay. So this is a
3 slide that Vidler had up on the screen yesterday, and their
4 argument was that when there was a pump test there was no
5 change in the monitor well. The pump test is the blue. The
6 monitor well is the red. And I looked at this a little closer,
7 and the State Engineer got this, and he got to look at this,
8 and he got to decide, and he found it wasn't persuasive, and he
9 should -- and then their question is should he be deferred to
10 on that.

11 But first of all, if you look at the scale on each
12 side of this, they're not the same. And maybe that's not
13 significant; maybe it is, but they're not.

14 But what else is interesting is that on the red line
15 there's no data point from right after the pump test. You can
16 see that first red line right after the blue line comes back up
17 again. There's no data point between that and the one at the
18 far end of the line. So the line can then go straight. If
19 there was data in between those two -- I mean, I don't know why
20 there wasn't data in between those two, but that's what we want
21 to see, to see if there was a response, and there's no data
22 plotted on that chart.

23 So my point isn't to say that -- my point is just to
24 say the State Engineer looked at all of this. He had all of
25 this. Everyone had a chance to cross-examine witnesses.

1 Everyone had a chance to challenge what the experts had said,
2 and he heard all of that, and he saw them. He saw how they
3 responded, just like you do in trial. He saw how they
4 responded, how the witnesses responded under cross-examination,
5 what their demeanor was, whether they admitted to making
6 errors.

7 And before I forget, I'll say, you know, some
8 witnesses change their view of the facts as a result of the
9 hearing. That's been criticized by some here as a due process
10 violation. That's not a due process violation. That's the
11 process of testing the mettle of expert testimony in trial.
12 That's what that is. And witnesses, good witnesses should be
13 prepared to change their opinion if they learn new evidence
14 that is persuasive. And so some -- if witnesses did that,
15 that's not any form of a due process violation.

16 So with respect to deference, I think that's my point
17 there is that leave that to the State Engineer because he
18 understands the types of things that happen when you see
19 hydrographs like this.

20 Now, there's a -- the evidence that the State
21 Engineer relied upon in finding the connectiveness and the same
22 source --

23 Rob, if you could go to slide 34, please --

24 The first -- well, we list all of the different
25 evidence. I think the first question the Court should ask is

1 okay, you want me to do a substantial evidence review. What
2 was the evidence that you had. So we listed it here. And he
3 had evidence going back to hearings on the water rights in
4 Coyote Spring Valley back in the '90s. He had the 2001
5 hearings. He had the aquifer test. He had the expert reports
6 after the aquifer test. And then he had 1309 -- or the 1303
7 reports.

8 What I wanted to point out now is what I said earlier
9 is that the question and probably the question not for us today
10 to decide -- I think there's a process by which this question
11 will be answered, but who will get water? When there's 8,000
12 only or less, who will get water? That will be determined
13 later. And when it is determined, parties will be able to
14 present arguments that I relied or I didn't rely or I knew or I
15 didn't know that this might happen. And other parties will be
16 able to come in and say, wait, you did know or you didn't know
17 that this might happen. You were on notice. It's not
18 reasonable reliance to say that you just thought the State
19 Engineer was going to always have water for you.

20 And when you look at the record, the actual record of
21 events in this case, you see that many parties knew that all of
22 this was possible. And again, not for us to decide today, but
23 I think when folks get up and say that we had a green light to
24 develop, I think it needs to be made clear there was a lot of
25 yellow lights, and maybe -- I mean, in Boston people run red

1 lights, but, I mean, I think there were red lights, and for
2 instance, and we've cited this in our brief. So I won't go
3 into it into much more detail, but we've cited to what CSI said
4 to the Clark County Commission when their project was approved
5 about it was their obligation to make sure that they had water
6 secured for their project, that they were taking on that
7 obligation, that development takes care of itself, that they
8 weren't expecting the public agency to get them their water.
9 They were going to get that themselves.

10 Then in the ruling, in Ruling 625, and I don't recall
11 the one for Coyote Spring, but there was that series of rulings
12 that came out after Order 1169. And in those rulings they said
13 that all new applications were denied. And there's this
14 perception that those rulings didn't deal with existing rights
15 at all, that they only dealt with new appropriations. It's
16 true that they only denied new appropriations. That's what the
17 point of that was.

18 And if you recall, there were hundreds of thousands
19 of acre-feet of water of applications in Coyote Spring Valley.
20 Hearings were held in 2001 on those applications. The State
21 Engineer at our -- at SNWA's request ordered the pump test
22 because SNWA had -- I'm sorry, Las Vegas Valley Water District
23 at the time had those -- had a lot of those water rights in
24 that queue, and after the pump test, after the pump test
25 reports were submitted, the State Engineer denied all of the

1 new applications, but he also said, It remains unclear. That's
2 the language. It remains unclear whether there's water
3 available for new development from existing rights. And we
4 have --

5 I'm sorry, Rob, but that's towards the end too.

6 (Pause in the proceedings.)

7 MR. TAGGART: Yeah, this is it. So this is Record on
8 Appeal 780. And this is the State Engineer's finding that,

9 The amount and location of groundwater that
10 can be developed without capture of and conflict
11 with senior rights on the Muddy -- and Muddy
12 River and Springs remains unclear, but the
13 evidence is overwhelming that unappropriated
14 water does not exist.

15 So that's not necessarily a red light, but I think
16 it's -- I think it's orange or at least yellow. So that's our
17 point there.

18 So getting back to the evidence that was relied upon
19 by the State Engineer, there was a lot of points made about
20 this already.

21 The -- oh, before I do though, the Water Authority
22 and the District lost water rights in those rulings. We
23 understood that, and we accepted that. More importantly, the
24 water authority has water in the Lower White River Flow System.
25 Mr. Robison mentioned it yesterday. We have thousands of

1 acre-feet that may be considered junior, that we may lose. I'm
2 not going to say we will because we haven't got there yet. But
3 we have 1989 water rights that are, you know, dangerously close
4 to what that cutoff line would be. So we understand what that
5 means and the authority has understood, well, that's part of
6 just living with the world the way it is, that there was no
7 water available for everyone.

8 So I just want to make that clear.

9 So Rob, could you go to Slide 39.

10 We talked about the hydrographs already and what the
11 State Engineer looked at, and I think he -- his counsel did a
12 good job of explaining it from this poster board of how those
13 hydrographs were looked at and how they were compared to each
14 other.

15 So the -- you know, this page 41 in my slides is ROA
16 41982, and this is the panels of hydrographs in each basin, and
17 it's laid out to be a comparison visually during that pink
18 shaded area, which is the aquifer test.

19 So again, this is the primary sort of evidence that
20 was used. The State Engineer is showing it all on the map
21 there.

22 And what is important to understand too is that after
23 the 1169 pump test and after the reports were submitted and
24 then after the new applications for more water were denied, we
25 had a period of time that went by, and we call this the

1 recovery period where we look to see what the aquifer did.

2 Sometimes when a well is pumped and you stop pumping
3 it, the water comes back to the same level it was at when you
4 started pumping it. You kind of wonder. That's what they do
5 when they do a pump test. You know, how much -- how quickly is
6 this thing going to recharge after I pump it? Otherwise it
7 will just go dry.

8 So when they -- so looking at the recovery of the
9 system after the pump test was the new information that the
10 State Engineer had in 1303 hearing, and so when people say,
11 well, what's new? They didn't have any new evidence; this is
12 all arbitrary. That is what was critical. That was, you know,
13 seeing that 3.2 at Warm Springs West Gage was not far off of
14 where the flows were at the gage, and it wasn't increasing.
15 These are the types of things of the additional time that
16 occurred after the pump test that raised concerns and that the
17 State Engineer looked at. So that was the additional
18 information that he had.

19 And in his ruling, he indicates that the recovery did
20 not occur and has not come back to pretest levels. That was
21 kind of the language that he used. And that's critical to how
22 the system can respond to additional pumping. I think that was
23 his point is if additional pumping occurs, you can -- I might
24 not have the ability to cut it off and get that water level
25 back. That's the problem.

1 If he could just cut off water use and bring the
2 water back -- Mr. Dotson's client wants the water back -- that
3 would be one thing, but I think they learned that they did the
4 pump tests. If it lowers even a half foot, even a half a foot
5 across 1100 miles that, you know, that 6 inches on that ruler
6 you saw yesterday, that's 1100 miles. That's twice the size of
7 the Las Vegas Valley is what we're talking about.

8 And how much water disappears when a half a foot only
9 decline occurs, and if it occurs everywhere. It's telling us
10 something. It's telling us it's the canary in the coal mine
11 about what happens if you really pump it, if you start to
12 really pump this system.

13 So the State Engineer found that the aquifer test
14 data was the most persuasive, and I think we've talked about
15 why that was reasonable for him to make that conclusion. There
16 was a lot of information put in about geology and mainly CSI,
17 Lincoln County and Vidler put in a lot of geophysical and
18 geologic information based upon studies that they completed.

19 And their position was that these created a
20 compartment or some sort of barrier so that they could pump,
21 and it wouldn't effect the area outside that compartment.

22 And in the State Engineer's ruling, he said that he
23 wasn't persuaded that the compartments exist.

24 And so two points on that. One is, he did consider
25 their evidence, and he found it not to be persuasive. Two is

1 that they knew that geology would be one of the factors the
2 State Engineer looked at, those criteria we talked about
3 yesterday. And so there was no due process problem. They knew
4 exactly what the State Engineer would be looking at, and they
5 submitted what they submitted.

6 What the criteria is, again, I talked about this
7 yesterday, but I'll just say this quickly is if someone were to
8 say I want all of you to go out and measure how high
9 Mt. Charleston is, and you might have five experts all go out
10 and do it a different way. And one might, you know, use a
11 pedometer, walking up there. One might use a GPS. You know,
12 there might be four or five different methods of how to do it.
13 And then when they all come back, someone might say, well, I'm
14 going to tell you what I think the most reliable of those five
15 methods you just applied are to finding out what the true
16 height of Mt. Charleston is. That's all the criteria are is
17 just the State Engineer ranking what the most persuasive
18 evidence is that he received from the experts.

19 So there's groundwater budget data. There's climate
20 evidence. This has all been discussed. I think it's the State
21 Engineer. I won't go through this in detail except to say that
22 the State Engineer in his order mentioned this evidence, which
23 indicates that he reviewed this evidence, and explained why he
24 felt that it was not persuasive.

25 So one of the arguments is that he didn't look at our

1 evidence. Well, that's not true. What he did is he judged it.
2 He weighed it, and he found it to not be persuasive. So
3 climate evidence, for instance, the State Engineer reviews this
4 in his order, and indicates that, you know, many parties argued
5 about climate.

6 And we had a lot of testimony about this. We had a
7 lot of analysis of it. We had experts from the federal
8 government who looked at climate throughout the area outside
9 the Lower White River Flow System and looked at climate and saw
10 what it was doing and then looked at over climate. We debated
11 which climate data should we look at, which weather station
12 should be considered. Are some too far away? Are some the
13 right ones to use? And then the hydrographs were analyzed.

14 And I don't know if I can get back to -- back here,
15 this is Slide 41. That lower panel, and this is all those
16 hydrographs, that's what that lower panel is. It's climate.
17 It's showing what the precipitation is, the average
18 precipitation in the area is based on that expert's review.
19 That's climate.

20 And then the expert would get up and testify, well,
21 here's what we see in the hydrographs. Here's what we'd expect
22 to see based on the climate, but here's what we see. So it
23 must not be climate, or maybe it is climate. That's what they
24 did. And that's what the reports are full of all of that. So
25 the State Engineer looked at all of that, and his judgment can

1 be upheld based on that because it's reasonable what he came up
2 with.

3 Okay. All right. So again, I'm going to talk about
4 Kane Spring. I think we have a -- again, I said it earlier.
5 The primary area of the Lower White River Flow System are
6 the -- is Coyote Spring, Hidden and Garnet, Muddy River Springs
7 area, California Wash. We're ending up to talking a lot about
8 Kane, and they -- and we should because it's a big concern with
9 Vidler, but, you know, it's a bit overshadowing the bigger
10 issue with what we're trying to do with the Lower White River
11 Flow System. But a lot has been said about it. I think that
12 the first thing I want to say is like this picture here, which
13 is Slide Number 53, this is the monitor well for Kane Spring,
14 and it's next to their production well. It's right on the
15 boundary between Kane Spring and Coyote Spring Valley.

16 That's just the fact that it's located right there.
17 If they got as close as they could to Kane Spring Valley
18 without being in it for a reason --

19 THE COURT: You mean to Coyote Spring Valley?

20 MR. TAGGART: To Coyote Spring Valley. I'm sorry.

21 And then they developed a biological opinion with the
22 Fish and Wildlife Service to address potential impacts of the
23 Moapa dace. And I'm sure they don't believe that any pumping
24 in Kane Spring will affect the Moapa dace. And they may have
25 entered the agreement believing that, but the Fish and Wildlife

1 Service certainly believed that pumping in Kane Springs might
2 affect the Moapa dace and to the point of requiring them to go
3 through all of those exercises under the Endangered Species
4 Act.

5 We've heard that, well, there was no pumping in Kane
6 Spring Valley under -- during the pump test. Well, that
7 doesn't -- I mean, that's true, but the water levels were
8 monitored. So the water levels in Kane Springs were monitored
9 based on the pumping that did occur in the pump test. So
10 that's significant. That's significant information that was
11 collected.

12 A question --

13 THE COURT: Meaning even though there was no pumping
14 going on in the Kane Springs well, the level of the water in
15 the Kane Springs well was still getting monitored?

16 MR. TAGGART: Right. Right. So they were monitoring
17 what was happening in Kane Springs as a result of pumping
18 elsewhere.

19 And so arguments have been made there was no notice
20 that Kane Spring might get added. Well, I think they were
21 there at the hearing arguing it shouldn't be, and hard to
22 believe that they didn't know that it might get added if they
23 were putting on evidence that it shouldn't be in.

24 And there were arguments about how the use of the
25 word attenuated was in the State Engineer's order.

1 Well, it's farther away from the pumping center than
2 other places where the monitoring of impacts was greater. So
3 it just stands to reason that as you get further away the
4 impacts would be less attenuated. And I think that's what the
5 State Engineer meant. That doesn't mean they don't exist
6 there. It just means that they are less at distance, and I
7 think the State Engineer acknowledged that.

8 And ultimately there's a hydrograph that was reviewed
9 from the wells in Kane Spring versus the wells in Coyote
10 Spring, and it was the State Engineer's judgment from those
11 hydrographs that there was a significant enough connection to
12 add them.

13 There's a case called *Eureka County v. State*
14 *Engineer*. And again, this is a case that has been cited to.
15 This wasn't raised. It was raised in the briefs, but it wasn't
16 raised in argument, but I think I need to address it in case it
17 gets reraised later. That the State Engineer essentially can't
18 bifurcate the proceeding. You also heard argument that its
19 segmentation, like the CEQA in California would prohibit.

20 Well, isn't dividing up the basins and not looking at
21 them in isolation, wouldn't that be segmentation? If you were
22 going to ignore what the aggregate impact is of the five
23 together because of their separate -- their original separate
24 nature if, you know, that sounds like segmentation to me.

25 But the argument is that the *Eureka County* case,

1 *Eureka County versus State Engineer*, and this case was about a
2 groundwater project that was going to dry up a spring, okay.
3 Again, this is not a case of first impression that we're in
4 here. Groundwater, major mining project, going to dry up a
5 small spring in Kobeh Valley.

6 And the question was, and the State Engineer said, I
7 understand that there's going to be an impact to that spring
8 from groundwater pumping, and I am going to require a
9 mitigation plan, and the Supreme Court -- but I don't -- but I
10 haven't seen the mitigation plan yet, but I'm going to require
11 one. And the Supreme Court said that's not good enough. You
12 can't make a decision that a mitigation plan will avoid a
13 conflict if you don't have the mitigation plan in front of you
14 first. You have to have presently known substantial evidence,
15 presently known substantial evidence.

16 And I think -- and I'm going to get to this in a
17 second, Mr. Lake for Center for Biological Diversity talked
18 about this case too and how it relates to the steady-state
19 finding of the State Engineer.

20 But this other point, so can the State Engineer
21 bifurcate? The argument is he can't bifurcate because if he
22 does facts first it's going to -- it's based on -- it's not
23 based on presently known evidence. This is completely
24 different.

25 This is a traditional method of making the factual

1 findings first and then doing the policy decisions later. And
2 the State Engineer is deferring management decisions to a later
3 time. He didn't authorize a conflict -- well, assuming that --
4 I mean, we've argued that his conflict decision was incorrect,
5 but assuming we're right on that, he did not rely on evidence
6 in the way that occurred in Eureka County.

7 Now, I think Mr. Lake's point though is that the
8 State Engineer heard evidence about the steady state, and maybe
9 I should -- you know, I'm going to get to that, but the point
10 there was some witnesses said, you know, it looks like a -- and
11 I hope -- let me put it into context is we're talking about
12 Warm Springs West Gage. We're talking about the 3.2 flow rate
13 at Warm Springs West Gage, and whether or not that was
14 stabilizing, whether or not that was continuing to decline or
15 not. Some people thought that that was continuing to decline.
16 The State Engineer said it's approaching steady state. That's
17 the finding that he made. Witnesses testified about this.

18 And one witness said, well, I need to see a few more
19 years of evidence before I could say that it's reached steady
20 state. That was Mr. Felling (phonetic), but you asked, well,
21 when is enough enough? I mean, when should -- you know, can't
22 we just be asking for more data all the time? We get that
23 question all the time. More data is always better, according
24 to the experts. More models, more, you know, more well data,
25 but I think it's -- I think you have to think in context to the

1 actual decision.

2 If you have ten years of flow data and something is
3 doing something on a trend versus two years, ten is going to be
4 more valuable than two. So I don't think it's an indefinite
5 period of time, but I think -- I mean, I think even
6 Mr. Felling's testimony wasn't he needed forever. He needed a
7 little bit more time to really conclude that it was equalizing.
8 And I think that's why the State Engineer said it's
9 approaching. They didn't definitively say it is. They said
10 it's approaching. And so that's a little bit about that.

11 So the next point that I want to make is about
12 conjunctive management. So -- so conjunctive management, what
13 is that? So we talked about this before. There's been
14 statements that well, the groundwater and the surface water
15 have always been managed separately in Nevada because they have
16 two separate chapters. Well, that's pretty simple of an
17 argument. The reason we have two separate chapters is because
18 LCB decided to make them two separate chapters for whatever
19 reason LCB decided to do that back in 1939, and LCB has, you
20 know, interesting rules about why it does things, why it uses
21 certain words in certain places at certain times. So that's
22 the first point.

23 The second is that the water law surface water was
24 adopted in 1905, and then through 1905 through 1913 it was
25 litigated. And so we think of it as kind of between 1905 and

1 1913 the water law was adopted, the surface water.

2 Then in 1939, the groundwater law was adopted. So
3 that's Chapter 534, surface; 533 was the initial one surface.
4 Then 534.

5 534 is just a bolt on to 533. The reason we know
6 that is that in -- so the reason we know that is NRS 533.370.
7 So this is in the surface water chapter, 533.370.

8 THE COURT: And this is slide 57?

9 MR. TAGGART: Yes, it is. Thank you.

10 And this is the law that applies to all applications
11 that are filed in the State of Nevada, all water right
12 applications, ground and surface. So if I wanted to -- if I
13 file -- every application that was ever filed by any of these
14 parties in this case was filed under Chapter 533, under
15 533.370. And it says the State Engineer has to see if there's
16 water available for appropriation, see if it conflicts with
17 existing rights and see if it threatens to prove detrimental to
18 the public interest. So those are the three main things the
19 State Engineer has to look at under 533.370, sub 2. And so
20 when the legislature adopted 534 for groundwater, it said State
21 Engineer use the service water statute 533 to approve
22 applications. So they're connected. They have some, you
23 know --

24 THE COURT: Interaction.

25 MR. TAGGART: -- interaction.

1 But what's even more important is, and I think
2 Mr. Carlson said this yesterday too is that one of the first
3 statutes in 534 says that everything that's issued is issued
4 subject to existing rights. What were they talking about,
5 right? They had to be.

6 And then under 533.370, it says that you cannot
7 approve an application if it conflicts with existing rights,
8 and 533 must have been talking about surface and ground. So
9 there's always been this interaction, this interplay between
10 those two chapters.

11 And this is a slide here, Slide Number 58, and
12 actually that should say authority for conjunctive management.

13 THE COURT: Conjunctive management.

14 MR. TAGGART: I'm sorry. We worked on some of these
15 last night.

16 But this is a series of cases that we cited to in our
17 brief, maybe not all of them. So I'm going to -- you know, so
18 if somebody wants to object, they can, but if you survey our
19 water law, like that Orr Ditch, *U.S. v. Orr Ditch* in 2010,
20 that's the case I talked about yesterday where the Ninth
21 Circuit said a surface water court, a surface water decree
22 court has jurisdiction over groundwater right that might
23 interfere with the surface water.

24 *Eureka County versus State Engineer*, that's what we
25 talked about a minute ago. The, you know, again, there's a lot

1 here. *Griffin v. Westergard* was from the 1980s, and it was
2 ground -- that was the one I talked about. It was Smith
3 Valley, not Mason Valley, but it was Smith Valley, Nevada. It
4 was *Groundwater Pumping versus the Walker River*.

5 *Cappaert*, right, I talked about that already in 1976.
6 1976. *Pyramid Lake Paiute Tribe versus Ricci*. That was
7 groundwater being appropriated in Dodge Flat, and it
8 involved -- you read the case. It talks about water quality in
9 the Truckee River, making sure that that's -- there's enough
10 water for that.

11 So this isn't new. This has been going on for some
12 time. You know, these issues needing to address conjunctive
13 management.

14 So I guess I don't know whether this is the right way
15 to look at it, but if the State Engineer doesn't have the
16 authority to do conjunctive management, he's going to get in a
17 lot of trouble from the courts, because the courts have told
18 him he better. The courts don't care if I have a client, and I
19 do, who have surface water rights that are being taken away by
20 groundwater pumpers. I have one here, and I have one in other
21 parts of the State, and, you know, it doesn't really matter
22 whether it's coming -- whether a groundwater well is taking the
23 water or somebody went up and put a ditch in up gradient from
24 me and took my water. It doesn't really matter. It doesn't
25 matter where the headwaters are. It doesn't matter whether

1 they're in Clark or Lincoln. It just matters that somebody's
2 taking my water. So that's the last I'm going to mention of
3 conjunctive management.

4 So we think there's clear evidence that the State
5 Engineer relied upon to come up with the connection between the
6 basins and the same source of water.

7 So now I want to talk about -- now I'm going to talk
8 about the 8,000 acre-foot cap. Okay. So a number of questions
9 came from the bench to parties here about -- I think the Court
10 asked, you know, is it your position that no water can -- water
11 can never be taken away? I think one of the answers was the
12 State can take it -- or the State giveth, the State taketh
13 away. I think I've said that in other cases too.

14 But the answer back was, there has to be a process.
15 He can't overrule. He has to administer. That was an answer
16 that you got as well.

17 So and I agree. There's a residual power that the
18 State Engineer has over all water rights that he's granted.
19 And it is -- it is part of the water law, and it's also part of
20 the public trust doctrine now. And that's this Mineral County
21 case that we talked about over and over again.

22 So the procedure that the State Engineer must follow
23 to curtail existing law, and there is a process. So most of
24 the parties conceded that, yes, the State Engineer can take
25 water away, but he has to follow a process.

1 And so you asked, and I think you asked Mr. Bolotin,
2 so is the State Engineer going to decide what the rules are?
3 No. The process is decided by the legislature, and the Courts
4 will review what the State Engineer does if someone appeals.
5 My money is on someone appealing.

6 So that's -- so now I'm going to talk about what that
7 process is, and it starts with understanding what is the supply
8 of water that's available. That's the first step that the
9 State Engineer has to do is understand how much water is
10 available. That's what he has to do when he grants new water
11 right applications. That's what the statutes say he's supposed
12 to do here. 534.110 sub 6 I'll talk about in a second which
13 talks about that.

14 How much water is available -- or first, what's the
15 supply? How much is available for -- because there could be a
16 lot more water in a basin, groundwater than can be pumped on an
17 annual basis, on an annual sustainable long-term basis. So how
18 much, you know, what's the aquifer? How much can be pumped?
19 Is there a shortage? How do you deal with the shortage through
20 curtailment? So there's -- that is the process. And
21 unfortunately, there will be winners and losers, but it has to
22 happen. It can't be avoided.

23 So I think my client urges that we not start this all
24 over again. I mean, I think the State Engineer did a good job
25 with 1309 except for what we've argued against, and this is our

1 starting point, and we need to move to the next level and start
2 to deal with the policy questions that we talked about a little
3 bit yesterday.

4 So the -- so Slide Number 6 of this new presentation,
5 which is my third, and it's --

6 THE COURT: And do we have a copy of it?

7 MR. TAGGART: Not yet, but I think I have a copy
8 here. And it is -- it's the 8,000 acre-foot cap presentation.

9 The -- my point here is that we know how curtailment
10 happens because it's always happened, maybe not this complex
11 and maybe not this dramatic, but on river systems when there's
12 not enough water every year, it goes into curtailment, or it
13 goes into regulation it's sometimes called. And priorities are
14 cut off. The youngest priorities are cut off as the year goes
15 by, and there's water commissioners who run rivers and decide
16 who's going to get water, and they have a system on how they do
17 that. The State Engineer oversees that work for Courts in
18 Nevada who have entered decrees and acts as the water
19 commissioner to those Courts and does that. And so there's a
20 system.

21 And like I said yesterday, I think that that's the
22 color that we have to use whenever we're looking at statutes
23 that codify that common law system.

24 Here is the list of -- this is Slide 7. Here's the
25 list of statutes that apply. There's more than this, but I

1 think these are the critical ones. We talked about 532.120 and
2 534.120 already.

3 532.167, sub 3, he has a duty to perform an estimate
4 of the amount of all groundwater that is available in a basin.
5 That was like my first point. First he has to decide what the
6 supply is. He has to determine the specific yield of aquifers.
7 That's a term that means how much water is in an aquifer on a
8 cubic meter basis usually, like how much of that area is filled
9 with water.

10 Then he had --

11 THE COURT: Well, let me just ask a quick question.
12 So the perennial yield has to do with a basin, but that is
13 different than the yield of an aquifer?

14 MR. TAGGART: It is. Well, a specific yield is a
15 term, a hydrologic term that I just did the best I could on
16 explaining what it is.

17 THE COURT: Okay.

18 MR. TAGGART: It's not perennial yield.

19 THE COURT: It's not the same as perennial yield?

20 MR. TAGGART: It's different.

21 THE COURT: Okay.

22 MR. TAGGART: And perennial yield is this notion of
23 how much can you develop on an annual basis and maintain
24 equilibrium. But I can tell you that that discussion has been
25 years and years and years too have we fought over what that

1 exactly means, but really what it is, is what's the
2 sustainable -- I like sustainable yield because it kind of
3 conveys the idea better of what the goal is, but it's the
4 amount of water that on an annual basis can be pumped and be
5 there, you know, forever or, you know, out into time.

6 And so -- but specific yield is more of a -- it's
7 more of a hydrologic term about how they figure out how much
8 water is in an aquifer.

9 THE COURT: Okay.

10 MR. TAGGART: And then 534.110, sub 6, that's what
11 we're going to talk about a lot more here, because that's the
12 curtailment statute, and it says the groundwater supply may not
13 be adequate for the needs of all permittees. I have a couple
14 slides on that.

15 We talked about subject to existing rights, and we
16 talk about the conjunctive management -- and I'm sorry -- yeah,
17 the manage conjunctively legislative declaration. So now we've
18 got an -- I mean, that's a water law right there on one slide.

19 But public trust doctrine, I want to talk about that
20 while I can.

21 And so the public trust doctrine is a what we -- I
22 used to call it the wildcard of western water law. It
23 didn't -- it started in -- well, California adopted it in the
24 water law first, and then in Nevada, there was a case in the
25 '80s -- in the '90s, and it's Mineral County. I'm blanking

1 on the name, but it was the first case about Walker Lake. And
2 there's a -- there's a concurrence in that opinion by Justice
3 Rose, and he said that if we don't have the public trust
4 doctrine in this case in this state we should. And -- but he
5 wasn't in the majority.

6 And then fast-forward to last year or the year before
7 when we got the Mineral County case, Walker Lake again. It
8 bounced back and forth between the Federal courts and the State
9 courts because it's a federal court decree that governs the
10 surface water on the Walker River. And the Supreme Court was
11 being asked, and this has been talked about already a bit.

12 The Supreme Court was being asked by the Ninth
13 Circuit on a certified question is -- is it possible for the
14 water rights in the Walker River decree to be reallocated for
15 the benefit of Walker Lake and the environmental needs of
16 Walker Lake. And the Court said no. It said that there is a
17 public trust doctrine in Nevada, but decrees on river systems
18 can't be changed.

19 And so it really had some tough decisions to make,
20 but it also told the State Engineer that this public trust
21 doctrine thing really matters. It's -- there was a Lawrence
22 (phonetic) case that came before it, and it established the
23 public trust doctrine in Nevada for land underneath submerged
24 waters, but the Mineral County case said the State Engineer
25 better take into account the needs of the public trust. What

1 does that mean? That means that the water is owned by the
2 public, and the State Engineer is the trustee of that water.
3 And when he gives it out, he has to make sure it's being used
4 according to that trust obligation that he has to the public.

5 And it also involves retaining powers that the State
6 Engineer -- that's why call it the wildcard. We know what the
7 statutory retained powers are of the State Engineer over
8 groundwater right. They're mentioned in the permit terms.
9 What the -- what the public trust doctrine retains is, you
10 know, is not as clear.

11 So, but we know now that the State Engineer has to
12 keep that in mind. Why is it important in this case? We think
13 that if there, you know, if he -- if he could some -- I mean,
14 how could someone argue that the State Engineer cannot take the
15 Moapa Basin into account? I don't know that anyone has
16 actually argued that, but that was a really, you know, hard
17 position I think to take in today's day and age.

18 So the question is, and I'll just jump to that now on
19 the ESA stuff, is that --

20 THE COURT: So let me --

21 I think what has been argued is that -- well, that he
22 made that determination under the Endangered Species Act as
23 opposed to public trust doctrine.

24 MR. TAGGART: Right.

25 THE COURT: I think that's what that argument was

1 about that it was improper for him to determine that there
2 could be the potential of a take under the Endangered Species
3 Act because of that, that that was faulty logic, I guess.

4 MR. TAGGART: Right. Uh-huh.

5 THE COURT: I think that's what the argument was.

6 MR. TAGGART: Yes. And that he -- I think even some
7 have argued that he made a determination that take will occur,
8 and only the federal government can do that.

9 So public interest, public trust, those I think are
10 separate ideas. Public trust doctrine is what I kind of just
11 talked about. Public interest is mentioned in the statute; it
12 says something the State Engineer has to account for, but they
13 blur into each other.

14 So when the State Engineer wrote 1309 and --

15 THE COURT: So just so that I am clear, the public
16 interest is the public interest that's referred to in the
17 statute under the declaration?

18 MR. TAGGART: Yes.

19 THE COURT: And the public trust doctrine is
20 something separate that was adopted by our State through case
21 law?

22 MR. TAGGART: Right.

23 THE COURT: Okay.

24 MR. TAGGART: And public interest is not public
25 trust, public interest is one of the factors the State Engineer

1 has to consider when he approves an application. He has to
2 look at whether it threatens to prove detrimental to the public
3 interest.

4 And so arguments have been made that the decision
5 that's made by the State Engineer when he approves an
6 application that something that doesn't threaten to prove
7 detriment to the public interest, that after he approves it, he
8 can't go back --

9 THE COURT: And change it.

10 MR. TAGGART: -- and change that, right.

11 THE COURT: Because the objection and all that kind
12 of stuff has to happen at the time when it is issued.

13 MR. TAGGART: Right. Now, what I call that is it's
14 an argument that the public interest inquiry does not survive
15 the approval of the application. You know, does it or doesn't
16 it survive that approval, and I think it has to because the
17 State Engineer doesn't know everything about what's going to
18 happen when he grants a water right. And many times he grants
19 a water right based upon a mitigation plan, a monitoring plan.
20 And if those things -- if things turn out to be different than
21 he thought when he granted the water right, then he has to have
22 the ability to go back.

23 Now, the other part of how he approves the water
24 application is whether it conflicts with another water right.
25 So what happens if it does? What happens if he makes a finding

1 when he approves the water right that it won't conflict with
2 anyone, but then it does?

3 THE COURT: But then wouldn't he go through the
4 statutory process at that point to do that?

5 MR. TAGGART: Well, when he issues permits, he says
6 in them subject to existing rights.

7 THE COURT: Right.

8 MR. TAGGART: And he has a statute that says all
9 water rights are issued subject to existing rights.

10 THE COURT: Right.

11 MR. TAGGART: So on that one it's clear that it
12 survives the approval of the water right.

13 And while I'm on that, I'm going to say I think of
14 curtailment in two different ways. One is conflict
15 curtailment, and one is priority curtailment. So conflict
16 curtailment is if CSI's pumping impacts another groundwater
17 right, the State Engineer can regulate CSI's pumping, or
18 anyone, for that conflict. That's conflict curtailment. And
19 that's I think what you said. There's a process for that.

20 THE COURT: Right.

21 MR. TAGGART: Priority curtailment is what we're
22 dealing with here where if there's not enough water in the
23 system for all the water rights, then you start to cut people
24 off who are the most junior.

25 So whether the -- you know, whether the public

1 interest inquiry survives the approval, like the conflicts
2 obviously does, is an open question. And I would hope, and I
3 think of Justice Rose's concurrence in that case again, I would
4 hope the State Engineer has the power to go back and fix a
5 problem if he authorizes pumping that impacts a fish or
6 something like that.

7 But in 534.120, sub 1, in a designated basin, he has
8 the power to enter an order that's essential for the welfare of
9 the area. And that is a lot like public interest. So in our
10 view, that 534.120 authorizes orders that are essential for the
11 welfare. So to the extent he can't take into account, you
12 know, the ESA, he can take into account the needs of the fish
13 because it's in the well -- it's essential to the welfare of
14 the area. And I think that's what we want the conclusion to be
15 because the State Engineer has to take the environment into
16 account.

17 Now, so that's the point there. Oh, yes. So also I
18 think it's clear when you read the State Engineer's decision
19 that he did refer to the public interest. He did not try to
20 enforce the Endangered Species Act. He pointed out that there
21 was the potential for take. There was the potential for State
22 liability. And he should take that into account. And the
23 potential for liability is listed in all of those cases that we
24 have cited, that Center for Biological Diversity has cited, and
25 in particular, the *Strahan* case about -- let me make sure I get

1 this right. One of them had to do with lobster traps and
2 whales.

3 But the point being that if the State Engineer
4 authorizes a groundwater permit that ends up threatening an
5 endangered species, he may have direct liability. He may have
6 liability through proximate cause analysis.

7 THE COURT: Right.

8 MR. TAGGART: And --

9 THE COURT: Even though he's not the one -- is this
10 the third party --

11 MR. TAGGART: Right.

12 THE COURT: Right. Where even though the third party
13 is actually doing the harm, that because they issued out
14 whatever the regulation, then they would be liable?

15 MR. TAGGART: Right.

16 THE COURT: Okay.

17 MR. TAGGART: So, yeah. So we have -- this is Slide
18 Number 53. *Strahan* was the case about the whales in
19 Massachusetts. Massachusetts issued licenses for lobster,
20 gillnets.

21 There's the Hawaii case, and then there's also this
22 case *Aransas Project vs. Shaw*, which was cited in the reply
23 briefs. So what that case is important about is it's a
24 question of proximate cause. And if it's too attenuated, the
25 State's nexus, the State action in the nexus of that action to

1 the actual take, then if it's too attenuated, then it's not a
2 proximate cause. There's intervening causes, as I'm
3 remembering from law school and torts.

4 There's other -- if there's other reasons, he might
5 not be liable.

6 So the question to ask is could the State Engineer --
7 is pumping a direct enough effect on the water flow for fish to
8 be considered a proximate cause, or are there a lot of other
9 intervening factors? And in this particular case which did not
10 find the State to be liable, there were many other intervening
11 factors. I think it was a crane, and the State action was
12 affecting the feeding area, the crane. They were having to go
13 to other places, and so how the crane populations were
14 decreasing, there were a lot more intervening causes about why
15 that was happening.

16 So I think it was fair for the State Engineer to take
17 this into account, the potential for liability, shouldn't stick
18 his head in the sand when it comes to that, particularly when
19 this case was out there.

20 So now I'm on Slide Number 9. So people talked about
21 what's the process that you can -- that the State Engineer can
22 take water away if he follows the process, if he administers
23 and doesn't overrule. And so how is he going to do that here?
24 534.110 talks through this process. 534.110(2)(b) says he can
25 conduct pumping tests to determine if pumping is -- if

1 overpumping is indicated to determine the specific yield of
2 aquifers and determine the permeability characteristics. He
3 did that, Rule 1169. And then he -- I got all of the data from
4 it and made findings based upon that data.

5 And then 534.110, Sub 6.

6 The State Engineer may limit withdrawals --
7 that's curtailment -- where it appears that the
8 average annual replenishment to the groundwater
9 supply may not be adequate to the needs of all
10 permittees and vested right claimants. This is
11 pretty explicit.

12 All permittees or all the water right owners for
13 groundwater, all vested right claimants would be the Muddy
14 River decree right holders in this case, and the -- and the
15 State Engineer looked at whether the annual replenishment
16 perennial yield to the groundwater supply is enough for all of
17 those permittees and vested right claimants, and he found it's
18 not.

19 So it says "may," and so that's the next step. You
20 know, without belaboring critical management area, I mean,
21 that's a whole other level. There's one of them in Nevada. At
22 Steinman Valley was talked about, but in that he has a 10-year
23 clock on when he must curtail. This may becomes a must after
24 10 years in a critical management area. So that's the
25 procedure.

1 Okay. Now, the 8,000 acre-foot cap was called rough
2 justice, and that the State Engineer backed into a number. I
3 think it was clear that there was an evidentiary basis for the
4 8,000. There's on Slide Number 15 again, the first question
5 that should be asked is what data did he have, and this is a
6 list of the data that he had to make a determination that the
7 8,000 is the proper cap. That's on page 15.

8 So the first was actual data of measured declines and
9 groundwater levels and springs. That's Slide 16. He had this
10 actual data from 1169. The District, Water District installed
11 a lot of those monitor wells and maintained the annual reports
12 on those wells and still to this day submits those reports to
13 the State Engineer.

14 The record on appeal includes monitoring reports for
15 this area for back a couple decades. So that's -- I mean,
16 those are reams of paper, you know, with lines and numbers that
17 are the data of water levels in all of these wells. That data
18 is far more reliable than estimates and the types of water
19 budgets that were used back when reconnaissance reports were
20 done.

21 This is the map we've talked about before, but it
22 just shows where all of those monitor wells are located. So
23 throughout all the basins, they cited monitor wells, and there
24 was some discussion about 1169 wasn't well thought out. Well,
25 my client worked really hard and spent a lot of money getting

1 the Order 1169 approved by the State Engineer. So after he
2 ordered it, you'll find other orders in the State Engineer's
3 office about how the pump test would be done, where the monitor
4 wells need to be located, how often they needed to be measured,
5 how often the measurements need to be reported to the State
6 Engineer. All of that was thought out and completed before the
7 pump test began.

8 THE COURT: And this is Slide 17?

9 MR. TAGGART: Yes. On slide -- and now on Slide 18,
10 I talked about this before, about the uniform water levels
11 throughout the area. That was kind of point Number 1.

12 Slide 19 is that same slide with all the panels of
13 the hydrographs.

14 Slide 20, he also had measurement data showing less
15 flow in the Muddy River. So he used that. This has been
16 described earlier about what the flows are now at 30,000 and
17 when predevelopment flows were 36 or 37.

18 An expert testified about the reasons for declining
19 flows in the Muddy River. Many believed it was the Lower White
20 River Flow System. I think nearly all, and that pumping --
21 pumping can be at a one-to-one impact to the river depending on
22 how close the pumping is to the river.

23 There was evidence put on like this slide here, this
24 is Slide 21, and this was an estimate of how much water was
25 taken out of the river by groundwater pumping.

1 This is slide Number 22. Slide Number 22, which is
2 another graph from the expert report that demonstrated -- that
3 showed how the decrease in river flow corresponded to pumping
4 in the Lower White River Flow System. He had analysis of water
5 level and spring flow changes, and he reviewed those
6 hydrographs. He was able to look at preaquifer test
7 measurements, during the aquifer test measurements and post
8 aquifer test measurements.

9 There was a statement made that, you know, why did
10 the pump test have to return back to the number that it was
11 at -- to the level that it was at before the start of the pump
12 test, that that was arbitrary. Well, no, that's actually
13 scientifically what the State Engineer determined was
14 appropriate. You want to check to see if recovery gets back to
15 the pretest levels. So he had that information.

16 This one here I don't think you've heard about yet.
17 A correlation between water level and spring flow. Slide
18 Number 25. So this particular -- this is the correlation
19 between water level and flow at the spring. So yesterday I
20 showed you that there was this monitor well called EH4, and
21 it's really close to the Warm Springs area where the fish are,
22 and they compared the water levels at that area, groundwater
23 level to how much water flowed out of the spring, and checked
24 to see whether those two things are correlated. So if water
25 level changes, does flow change.

1 And so they used statistical methods to understand
2 that correlation, and they found strong evidence that the
3 groundwater pumping -- well, they found a correlation.

4 So let me point -- that's what this on Slide 27 looks
5 like. So this little graph on the side is a plot that
6 correlates. It's a statistical method that correlates the flow
7 data points to the water level data points. And the closer
8 they're aligned, the more correlation there is.

9 And the State Engineer looked at this, and this is
10 the strongest evidence that changes in water level affect flow
11 in the spring. So then -- so that was at the -- really close
12 to the spring. That's why that monitor well was put there,
13 EH4. It was put right real close to the spring to measure
14 that.

15 Then they looked at, well, what happens between
16 groundwater pumping in Coyote Spring Valley and EH4, and they
17 checked that correlation. And that's what this chart -- that's
18 what this chart shows. This is Slide 29, and they found a
19 correlation between -- well, hold on a second.

20 Yeah, what I said is correct. My slides are a little
21 backwards.

22 So this particular side, Slide Number 29 shows the
23 correlation between the monitor well and the Warm Springs West
24 Gage.

25 Then on Slide 27, that's the correlation between --

1 THE COURT: Oh, that's Coyote Springs, okay.

2 MR. TAGGART: Yeah, between Coyote Springs and EH4.
3 So the State Engineer looked at this.

4 Now, you know, is .93, our squared .93, is that a --
5 well, is that a close enough correlation. That's a judgment
6 for the State Engineer, but he thought it was.

7 And so that's what -- what he had too.

8 Again, this little map that I have on Slide 28, it'll
9 show you where Warm Springs West is, and there's EH4. So down
10 on the bottom in the middle there is a little EH4. So that's
11 how close they are.

12 So he had that.

13 So that's uncontroverted evidence that the
14 groundwater levels are directly tied to spring flows, and
15 that's what he said. The high correlations also confirm that
16 the hydrologic head in the aquifer is the main driver of spring
17 discharge for the Springs, changes in groundwater level
18 resulting in changes in flow.

19 So it was reasonable for him to conclude that
20 groundwater pumping affects the spring flow.

21 Then there's the lack of the recovery data. I
22 covered that earlier. So I won't go into that again.

23 And then we get to how did he come up with 8,000, and
24 so 8,000 is how much water is approximately being pumped now,
25 and he compared that to how much the flow is in Warm Springs

1 West Gage, and it didn't come out of -- he didn't back into it.
2 It's not rough justice. It's the number of current pumping and
3 what current pumping is causing to the spring. And his
4 determination was the spring can handle that much pumping, but
5 nothing more, and it may be less. And so it's really tied
6 directly to what the existing amount of pumping is and what
7 the -- and what's happening at the spring as a result of that.

8 Then he set a condition on the 8,000.

9 So -- so he said -- and this has been pointed out by
10 parties that he said that the data is of an insufficient
11 duration to make a determination with absolute assurance. This
12 is slide number -- Slide Number 33. He said that continued
13 monitoring is necessary to determine if this trend continues or
14 if water levels are continuing to decline slowly. He noted
15 that climate and recharge efficiency may dictate lower pumping,
16 and monitoring will be used to measure if additional impacts
17 occur.

18 So on this Slide 34, I say -- or I indicate that
19 everyone -- I think it's pretty clear that 40,000 is too much.
20 So he knew that. He knew 14 and a half thousand is too much
21 because that's what was done during the pump test and led to
22 significant declines.

23 So given that had to be less than 14 a half, then he
24 had what existing pumping is and what it was causing. So he
25 used that. That's reasonable.

1 By the key for my client is this commitment to
2 continue to monitor and to -- and to reduce that if the Warm
3 Springs West Gage continues to decline.

4 I think you're aware by now that we wanted a lower
5 cap, but we're willing to accept the 8,000 acre-foot cap with
6 that conditional lowering dependent upon additional evidence.

7 So on that we trust the State Engineer to monitor and
8 take action if the flow continues to decline.

9 Okay. Just a reminder though that we don't think
10 that that amount -- just because we accept that the 8,000 is a
11 proper cap to stop the declines, that doesn't mean that we're
12 conceding to conflicts. We already covered that, but that
13 argument was made in the State Engineer's brief that -- or
14 that's how we interpreted it. So there you have it.

15 The dace, that's already been talked about quite a
16 bit. So I'm going to kind of skip over those slides.

17 Yeah. We -- just to quickly summarize in this Slide
18 Number 39, small little areas of water coming up out of the
19 ground. They accumulate into bigger channels. Those channels
20 meet into each other. So that's what Pederson, Abcar
21 (phonetic), Jones, that's what those are, plumber. They all
22 come together to an eventual Gage, but they're really
23 sensitive. They're high elevation. There's not a lot of flow.
24 That's where the fish are, and, you know, small changes can be
25 really significant.

1 So the State Engineer relied -- I went on earlier
2 about why he could look at the dace, why he could take that
3 into account. Our view is he has a couple of different
4 reasons. We think the public interest concern survives the
5 approval of an application. We think that 534.120 says
6 essential -- he can enter rules that are essential for the
7 welfare. That includes the fish. We think the public trust
8 doctrine says that he has to consider environmental issues that
9 are related to water development. So for all those reasons, it
10 was proper for him to consider it. So now did he consider it
11 properly?

12 He heard, you know, what evidence did he have?
13 Again, that's where we start. He had the MOA among the
14 parties. We've already talked about that. He had the
15 biological opinion about the MOA. He had modeling that was
16 done during that biological opinion. He had expert opinion at
17 the hearing, and he had the test recovery data. So you already
18 heard about the memorandum of agreement, that experts got
19 together and determined what the proper triggers were to
20 protect the fish, and they set those into the MOA.

21 Biological opinion was done to see whether or not
22 those triggers were correct, whether the Fish and Wildlife
23 Service would agree with that.

24 When the Fish and Wildlife Service did the biological
25 opinion, it -- it ran an eco-hydrologic model, and that model

1 looked at the change in habitat as a result of change in flow.
2 And it came up with quantitative conclusions about the
3 percentage in linear footage of habitat that would be affected
4 by changes in flow. So that's serious detailed evidence, and
5 it was -- I think it was covered well before.

6 Two witnesses testified on behalf of the Southern
7 Nevada Water Authority. One was Bob Williams, who was the
8 former State Director of the Fish and Wildlife Service. That's
9 on Slide 45.

10 Mr. Williams had been part of the MOA discussion. He
11 talked about the needs of the fish and the point -- and the
12 3.2.

13 Zane Marshall, who is a -- who is an expert in
14 biology and has been studying fish in that area for decades, he
15 testified regarding the flow rate of 3.2 and the critical
16 nature of that flow rate to the fish. So that's Slide 46.

17 And then there was testimony from experts in the Fish
18 and Wildlife Service. It's important to point out that the
19 witnesses who testified for the Fish and Wildlife Service were
20 biologists. They were not compliance employees. So there's
21 been a lot said that, oh, well, these guys didn't say it was a
22 take. Well, these guys wouldn't say it's a take. That's not
23 what they do. They're in a whole different shop inside Fish
24 and Wildlife Service about compliance and who enforce the
25 endangered species act.

1 These individuals are more in charge of kind of
2 managing populations and making sure that existing populations
3 are properly -- the habitats are properly maintained and so
4 forth.

5 Then -- then the State Engineer had the post aquifer
6 recovery data that I talked about before.

7 So we think that the 8,000 acre-foot cap is also
8 supported by the needs for the dace independent of the ESA
9 completely, but then you can add to that the ESA.

10 And so I talked about that a bit already. State
11 agencies -- so this is Slide Number 51. State agencies can be
12 liable under the ESA. Groundwater pumpers can be liable under
13 the ESA. We already know that.

14 Cappaert was specific to groundwater pumping in
15 Nevada. The U.S. Supreme Court said you can't impact a fish
16 like the desert -- the Devils Hole pupfish in that particular
17 case. So these are the cases I flipped up to earlier about
18 proximate cause. So that's Slide Number 55 -- 53 and 54, and
19 then I want to talk about on Slide 55. Again, our point is
20 that the State Engineer could consider the potential liability
21 under the ESA. He didn't make a finding of take, and he should
22 consider the potential liability under a federal statute like
23 that.

24 The -- anyway, I've got a case I would tell you
25 about, but I didn't cite to it. So I'm going to -- I'll keep

1 it there.

2 So then when we got *Cappaert*, and I know this has
3 been talked about a little bit, but Devils Hole is a fish
4 there. It's a waterhole that is warm, and the fish is
5 endangered. And the State Engineer authorized groundwater
6 pumping near that hole that had an effect on the level of that
7 hole.

8 The State Engineer got enjoined by the Court, by the
9 federal courts to prevent grave danger to the Devils Hole
10 pupfish that could be destroyed. So that was conjunctive
11 management. That was controlling groundwater to protect
12 surface water, and so that the State Engineer doesn't take the
13 fish into account, he's doing it at his own peril.

14 And also, interestingly in *Cappaert*, so this is on
15 Slide 57, the Supreme Court, Justice Burger (phonetic) speaking
16 said that Nevada itself may recognize the potential
17 interrelationship between surface and groundwater. That was in
18 1976. And then they recognize that groundwater and surface
19 water are physically interrelated as integrated parts of the
20 hydrologic system.

21 During Order 1303, the State Engineer heard testimony
22 from a former Deputy State Engineer, Rick Felling, who was
23 testifying on behalf of Nevada Energy. He said that -- so I'll
24 slow down because I think this is more -- this is important.
25 He says,

1 I think it's very important to honor the
2 3.2 CFS trigger at Warm Springs West, and it's
3 very much like the Devils Hole issue. Water
4 levels in Devils Hole dropped. The habitat at
5 Devils Hole pupfish were imperiled, and a
6 Federal District Court Judge decided how much
7 water needs to be in Devils Hole. We could very
8 easily have the same situation in the Muddy
9 River Springs area if flows in the Muddy River
10 Springs dropped and imperil the dace, and then
11 we would have a Federal District Judge managing
12 water in Nevada and not the State, and I think
13 it's for the benefit of all the users that the
14 State continue to manage these water resources
15 and not a Federal Court Judge.

16 So that's pretty serious. If that fish, if that 3.2
17 gets breached and that -- and there starts to be habitat
18 problems, and the Fish and Wildlife Service decides that
19 they're going to use the ESA as a hammer, then all bets are off
20 on where all of this goes.

21 And so that was what Mr. Felling was warning the
22 State Engineer about at the hearing.

23 Okay. Let me just see if I have anything else to
24 say, Your Honor.

25 THE COURT: Okay.

1 MR. TAGGART: So in summary, we think that Ruling
2 1309 should be upheld, subject to the conflicts determination,
3 and we think that because the State Engineer has to have the
4 ability to upgrade and update the management system in Nevada
5 based upon new evidence.

6 A lot of the concerns that have been raised here are
7 valid, but are not right. There'll be things that are decided
8 later, the who of who gets curtailed is not at issue for now.
9 What's at issue now are the factual determinations that were
10 made. I think it's clear that the State Engineer was correct,
11 that there's a common source of water in all of these areas and
12 that there is not enough water for all the permits in the
13 decreed water in the river system.

14 So those two findings have to be upheld, and then we
15 will move on to the next phase to answer some of those more
16 difficult questions.

17 But at this stage, we think that the evidence is
18 clearly substantial, and he certainly had authority to do what
19 he did in 1309. Thank you.

20 THE COURT: All right. Thank you.

21 All right. So I think now would be a good time to
22 take a break.

23 What is -- is 12 minutes enough? So we're back at
24 10:30.

25 All right. Let's do that.

1 (Proceedings recessed at 10:18 a.m., until 10:30 a.m.)

2 THE COURT: Whenever you're ready.

3 MR. ROBISON: Ready, Your Honor.

4 On behalf of Coyote Springs, Kent Robison.

5 I just wanted to point out that our brief and
6 intervention covered several topics, statutory authority, but
7 more importantly, with respect to where we are right now in
8 these proceedings with the Southern Nevada Water Authority
9 saying 1309 is void in part for our interest and not void, and
10 it is valid to jeopardize other petitioners, particularly
11 Coyote Springs.

12 But what we want to talk about right now, Your Honor,
13 with respect to intervention is the Endangered Species Act and
14 the Muddy River Decree.

15 Mr. Dotson talked about the law of primacy and the
16 law of recency yesterday. I submit to you, Your Honor, the law
17 of logic and reason trumps that, and even a greater force is my
18 partner who is a very involved in this case and wrote the
19 briefs and is pregnant with knowledge and otherwise.

20 THE COURT: Pun intended.

21 MS. WINSTON: Hello, Your Honor.

22 THE COURT: Hello.

23 MS. WINSTON: Hannah Winston on behalf of Coyote
24 Springs. Sorry, I was so busy snacking that I didn't set up my
25 papers here.

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ARGUMENT FOR COYOTE SPRINGS

MS. WINSTON: As Mr. Robison just noted, there's three primary topics that I want to address today. The first are some of the arguments raised about the Endangered Species Act. The second is some of the arguments related to the Muddy River Decree, and the third are the issues raised by SNWA through Mr. Taggart this morning.

Beginning with the ESA, there are three important points. The first is the Center for Biological Diversity argues in their brief that no pumping can occur in the Lower White River Flow System. There is nothing in the record to support that, and one of the reasons that the -- I'll call them CBD -- that CBD makes that argument is that there could be some sort of liability under the ESA from any pumping in these basins.

The ROA does not support that argument. Mr. Taggart pointed out that the Fish and Wildlife experts who testified at the 1303 hearing were not compliance experts. They were biologists. And the center for CBD argues that those experts confirmed that any company in the Lower White River Flow System could harm the dace, and that simply isn't true.

Those experts, Sue Braumiller, Dr. Michael Schwemm testified that pumping and the rehabilitation of the dace can coexist. The Fish and Wildlife Service actually articulated that over 9,000 acre-feet was a sustainable amount to be pumped

1 throughout all of these basins. So that first issue that no
2 pumping can occur is just not supported at all by the record,
3 and certainly not by the Endangered Species Act.

4 Second, if CBD, if the State Engineer, if any water
5 rights user is concerned about liability under the ESA, there
6 are specific steps that those individuals or entities can take
7 to avoid that liability, and that's exactly what CSI did by
8 entering the 2006 MOA.

9 It's important to note that in the MOA there is a
10 triggering point for flow, and the Fish and Wildlife Service
11 has approved that number. So for the State Engineer or for the
12 Center of Biological Diversity to say that there's this
13 potential liability and that that decrease, that trigger rate
14 isn't sufficient to avoid liability is quite disingenuous given
15 that Fish and Wildlife Service has approved that amount in the
16 MOA.

17 THE COURT: So let me just ask. So, you know, as far
18 as the MOA, that really just has to do with those entities that
19 are within that MOA; correct?

20 MS. WINSTON: That is correct, Your Honor.

21 THE COURT: Okay. So if we are presupposing, you
22 know, if the State Engineer has the ability to delineate a
23 larger area as a basin, then that MOA really only applies to
24 that portion of that basin that those entities have entered
25 into. It doesn't actually account for any of the other

1 entities that are pumping within that larger system; is that
2 correct?

3 MS. WINSTON: Well, I think your question raises two
4 important points. To briefly answer --

5 THE COURT: Sure.

6 MS. WINSTON: Short answer would be yes.

7 THE COURT: Okay.

8 MS. WINSTON: Long answer is it's complicated.

9 THE COURT: It depends; right?

10 MS. WINSTON: It depends.

11 THE COURT: I'm a lawyer.

12 MS. WINSTON: It depends. So your question raises
13 two important points. The first is that yes, only certain
14 parties are -- or petitioners are parties to the 2006 MOA;
15 however, to get to that MOA there was a lot of research done
16 and a lot of work with Fish and Wildlife Service. And it's not
17 necessarily that it's a precedent, but if the Fish and Wildlife
18 Service approves, which is a federal agency, approve certain
19 triggering points or, you know, pumping or things like that,
20 then that can certainly be viewed for that entire area of
21 pumping.

22 The second issue is, of course we only looked at
23 pumping in a certain basin because that's how basins have
24 always been managed.

25 So I think your question does raise an important

1 point because we've relied on this basin by basin management
2 approach in many different areas that are related to this case,
3 one of which being the 2006 MOA.

4 In 1309 the State Engineer makes these kind of vague
5 references to the Endangered Species Act, and I won't harp on
6 him too much that he references provisions that don't apply to
7 State agencies, but what's really telling about his references
8 are that he uses the ESA to sort of have this scare factor.
9 We're going to be liable under the ESA. Of course, that's a
10 possibility if there was actual evidence and if a taking was
11 occurring. We don't have that here.

12 What the State Engineer ignores is that there's
13 50,000 acre-feet annually that flows into Coyote Springs Basin.

14 And, Mark, I'll ask if you can pull up Order 1169,
15 page 6.

16 MR. ROBISON: CSI 53 and 54.

17 THE COURT: Slides, okay. Is this from a previous
18 slide presentation, or is this the new one that --

19 MR. ROBISON: These additional slides to CSI 1.

20 THE COURT: Okay. So and then you'll get us a copy
21 of that?

22 MR. ROBISON: Absolutely.

23 THE COURT: Okay. Great. Thank you.

24 MS. WINSTON: And this is just Order 1169, Your
25 Honor.

1 So here the State Engineer is recognizing all of the
2 inflows and outflows that are related to these basins. We know
3 that 50,000 acre-feet annually comes into Coyote Springs Valley
4 Basin. 53,000 flows out, okay. So there's that three -- and
5 these are approximate numbers. There is about 3- to 5,000 of
6 recharge from the Sheep Mountain Range.

7 37,000 acre-feet annually flow to the Muddy River
8 Springs area, but 16- to 17,000 bypasses the Muddy River
9 Springs area, and that is what the State Engineer recognized in
10 1169.

11 Now, in Order 1309, the State Engineer says all
12 pumping throughout the entire Lower White River Flow System
13 could equally affect the dace. And therefore we need to limit
14 pumping to avoid liability under the ESA. So it really
15 addresses the fact that obviously the pump test did not account
16 for this amount that bypasses the Muddy River Springs area.

17 So the pump test provided an incomplete picture. The
18 State Engineer's reliance on an incomplete picture and reliance
19 on the endangered species act really just demonstrate how
20 arbitrary that 8,000 acre-feet cap is.

21 The Muddy River Decree is the next issue I'm going to
22 address. The main issue that we have with the discussion of
23 the Muddy River Decree is that SNWA, and even the State
24 Engineer attempt to quantify a volume of water that is
25 appropriated under the Muddy River Decree, and I'm not a

1 hydrologist, but I have practiced this.

2 So the Muddy River Decree assigns a rate or duty of
3 water to those water users. So a farmer in the upper north
4 area of the stream might have the right to divert a certain
5 cubic feet per second of water.

6 What SNWA tries to do is add up all of those assigned
7 duties or rates and say that that's the volume that's allocated
8 under the decree. And it gets confusing because when we think
9 of volume, we're thinking of acre-feet annually. How much
10 volume of water does Coyote Springs get to pump? We look at
11 acre-feet annually.

12 The Muddy River Decree doesn't have a volume because
13 when water is diverted for irrigation on a farm, for example,
14 not all of that water is going to be used by that farmer.
15 Diversion rates, which is what the decree uses, can account for
16 losses and additions to the groundwater table.

17 So to illustrate, if we have that farmer that I
18 referenced who gets 3.2 cubic feet per second of water to
19 divert, and the farmer diverts water to his crops, some of that
20 water is going to be lost due to evaporation. Some of it isn't
21 going to be used. There's just too much water for what those
22 crops need. That water is going to go back into the
23 groundwater table and continue to flow. Then a farm lower or
24 at a more southern point in the river can capture that water
25 and divert that water.

1 So when SNWA discusses the water that's allocated or
2 decreed in terms of volume, it's really inaccurate because that
3 water that returns to the groundwater table would be counted
4 twice. So I think that's just an important distinction to
5 make, that, you know, we can't look at it in terms of a volume
6 of water, and I think that this Court recognized that early on.
7 In Mr. Taggart's opening, you asked him, you know, cubic feet
8 per second is different than volume of water. And I think
9 that's a very important distinction.

10 During Mr. Taggart's argument this morning, I was
11 very struck by his comment that we don't need to be parsing out
12 specific words of statutes. That is what we do. We are
13 lawyers. I remember in law school my favorite professor told
14 me he won a \$15 million judgment based on a missing T. The
15 word was either thereof or hereof, and he won it because there
16 was no T in front of hereof. We parse out words. We don't get
17 to say, yeah, there's words in a statute, but the legislature
18 clearly intended that the State Engineer have the authority to
19 do this. That's not how statutory interpretation works.

20 I think it's very telling that the State Engineer and
21 SNWA do not actually want to conduct a statutory interpretation
22 analysis. Because when you do and when you combine that with
23 the past practices of the State Engineer and the Nevada Supreme
24 Court, you find that there is no authority to combine basins.

25 The first place I want to start is NRS 534.030.

1 Mr. Taggart argued this morning that that statute really is
2 inapplicable. And the truth is Order 1169 doesn't reference
3 NRS 534.030. I'm going to come back to that.

4 What's important about NRS 534.030 is that it
5 provides the process, the procedural steps to designate a
6 basin. And we've gone through the different meanings of
7 designate and delineate, right.

8 MR. TAGGART: Your Honor, can I just, with all due
9 respect, is this an answering argument, or is this -- I mean,
10 she's attacking our positions, not defending the State Engineer
11 right now. She's --

12 MS. WINSTON: It was my --

13 THE COURT: No. No. But it's -- they are allowed to
14 in their answering also. Because in their answering brief they
15 also -- so it would be supporting the State Engineer or, I
16 don't know how to say this in a nice way, taking pot shots at
17 everyone else's -- everyone else's openings.

18 MR. TAGGART: But she's talking about joint
19 management. She's talking about all -- I mean, we support the
20 State Engineer on that, and now she's challenging what we said
21 about whether he properly did joint management or not, that
22 they can reply. They raised that in their opening brief. They
23 challenge the State Engineer in their opening brief. I
24 would -- I guess I expected that anybody with the
25 (indiscernible) argument Muddy River Decree and our position

1 with respect to the Muddy River Decree, because that's what we
2 raised in our opening brief, and that's what they'd be
3 answering when it comes to me and my client.

4 THE COURT: So for my -- okay.

5 MR. TAGGART: I mean, I guess I don't mind, but --

6 THE COURT: No, no. But so does --

7 MR. TAGGART: Because they only have four hours.

8 THE COURT: Let me just qualify. So from my
9 recollection of your answering brief, the majority of the
10 answering brief had to do with the way that SNWA was
11 quantifying their water.

12 So if you are talking about the process to -- I don't
13 remember if that was in the actual answering brief.

14 MS. WINSTON: We did join in the statutory authority
15 arguments of some of the other petitioners. My understanding
16 of our time this morning was to address other arguments raised
17 by other --

18 THE COURT: The opening briefs. Yes.

19 MR. TAGGART: -- intervenors or opening briefs,
20 especially to give Mr. Taggart that chance to rebut --

21 THE COURT: The opportunity in the reply, yes.

22 MS. WINSTON: -- in his reply.

23 THE COURT: Yes. Yes. That is correct.

24 So that way you will be able to reply to their
25 criticisms of your -- of the arguments that you brought up in

1 your opening brief. That's what we talked about yesterday.

2 MR. TAGGART: Okay. All right.

3 THE COURT: Okay. Thank you.

4 MS. WINSTON: Thank you, Your Honor.

5 So let's get back to where we were.

6 534.030 provides the process to designate basins or
7 areas, and I know that there's been discussion about the words
8 delineate versus designate. And designate is really to -- it
9 begins with 534.030. That's the process. To look at basins
10 that do not have adequate perennial yield to meet the needs of
11 all the permitted water rights users. And what's important
12 about that statute here is that that is not how 1169 began.

13 And if we'll go to page or just lower on this page,
14 please. Oh, sorry, page 6 of 1169. That's the ROA 664. The
15 State Engineer references the statutory authority to conduct
16 the pump test, the statutory authority to enter 1169, and we
17 see in Nevada Revised Statute 533.368. So that is where the
18 pump test began. That is the statute that authorized 1169. It
19 was not 534.030, which provides the process for designating a
20 basin for additional or further management.

21 So 534.030 is relevant in the sense that that is not
22 why we are here today, which I think has been a bit muddied by
23 the conversation about these areas.

24 What I think is most important is to go to pretty
25 much any opinion by Justice Pickering. She loves statutory

1 interpretation. We start with the plain language of the
2 statute. The State Engineer in the answering brief, SNWA, they
3 really muddied the waters, no pun intended, about what a basin
4 is, and today Mr. Taggart pulled up a clip from the Water Words
5 Dictionary.

6 MR. BOLOTIN: Your Honor, respectfully, I think any
7 reference to the State Engineer's answering brief is definitely
8 in the reply, Your Honor.

9 THE COURT: Would be in the reply. I would agree.

10 MS. WINSTON: I just -- okay.

11 UNIDENTIFIED SPEAKER: Yeah, I --

12 MR. TAGGART: Your Honor, I don't understand this.
13 Because I would expect that if they want to address my Muddy
14 River arguments, then that's what I need to hear now so that
15 when I come back and reply -- when I come back and reply, all
16 I'm going to be able to talk about is the Muddy River -- my
17 Muddy River arguments.

18 THE COURT: The Muddy River arguments.

19 MR. TAGGART: So I just don't understand what we're
20 doing here. I mean, I guess it doesn't really matter. I mean,
21 they only have so much time, but it's just odd that we're --
22 are they going to get up and again and reply and make the same
23 arguments?

24 THE COURT: No.

25 So I would ask that you stick to what you briefed in

1 the answering brief.

2 MS. WINSTON: Okay, Your Honor. Well, then --

3 MR. ROBISON: Excuse me. You mean the brief in
4 intervention or the answering brief?

5 THE COURT: The -- I believe it was the answering
6 brief.

7 MR. ROBISON: Okay. Thank you, Your Honor.

8 MS. WINSTON: Well, okay. So now, sorry. I'm a
9 little confused. So I should not be addressing anything that
10 Mr. Taggart --

11 THE COURT: Hold on. Let me just -- let me just
12 think about this.

13 MS. WINSTON: Okay.

14 THE COURT: So when we were talking yesterday, it was
15 that the -- I wanted to make sure that all of the entities had
16 an opportunity to basically have their last word on whatever
17 else was being criticized by the other entities. So this would
18 be that opportunity.

19 MS. WINSTON: Well, and that's what -- yesterday
20 Mr. Taggart said if I hear my name, I want to be able to stand
21 up and reply to that.

22 THE COURT: Sure. So and I think --

23 MS. WINSTON: So that's why we --

24 MR. TAGGART: Well, wait. I mean, come on. I mean,
25 this is just twisted. I mean, it's appellate argument. It's

1 not complicated. We raised an issue in our opening brief.
2 They get to address it in their answering brief. I get to
3 address it in my reply.

4 THE COURT: Right.

5 MR. TAGGART: The only issue is the Muddy River that
6 I raised in my opening brief. That's all I raised. I
7 didn't -- and the State Engineer didn't file an opening brief.
8 So they couldn't have answered the State Engineer.

9 THE COURT: So, yeah. So anything that has to do
10 with the State Engineer would have -- would be something that
11 you would address in the reply.

12 MS. WINSTON: Okay.

13 THE COURT: And truthfully, you know, I have to tell
14 you I have read so many briefs that I can't even recall who
15 said what in which brief. But I would -- I would ask that you
16 limit your argument at this point to any criticisms that you
17 had regarding -- because this also is the brief in
18 intervention. So any arguments that you made in that second
19 portion of your pleadings, which would be whatever you filed
20 during that time. So I don't know if you need to clarify.

21 MR. ROBISON: We filed opening briefs, and in
22 November the State filed and the intervenors filed.

23 THE COURT: Yes.

24 MR. ROBISON: We filed intervention briefs.

25 THE COURT: Right.

1 MR. ROBISON: Because we intervened in each other's
2 cases.

3 THE COURT: Correct.

4 MR. ROBISON: And in addition briefed to the issues
5 for our brief in intervention.

6 THE COURT: Right.

7 MR. ROBISON: Which is Muddy River, ESA, the
8 statutory authority, due process, prior appropriation. Then we
9 all filed our reply briefs on January 11th replying to each
10 other's arguments.

11 THE COURT: So is your brief in intervention the same
12 as the answering brief?

13 MR. ROBISON: No. It's separate. It covers some
14 topics.

15 MS. WINSTON: Ours is the same. We didn't call it an
16 answering brief. We just called it a brief in intervention.

17 THE COURT: Okay. Just let me just look. Let me be
18 precise.

19 MR. TAGGART: Well, and in that brief they basically
20 reargued what they already argued in their opening brief in
21 some regard. We didn't make a big deal out of it, but, again,
22 you know, I don't think it's that complicated. The issues that
23 were raised by people in opening briefs get to be responded to,
24 and nobody --

25 THE COURT: Okay. Let me find it.

1 MR. DOTSON: Yeah, I don't want to disturb you, Your
2 Honor, but I thought about this last night. I actually might
3 be able to help.

4 THE COURT: Okay. Go ahead.

5 MR. DOTSON: Can I?

6 THE COURT: I always welcome --

7 MR. DOTSON: All right. This is Rob Dotson on behalf
8 of Muddy Valley Irrigation Company.

9 And you'll recall yesterday afternoon -- and I'm
10 getting old, and so I'm not as sharp in the afternoon -- we
11 were talking about getting your last shot at somebody.

12 THE COURT: Right.

13 MR. DOTSON: And I think I said something, well, I
14 think I had nine slides, but I might have to add something.
15 And then when I actually went to do it, Your Honor, what I
16 recognize is anything I would say in response to anyone's
17 opening argument has to be in defense of the State Engineer
18 because I'm opposing their criticism of the order that I
19 actually agreed to; right? And so what I figured out in the
20 end was, well, actually what I said was wrong yesterday.
21 Because anything -- technically wrong -- because anything I'm
22 saying today that I've added, and I really didn't add much, is
23 really in defense of the order.

24 THE COURT: Oh. Well, I mean --

25 MR. DOTSON: Do you see what I'm saying?

1 THE COURT: I do. And I guess, you know, if I --

2 MR. DOTSON: And so it just might help us.

3 THE COURT: So, I mean, I will tell you that in
4 looking at Vidler and Coyote Springs brief and intervention,
5 which in our Odyssey is titled answering brief; that's why I
6 was a little bit confused, a majority of those arguments had to
7 do with the quantification of the water that SNWA and Moapa
8 Valley Irrigation Company and how the Moapa Valley Decree. I
9 mean, to simplify --

10 UNIDENTIFIED SPEAKER: Muddy.

11 THE COURT: Muddy Valley Decree.

12 -- to simplify it is basically -- what they're saying
13 it says isn't really what it says. It isn't like a full
14 appropriation because of X, Y, and Z. So I would ask that, you
15 know, in fairness to all the parties, you know, they are
16 expecting that you would be arguing what's contained in that
17 brief in intervention or the answering brief. So I would ask
18 that you limit your arguments to that.

19 MS. WINSTON: Okay.

20 THE COURT: And then anything else would be in the
21 reply.

22 MS. WINSTON: Okay.

23 THE COURT: Is that clear?

24 MS. WINSTON: Yes, Your Honor.

25 MR. BOLOTIN: And, Your Honor, the State Engineer is

1 the same, that they don't -- as a petitioner, they get the last
2 shot at their petition. We're not saying that that's not the
3 case, but --

4 THE COURT: No. No. But they do that in the reply.

5 MR. BOLOTIN: Yeah. We filed our answering brief the
6 same time the same they filed their answering brief. It
7 doesn't make sense to respond to our answering brief in the
8 answering brief.

9 THE COURT: I agree with you on that.

10 MS. WINSTON: I totally understand, Your Honor. I
11 honestly was trying to avoid the situation where I saved
12 everything about Mr. Taggart's argument this morning for reply,
13 and then he says I don't get a chance to rebut that now. So I
14 just --

15 THE COURT: Well, you get a chance to rebut it in the
16 reply.

17 MS. WINSTON: I meant that he doesn't get the chance.
18 That's all.

19 MR. TAGGART: But the last chance I got to raise all
20 that stuff I talked about today was today. And, I mean, to be
21 clear, I think Mr.-- so he raised an issue in his opening brief
22 that the number is too high, 8,000. Rob Dotson raised an issue
23 that the number is too high. I have raised the issue. Those
24 are the issues that were raised in the opening briefs that are
25 beyond just defending the State Engineer that he chomps it.

1 And they are. And they are. And that's what they should.

2 But on the other stuff, yeah, I won't get another
3 time to argue about what I said this morning.

4 MR. ROBISON: He just spent an hour 40. He could
5 have saved some time for reply.

6 MR. TAGGART: Yeah, but I don't need it. That's the
7 point.

8 THE COURT: Well, what he's saying is, he doesn't
9 really need it because in the answering or in briefs and
10 intervention, what was really covered was more about the claim
11 issue. It was really more about, you know, and Lincoln Vidler
12 had their own calculation of how it should be calculated, and
13 Coyote Springs had their own calculation of how it should be
14 calculated. You know, that issue, and I think that's what he's
15 relying upon when he made his arguments. So and that's what
16 was contained in the briefs. So that's what I would ask that
17 you would limit your argument to.

18 MS. WINSTON: Okay. Well, then I think I'm finished.
19 I'll pass the torch to Mr. Robison, and I'll see you in the --

20 THE COURT: In the reply.

21 MS. WINSTON: Yes.

22 THE COURT: That sounds good.

23 MS. WINSTON: Thank you, Your Honor.

24 MR. ROBISON: Your Honor, I don't have -- I think I
25 just heard a order granting in limine argument. We are stuck

1 with the Muddy River Decree and the Endangered Species Act.

2 THE COURT: For this portion.

3 MR. ROBISON: Correct. We mentioned, you know,
4 statutory authority. We mentioned prior appropriation. Is it
5 your request that we reserve that for our reply?

6 THE COURT: Yes, please.

7 MR. ROBISON: Thank you, Your Honor.

8 THE COURT: Okay. So is that the sum of Coyote
9 Springs -- so you're not going to talk about the appropriation
10 calculation or any of that kind of stuff?

11 MR. ROBISON: Well, that's part of the prior
12 appropriation. Yes, I'd be happy to argue that right now.

13 THE COURT: Okay. Wait. So let me -- okay. So let
14 me -- maybe I'm clear as mud. But so in your brief in
15 intervention, you had criticisms regarding the way that I think
16 both Southern Nevada Water Authority and Moapa Valley -- Muddy
17 Valley. Sorry.

18 MR. ROBISON: Too many valleys.

19 THE COURT: Yeah, there is. Muddy Valley had
20 interpreted the Muddy Valley Decree.

21 MR. ROBISON: Correct.

22 THE COURT: As far as what rights they were entitled
23 to?

24 MR. ROBISON: Right.

25 THE COURT: And also the way they came with their

1 calculation as far as the volume of water that they were
2 entitled to that your colleague just talked a little bit about.

3 MR. ROBISON: Right.

4 THE COURT: Is there other argument regarding those
5 issues that you would like to further expound upon?

6 MR. ROBISON: Just very briefly.

7 THE COURT: Okay.

8 **ARGUMENT FOR COYOTE SPRINGS**

9 MR. ROBISON: And I would like to show CSI Number
10 2, please.

11 Your Honor, the 1169 analysis talks about the
12 estimated charge, recharge discharge. And as Ms. Winston
13 indicated, the quantity of water that bypasses Warm Springs is
14 around 17,000 acre-feet per year. Not affecting the dace one
15 way or the other but available for groundwater pumping.

16 The pumping of the water that bypasses Warm Springs,
17 that's right by Coyote Springs. That does not affect the dace.
18 But the science is that there's additional water coming off of
19 the sheep range, and that's in the evidence by our expert and
20 that the fault, we call the highway fault, that water that
21 comes off the sheep range goes south. So there's additional
22 water to be used that has no effect whatsoever on the Moapa
23 dace. And there's no test that substantiates that the pumping
24 from the water that flows to the southern border of the Coyote
25 Springs Valley will in any way affect the habitat of the dace,

1 and we think that that analysis then is skewed to blend those
2 things even though 1169 says they are distinctly different, and
3 that's what I have to add to that argument, Your Honor.

4 THE COURT: Okay. Thank you. All right.

5 So next I think is --

6 UNIDENTIFIED SPEAKER: Apex I think is up next.

7 THE COURT: Is it Apex?

8 UNIDENTIFIED SPEAKER: Yeah, I think so.

9 MR. BALDUCCI: Your Honor, on behalf of Apex and Dry
10 Lake, we have nothing to add during this portion of the
11 proceeding although we will reserve all of our time, although I
12 don't anticipate needing every second of it, for the reply
13 portion of argument.

14 THE COURT: Okay. Thank you. Let's see. So let me
15 just get my list.

16 MR. ROBISON: Center.

17 THE COURT: Center for Biological Diversity?

18 MR. LAKE: Yes, Your Honor. We have an answering
19 presentation.

20 THE COURT: Okay. Do you need a minute to set up?

21 MR. LAKE: I don't. I don't have a presentation for
22 this.

23 THE COURT: Okay.

24 MR. LAKE: So we're just going to keep it simple this
25 time.

1 **ARGUMENT FOR CENTER FOR BIOLOGICAL DIVERSITY**

2 MR. LAKE: And like Mr. Morrison, I was sitting over
3 there crossing things off as the other parties are talking.

4 I intended to talk about three things today. One is
5 the Endangered Species Act. The other one was Kane Springs
6 Valley, and finally the State Engineer statutory authority.

7 I think we've covered the latter two ad nauseam at
8 this point. I'm happy to talk about them. We briefed them.

9 THE COURT: If you want to highlight, certainly I
10 don't want to preclude you, but if you feel like it's been
11 adequately covered by Mr. Taggart, I'll leave that to your
12 discretion.

13 MR. LAKE: Thank you. And if the Court has any
14 questions, please ask.

15 With that in mind, I'd like to focus today on the
16 Endangered Species Act. There's been a lot of discussion about
17 this, and I think, you know, one of the really important parts
18 of this case is to understand the interaction between
19 groundwater pumping and the Endangered Species Act, both in
20 terms of the impact on the dace and in terms of potential
21 liability for the State Engineer.

22 And I'd actually like to step back a moment and talk
23 about, you know, why we're here in the first place. Why am I
24 here at all talking about the Endangered Species Act? And it's
25 because they -- you know, we have this groundwater system, this

1 regional groundwater system, and there are maps of it all over
2 the courtroom now. There are thousands, tens of thousands of
3 acre-feet of water rights already awarded in the system. And
4 the reason we're all here in court fighting about it is because
5 there are limits on it, and we have to figure out how to deal
6 with those limits.

7 One of those limits is, as Mr. Dotson was talking
8 about, the Muddy River Decree, and we have these water -- we're
9 in Nevada. It's a prior appropriation state. Water rights are
10 first in time, first in right. And if there's an impact on
11 those water rights, it has to be dealt with, and that's spelled
12 out in the statutes. That's in NRS 533.0245. It's also -- it
13 flows from the idea that all of the rights granted are subject
14 to existing rights. So that's one limit on the system. We've
15 talked about it a lot.

16 Now, the other limit on the system is the Endangered
17 Species Act. And again, this is not inconsistent with the
18 State Engineer's duties. It's not outside the State Engineer's
19 duties. I think Mr. Taggart did a very good job of explaining
20 why the idea that the State Engineer has to provide for the
21 public interest survives the initial granting of the
22 application.

23 And this is part of the public interest.

24 The State Engineer is acting as a trustee of the
25 State's water resources. The State Engineer doesn't own the

1 water in the State. The individual appropriators don't own the
2 water. The water belongs to the public, and the State Engineer
3 has an ongoing duty to provide for the public interest in the
4 administration of those water rights.

5 And this has two primary implications here. And one
6 is that, as Mr. Taggart pointed out, the dace, looking at, you
7 know, providing for the dace and its conservation is in the
8 public's interest. I mean, that public interest has been
9 articulated in the Endangered Species Act itself. It's
10 articulated at the State level with Nevada State protections
11 for endangered species, the work The Nevada Department of
12 Wildlife has done. The (indiscernible) has already and
13 continues to do.

14 And we also have the potential for liability. So I'd
15 like to talk about both of those things kind of in concert, but
16 I'd really first like to give the Court a roadmap of how the
17 ESA works and how it comes into play in this situation.

18 And I'd like to start by reading some testimony that
19 was before the State Engineer. Because I think there's this
20 idea that is -- the State Engineer's conclusion that there's
21 potential liability here sort of came out of nowhere, but it
22 didn't. This is an ongoing issue. As Mr. Taggart also
23 mentioned, the Fish and Wildlife Service protested applications
24 in Coyote Springs Valley all the way back in the 1980s. Even
25 back then they were talking about looking at the system and

1 realizing that if you pump water in Coyote Springs Valley, and
2 at that point we didn't know the full extent of the system, but
3 at least if you pump water here, it's going to affect Springs
4 (video interference).

5 So, you know, this plays out over a few decades, and
6 you get to the Order 1303 hearing. And Fish and Wildlife
7 Service participated in the Order 1303 hearing. And a lot has
8 been said about their testimony, and I'm going to read some of
9 that testimony right now. I'm reading from record on appeal
10 53,117. This is the testimony of Dr. Schwemm from the Fish and
11 Wildlife Service.

12 Dr. Schwemm is not a regulatory officer. He's
13 actually the head of aquatic biology for the Las Vegas office,
14 which means he's responsible for the analysis that goes into
15 things, like a biological opinion.

16 THE COURT: Can you spell his name for me.

17 MR. LAKE: Sure. Let me make sure I get this right.
18 So, S-c-h-w-e-m-m.

19 So the Fish and Wildlife Service makes a conclusion
20 to say that a species deserves to be on the endangered species
21 list or that some action is going to jeopardize the existence
22 of a certain species, but that's the kind of analysis that
23 Dr. Schwemm conducts. And this is his testimony from the Order
24 1303 hearing.

25 The examiner is Patrick Donnelly (phonetic), the

1 Center for Biological Diversity's Great Basin Director.

2 Okay. The question is, Dr. Schwemm, are you -- you
3 state that flow and habitat are proportional to the Muddy
4 River -- to the Muddy River Spring area; is that correct?

5 Answer: Yes.

6 Question: And that any reduction of flow will
7 decrease the amount of habitat available?

8 Answer: Yes.

9 Question: In the general sense then --

10 And I guess he passed on that question. Sorry. I
11 got lost here. I think I skipped one.

12 Question: Would a reduction in habitat reduce the
13 number of individual dace present?

14 Answer: Yes.

15 So Dr. Schwemm admits there that pumping -- and then
16 this is testimony that was before the State Engineer, something
17 the State Engineer took into account, pumping from the
18 carbonate aquifer reduces spring flow and thus reduces the
19 amount of dace present. And I did cover this earlier.

20 Continuing, since this is true, does this imply that
21 carbonate pumping would result in the reduction of the amount
22 of individuals of the Moapa dace.

23 The respondent now is Sue Braumiller. She's the Fish
24 and Wildlife Services Chief Hydrologist in Nevada. I would say
25 that's highly likely, is her response.

1 THE COURT: We're on the record on appeal with this.

2 MR. LAKE: This is the following -- this is 53,117
3 and going on to 53,118.

4 Now, it's been pointed out, and it's true that Fish
5 and Wildlife Service never said we needed to stop all pumping.
6 And I'd like to clarify that the Center's position has never
7 been no pumping.

8 Our position has been that any groundwater pumping,
9 and I think this is shared by several parties to this, any
10 groundwater pumping reduces carbonate water levels and spring
11 flows.

12 Our expert recommended that some amount of alluvial
13 pumping could occur, and this is essentially due to the
14 differences between the alluvial and the carbonate aquifer,
15 that I don't think I need to get into here, but, you know, I
16 think the important point here is that what we were offering
17 below is a technical analysis of just what would happen if you
18 pump, and it was a fact-finding exercise.

19 We do think 8,000 is too high, and the record shows
20 that we're still seeing decreasing spring flows with 8,000, but
21 I'm not going to stand up here and say that any and all pumping
22 anywhere in the system results in take. You know, the fact is
23 though that we have thousands of acre-feet of pumping occurring
24 and continue to have thousands of acre-feet of pumping
25 occurring if something isn't done. And that will in fact cause

1 take.

2 So what is take? Take comes from Section 9 of the
3 ESA, and it comes from the definition of basically three terms,
4 and I covered these on Monday. I was going to briefly come
5 back to them now so our memory is all refreshed.

6 Section 9 is pretty short and simple. It says,
7 Any person is prohibited from taking any
8 endangered species within the United States or
9 the territory of the United States. It is also
10 unlawful for any person to attempt to commit,
11 solicit, cause to be committed any offense
12 defined as take.

13 So it's a pretty inclusive definition there.

14 Take means to harass, harm, pursue, hunt,
15 shoot, kill, trap, capture, collect or attempt
16 to engage in any such conduct.

17 This is an intentionally broad definition as well.
18 The Senate report accompanying the final draft of the ESA said,

19 It's defined in the broadest possible
20 manner -- I'm quoting now -- to include every
21 conceivable way in which a person can, quote,
22 "take," end quote, or attempt to, quote, "take,"
23 end quote, any fish or wildlife.

24 And this was also acknowledged by the U.S. Supreme
25 Court in the decision of *Babbitt versus Sweet Home Chapter of*

1 *Communities*, 515 U.S. 687.

2 In addition, we also have the definition of harm.
3 This relates to habitat modification. So harm includes habitat
4 modification to the extent that it actually kills or injures
5 wildlife. So when you look at Dr. Schwemm's testimony, he's
6 basically saying that yes, you will have habitat modification
7 that actually kills or injures the Moapa dace, and that would
8 qualify as take.

9 And finally, we'll get to person, and I think this is
10 really important here because we're -- you know, Coyote Springs
11 and other parties have been talking about, you know, who is and
12 who is not liable under the ESA for various reasons.

13 Person is also defined extremely broadly, and I'm
14 going to go through the cases in a minute, but if you look at
15 this definition and you look at how it's been litigated, it
16 becomes pretty obvious that the party most who generally gets
17 dragged into court over this stuff is the State. And that just
18 reflects the reasonableness of the State Engineer's
19 consideration in this case.

20 So person is defined as,

21 An individual, corporation, partnership,
22 trust, association, any other private entity or
23 any officer, employee, agent, department or
24 instrumentality of the federal government of any
25 state, municipality or political subdivision of

1 the state or of any foreign government of any
2 state, municipality or political subdivision of
3 the state and any entity subject to the
4 jurisdiction of the United States.

5 So anyone we can legally call a person can
6 essentially be liable for take is what they're saying here. So
7 this is the mechanism for take, and Mr. Taggart mentioned the
8 *Strahan* case. I'd like to discuss the *Strahan* case a little
9 bit more. Some have pointed out that it's not strictly
10 analogous because it involves lobster fishing and not water
11 rights. I will get to that in a second. There are cases that
12 involve water rights.

13 But *Strahan* I think, the reason it's been cited so
14 much is it's just the clearest discussion and clearest
15 articulation of the nature of the State's liability under the
16 Endangered Species Act. And the holding of that case was that
17 a governmental third-party pursuant to whose authority and act
18 or directly exacts a taking is deemed to have violated the take
19 provisions of the ESA. And this is under a proximate cause
20 standard.

21 So what they said in *Strahan* was that licensing
22 natural resource extraction, quote, specifically in a manner
23 that is likely to result in a violation of federal law, end
24 quote, is generally understood to constitute proximate cause.
25 It's within that sphere of foreseeability.

1 And to put a little meat on those bones, it's like
2 here we have all of this science showing that pumping from the
3 aquifer is going to cause drawdown to the Springs. So it's
4 foreseeable that you're going to have a habitat reduction if
5 you pump to a certain level. And in most cases, Courts have
6 found that where the State is issuing a license to foreign
7 activity that impacts the habitat, that is within the zone of
8 foreseeable injury that we generally understood to be proximate
9 cause.

10 And so I'd like to now address some of the arguments
11 that were made in *Strahan* by the government, by the State
12 government because they really mirror some of the arguments
13 being made in this case.

14 First, the State argued that they couldn't be liable
15 for a take because they're not doing any take. It's the third
16 parties. It's the lobster fishermen. You know, they tried to
17 suggest that, you know, we're not telling them to use this gear
18 in this way. We're just allowing it. It's their choice, and
19 it's their conduct. You know, there's an intervening causal
20 factor there. Well, the Court said no.

21 Even though strictly speaking the third-party
22 fishermen, licensed by the Department, were causing the take of
23 whales, you know, this was foreseeable. Like the -- the State
24 just can't, and this is going to come up a lot, the State just
25 can't just stick its head in the sand and say, you know, see no

1 evil. It has to take into account, and the Court will take
2 into account the reasonably foreseeable consequences of issuing
3 the permit.

4 Also, this idea, and I really want to discuss this
5 today because I think this has been a huge source of confusion
6 in this case, the idea that the State was somehow being
7 co-opted to enforce the ESA. And the argument was made in
8 *Strahan* that that's what was happening. Like they said, you
9 know, First Circuit, if you decide in favor of the plaintiff
10 here, then we will be forced to use our state regulatory
11 apparatus to enforce the ESA.

12 And it's a little different here. Here it's being
13 alleged that the State Engineer went ahead and took that step
14 himself.

15 But what the First Circuit explained in *Strahan* was,
16 well, that's not really what's happening here. There's a
17 difference between acknowledging a legal requirement and
18 enforcing it.

19 So I'd like to stick on this for a minute because
20 there's been a lot of verbiage thrown around about the ESA
21 using terms like jurisdiction and authority. And I don't think
22 that's appropriate at all here. That's not what's happening.
23 That's not what the State Engineer did here. The State
24 Engineer read the law and understood what it meant.

25 And, you know, the argument that we should simply be

1 blind to this is kind of like saying, and I've been searching
2 for an analogy for this all week, but it's kind of like saying
3 that, you know, the speed limit doesn't exist until you get
4 pulled over. It's like a motorist saying, okay, I don't think
5 anybody can prove that I'm going over 65. So I'm going to go
6 80. Or if a motorist says, you know, sees the speed limit sign
7 and goes 65 because that's what the speed limit says, you know,
8 does that somehow constitute enforcement on the motorist's
9 part, or is it just prudent behavior.

10 You know, the same thing, to use maybe a more extreme
11 analogy, are you enforcing the criminal law by refraining from
12 murdering somebody? It's just a different kind of situation.

13 The State Engineer is entitled to recognize a
14 potential liability of the State, which exists whether or not
15 he chooses to acknowledge it or not.

16 So not only would this be contrary to law, but it's
17 also contrary to the public interest. It's not in the State's
18 interest at all and not in the interests of the people in
19 Nevada for the State Engineer to be issuing permits to
20 appropriate the people's water such that the State is getting
21 sued left and right by people like me.

22 And this is borne out in the case law involving water
23 diversion. I'm going to mention a few of these cases. I don't
24 think we have to spend a lot of time on it. The *Cappaert* case
25 has already been mentioned, and I think that is a very

1 instructive case in this instance. It's not directly
2 analogous, but what the U.S. Supreme Court did recognize there
3 is that when it comes to the management of endangered species
4 there is a higher authority here, and again, that authority
5 will intervene whether or not the State chooses to acknowledge
6 it.

7 And as the former State Engineers testified at the
8 hearing, that is probably not a desirable result for the State
9 Engineer or the Department of Conservation of Natural
10 Resources.

11 So the first case I'm going to talk about is *U.S. v.*
12 *Glenn-Colusa Water District*. And the cite for that is 788 F.
13 Supp. 1126. It's from the Eastern District of California. And
14 this is an action, this is sort of a illustration of what could
15 happen because in that case the United States brought an action
16 for take against the operator of river diversion that was
17 killing endangered fish.

18 And, you know, there was an argument made there that
19 this is a State matter. You know, this is a matter of State
20 water regulation, and the Court said no. You know, this --
21 this is -- the State's water regulation scheme does not somehow
22 override or nullify the legal mechanism in the ESA.

23 In another case now, *Natural Resources Defense*
24 *Council versus Zinke*, again in the Eastern District of
25 California from 2018, the cite for that one is 347 F. Supp. 3d

1 465. And this just found that water supply contracts could be
2 the basis for Section 9 liability, that again issuing --
3 issuing or approving a contract that allows a certain amount of
4 water to be diverted for development from a river harboring
5 endangered fish was within that zone of foreseeability that
6 we're talking about proximate cause.

7 Similarly, the *Coalition for a Sustainable Delta*
8 *versus McCamman*, 725 F. Supp. 2d 1162, similar result, finding
9 that take may include the acts of a third party indirectly
10 bringing about that take. Again in the context of water
11 diversions. And I could go on, but I think I've made my point.
12 There are several other cases here that basically say the same
13 thing.

14 I would like to talk about the *Aransas Project* case
15 that Lincoln and Vidler cited in their briefs. This is a Fifth
16 Circuit decision. I'd just like to note at the outset that the
17 Fifth Circuit tends to take a different view of these issues
18 than the Ninth, and I think it would be risky to look at the
19 Fifth Circuit precedent here given the difference between the
20 circuits and the fact that the Ninth Circuit is the controlling
21 jurisdiction.

22 But I think the more important point there is that,
23 you know, this wasn't a case about take liability or the nature
24 of take liability or the existence of it, I guess. This was a
25 case about proximate cause. Everything I just talked about was

1 acknowledged in that case. But the Court was discussing, well,
2 have the plaintiffs met their burden to show proximate cause
3 here, and they hadn't.

4 But if you look at the facts of the case, this was a
5 far more attenuated chain of causation than we're dealing with
6 here. In that case plaintiffs allege that water withdrawals
7 would raise the salinity of certain water sources. So there's
8 like an estuary in the Texas coastline, which would change the
9 availability of certain food sources for a bird species that
10 uses this habitat, and the bird species was the one that was
11 endangered. So, you know, changing the chemical composition of
12 the water, affecting food sources, affecting the bird's
13 behavior, leading all the way to actually killing or injuring
14 wildlife.

15 And I think what the Court said was only a fortuitous
16 consequence -- confluence of adverse factors could impact
17 whooping cranes in that case. And this is not what we're
18 dealing with here. In fact, this is one of the things that I
19 think was pretty squarely resolved in the Order 1303 hearing.
20 You know, what is this chain of causation? And it is clear
21 pumping reduces groundwater levels. Spring flows depend on
22 groundwater levels. Therefore pumping reduces spring flows.
23 Reductions in spring flows, as both myself and Mr. Taggart have
24 discussed here, lead to losses of habitat.

25 And now I'd like to turn to the MOA, and the MOA is

1 also something that we've discussed a lot. I kind of touched
2 on earlier what the MOA does and doesn't do and what the
3 biological opinion does and doesn't do.

4 And the short answer here is that the MOA does
5 absolutely nothing. The MOA is a private agreement. The MOA
6 is not regulatory. The MOA is not a liability shield for
7 anybody. It simply recites the agreement between the parties
8 that they were going to do various things in anticipation of
9 the Order 1169 pump test. And there were conservation measures
10 there that some of which were very beneficial to the dace.
11 Nevertheless, it's not what you need to do to avoid Section 9
12 liability. That comes through a different process, and that
13 process is called formal consultation, which results in the
14 preparation of biological opinion, which was done there, but
15 it's limited, as I'm about to describe.

16 So this is going to get a little bit wonky, and I'm
17 happy to clarify at any point.

18 But we need to draw a distinction between take under
19 Section 9 of the ESA and jeopardy under Section 7 of the ESA.
20 Because when you're talking about biological opinion, it's
21 about jeopardy under Section 7 and not take under Section 9.
22 And there is an interaction between the two, but it is -- I
23 would say it's very fact dependent and limited to the facts of
24 the particular case.

25 So Section 7 -- Section 7, A2 specifically, and the

1 cite for this is 16 USC § 1536(a) (2).

2 THE COURT: Can you say that one more time.

3 MR. LAKE: Yeah. 16 United States Code § 1536(a) (2).

4 THE COURT: Which is Section 7?

5 MR. LAKE: At Section 7. 1536 at Section 7, and this
6 is a subpart of Section 7. This requires each federal agency.
7 So right there you have a distinction. Take applies to
8 everybody. Section 7 applies to the federal government, and it
9 says, Every federal agency has to ensure that any action it
10 takes or funds, authorizes, carries out is not likely to
11 jeopardize the continued existence of any threatened or
12 endangered species.

13 Now, notice that that doesn't use the same language
14 as take. This is a broader, more general inquiry. Are we
15 imperiling the conservation and recovery of this species, not
16 are we going to kill individuals.

17 And so the Fish and Wildlife Service to implement
18 this provision goes through a process called consultation where
19 the federal agency that's doing the action, and I think it
20 might be helpful to talk about this in some concrete context.
21 So I'll use the context of a subdivision because I think that's
22 going to be pretty familiar here in Vegas.

23 Say BLM wants to privatize a certain tract of land to
24 build a subdivision. Well, BLM is taking an action there.
25 It's a federal action. Say there's an endangered species on

1 that land that uses that land. Well, BLM at this point is
2 going to have to enter into the consultation process to ensure
3 that the land transfer doesn't impact, doesn't adversely affect
4 the endangered species. So the Fish and Wildlife Service looks
5 at the proposal and comes to a conclusion about the impact of
6 the action. Where an action may affect a listed species, it
7 triggers a process called formal consultation.

8 Formal consultation is basically a process of study
9 that results in a biological opinion. The biological opinion
10 is prepared by the U.S. Fish and Wildlife Service, and that's
11 the summary of the findings that the Fish and Wildlife Service
12 made during the study. So they're going to look at all of the
13 environmental consequences of this and decide whether it's
14 going to imperil the species or not.

15 And so at the end of that, it's going to -- the Fish
16 and Wildlife Service is going to transmit the biological
17 opinion to the action agency. So this would be Fish and
18 Wildlife Service transmitting to BLM and giving their opinion
19 on whether this is compliant with the ESA or not essentially.

20 Now, if the Fish and Wildlife Service makes a finding
21 in that biological opinion that the action is not going to,
22 like not going to jeopardize, and the technical finding that
23 they will make is, you know, it could be likely to adversely
24 affect, but it won't jeopardize the continued existence of the
25 species.

1 Now, there's kind of a gap there; right? Like
2 they're there allowing for some impacts if they make that
3 finding, which leads to the question, well, what are we
4 supposed to do, Fish and Wildlife Service, because there's --
5 you know, we're liable for take. Everybody is liable for take.
6 You know you kill one member of the species, and it's take.

7 So what Fish and Wildlife Service does in that
8 context is they'll issue something called an incidental take
9 statement. And this, this is the only thing that shields a
10 party from take liability is the incidental take statement.
11 The incidental take statement specifies how much take is
12 allowed, and this can either be in terms of individuals. So it
13 can say you can take X number of individuals of the species.
14 After that it's exceeded. After that, no more liability
15 shield.

16 Or it can be -- and the ones in the record here, and
17 there are a few in the record here, are phrased in terms of
18 habitat affected, and specifically spring close. So the
19 incidental take statements in the record here and a lot of
20 incidental take statements actually say you can take up to --
21 you know, here it's a certain level of spring flow, like
22 Lincoln-Vidler's incidental take statement for their Kane
23 Springs project, for example, goes down to 3.0 CFS at Warm
24 Springs West. So what that says is once -- if you reach 3.2
25 CFS at Warm Springs West, there is -- that is the full extent

1 of take protection that's given to Lincoln-Vidler through that
2 process. Take occurs below that flow level, unpermitted take.
3 An unpermitted take is the thing that leads to liability.

4 So as I mentioned, there was a biological opinion
5 attached to the MOA. So Fish and Wildlife Service as a
6 signatory to the MOA did go through this consultation process,
7 and full disclosure, my organization litigated that
8 consultation process. And there was a decision, and it was a
9 federal court decision on that where we lost. And I think the
10 reason that we lost that case is especially relevant here
11 because it really lays out the boundaries of what the MOA does
12 and doesn't do, and we actually went to court thinking that it
13 does a lot more than the Court said it did.

14 So the MOA, and this is a quote from the MOA record
15 on appeal 47,146, evaluates as the proposed action the
16 execution of the MOA by the Fish and Wildlife Service, not
17 groundwater pumping, the execution of the MOA, and the MOA has
18 three parts. There's the dedication of water rights. There's
19 the habitat restoration measures, and there's those spring flow
20 triggers at Warm Springs West. That's what it's looking at.

21 It specifically states that it's programmatic. It's
22 considering the big picture, does not consider future
23 site-specific actions. So pumping from any particular well is
24 not analyzed in the biological opinion. Groundwater pumping in
25 general, I mean, there's an analysis of what groundwater

1 pumping could do to spring flows, and it's basically the same
2 analysis that we've seen throughout this case. It's this close
3 connection acknowledging that groundwater pumping is going to
4 reduce the spring flows at Warm Springs West.

5 But because they are analyzing the MOA and not the
6 pumping, the Fish and Wildlife Service didn't issue an
7 incidental take statement here. There's no incidental take
8 statement attached to the MOA. The Fish and Wildlife Service
9 said, well, signing the MOA isn't going to cause any take. So
10 we don't need to issue an incidental take statement.

11 We have analysis in the MOA that we can, quote, tier
12 to that may support an incidental take statement for a future
13 project. But the MOA itself doesn't -- it doesn't protect
14 against take at all. Nothing out of this process protects
15 against take.

16 What does protect against take are the tiered BiOps,
17 and as far as I can tell, there are three of them in the
18 record. One of them is to CSI for the withdrawal of 4,600
19 acre-feet from two locations in Coyote Springs Valley. The
20 incidental take limit on that statement is 2.7 CF -- or 2.78
21 CFS at Warm Springs West.

22 There's another one to Southern Nevada Water
23 Authority, also with the same incidental take limit. And as I
24 mentioned, Lincoln Vidler has received an incidental take
25 statement for the withdrawal of a thousand acre-feet from Kane

1 Springs Valley. And the take limit on that is 3.0 CFS at Warm
2 Springs West.

3 This means that the vast majority of the water users
4 in the Lower White River Flow System and the State Engineer
5 himself lack any protection against take liability. And the
6 parties that I mentioned have protection only insofar as they
7 conduct these specific actions. So we're talking about, you
8 know, specific water withdrawals within the system.

9 THE COURT: Of that particular entity.

10 MR. LAKE: Yeah. One or two wells. I mean, Coyote
11 Springs Valley is two wells. Lincoln Vidler is one well.

12 Any expansion on that is going to require more
13 consultation.

14 And you have all of these -- you have 40,000 -- this
15 adds up to -- I'm going to try to do math again. So I'm sorry.
16 You know, this is about a little under 10,000 acre-feet I think
17 in total. I could be wrong about that, but my point is that
18 it's less than 40,000, and that's the amount of rights that are
19 out there. So the idea that take could occur is not remote
20 here, and the State Engineer was correct to realize that.

21 We've talked about hydrology quite a bit, but I would
22 just like to reiterate and remind the Court about the testimony
23 that I read off from Fish and Wildlife Service that, you know,
24 this is well established in the record. And what certain
25 parties are asking here is that the State Engineer just bury

1 his head in the sand, and an argument has been made even that,
2 well, there's no evidence for take in the record, but that's a
3 different -- I mean, there is evidence for take in the record.
4 But that's really a different question.

5 What's being addressed in the briefing I think is the
6 question of proving liability for take. I mean, this is the
7 standard that comes into play when you go to federal court, and
8 you say, you know, this person has taken an endangered species,
9 and this is the burden you have to meet to prove that in that
10 specific case. It's a different question from whether there is
11 potential liability. It's like, you know, we said earlier
12 there's a difference between showing that death occurred and
13 then somebody committed murder, and I think we've shown that a
14 death can occur here, you know, quite easily.

15 And then some people are running in here and saying,
16 well, we should completely disregard that because no one has
17 proven that, you know, no one has been convicted of murder yet.
18 We don't need somebody to be convicted of murder for this to be
19 acknowledged. The State Engineer, you know, does not need to
20 be sued for take in order to realize the impacts on this fish.

21 I'd also like to talk about briefly the public trust
22 doctrine and how that plays into this.

23 The State Engineer has an ongoing duty to consider
24 the public trust because water rights are, and this is provided
25 in the statute. This is NRS 533.025, all underground waters

1 both in the boundaries of the State belong to the public. They
2 are also subject to all existing rights. I think this statute
3 really encapsulates the two immovable obstacles that we
4 encounter in this case that require the reduction of pumping.
5 Public ownership and the existing rights.

6 The ESA issue, of course, relates to public
7 ownership, and Mr. Taggart has discussed the Mineral County
8 case. And I'm not going to go back into the statutes --

9 THE COURT: You're talking about the most recent one?

10 MR. LAKE: The most recent one, right, and this is
11 where the Nevada Supreme Court said the public trust doctrine
12 applies. What the Nevada Supreme Court also said in that case
13 is that the public trust, like the State and Nevada water
14 statutes are consistent with the public trust doctrine. So
15 they looked at the statutes, and they said, you know, the State
16 Engineer already has an obligation to look at the public
17 interest. Therefore we don't need to graft on, at least in
18 those circumstances, they did not need to graft on any
19 additional common law requirements. They said the statutes
20 already provide for the public interest.

21 And if we were to take the very narrow analysis that
22 some parties are urging here, looking at each statute
23 individually as if it doesn't relate to the other statutes,
24 then that decision doesn't make any sense. We've talked a lot
25 about how science is evolving, and that was something that did

1 come up in the Walker Lake case too.

2 Science is evolving, and if -- just like a conflict
3 with existing rights, if a particular appropriation turns out
4 not to be in the public interest later on down the road, well,
5 that kind of implies that -- and the State Engineer can't do
6 anything about it. So if that's the case, that implies that
7 there really isn't adequate protection for the public trust
8 doctrine in Nevada water statutes. And you can see that very
9 starkly in this case.

10 If the State Engineer is powerless to address the
11 overappropriation we're seeing here, I mean, you're cutting off
12 the supply of water to the dace. You're also cutting off the
13 supply of water to the only communities, the only businesses
14 that depend on Lower White River Flow System water, you know,
15 the communities in the Moapa Valley, the farms in the Moapa
16 Valley, the water rights holders under the Muddy River Decree.
17 That's what happens if the State Engineer can't manage the
18 system.

19 You know, putting aside all of the technical
20 discussion about how exactly this is accomplished, this is
21 something that, you know, if the public interest means anything
22 in Nevada, if the public trust means anything in Nevada, this
23 is something that needs to be safeguarded.

24 I would like to briefly address something that came
25 up in the last argument. Counsel for Coyote Springs mentioned

1 that there is an amount of water that doesn't affect the dace.
2 That evidence was presented to the State Engineer. That
3 evidence is based on geologic studies and an analysis of
4 basically precipitation induced recharge in the sheep range.
5 This is basically somebody trying to decide of all the rain
6 that falls in the sheep range, how much of it infiltrates and
7 actually gets into the carbon aquifer.

8 I'm not going to go into the details of that, I'll
9 just note that several parties raised substantial concerns with
10 the methodology employed in that analysis, both the geologic
11 study and the implications drawn from it and the precipitation
12 study. You know, to put it in greatly simplified terms, and
13 I'm sure --

14 THE COURT: Oh, no, simplify it.

15 MR. LAKE: Well, if Dr. Myers were here, he'd
16 probably yell at me, but the precipitation map just didn't
17 apply to the situation that they were using it for. So this
18 precipitation map has to be used with one particular kind of an
19 analysis on one particular scale, and that wasn't done here.
20 And several hydrologists testified at the hearing that if you
21 don't, you know, if you don't match up this precipitation map
22 with these other methodologies, it's useless.

23 There was also questioning of like if there's a fault
24 at a particular location, that doesn't show a boundary. There
25 are faults all over the place in the Lower White River Flow

1 System. Some of them, like the Pahranaगत shear zone that
2 Mr. Taggart mentioned, are boundaries. Others, like the faults
3 at the mouth of Kane Springs Valley aren't. Water flows
4 through them. Water can flow. You know, you see impacts on
5 either side. I think that's the real test here.

6 Yeah, there's faults, but, you know, the issue is,
7 like if you pump at a well at Location A, and Location B is on
8 the other side of the fault, are you seeing an impact from that
9 pumping? Are you seeing a response? And you did. You saw
10 responses throughout Coyote Springs Valley. And that was used
11 to refute the analysis that there's some amount of water that's
12 bypassing the Springs and doesn't affect the dace. The State
13 Engineer took that into account. It's within his bailiwick of
14 technical expertise, and that should not be disturbed.

15 And I believe that is all I have.

16 My next topic is Kane Springs Valley. I feel like
17 that's been covered, as they said, ad nauseam. I'll address a
18 few points. This is also briefed. So I don't think I need to
19 go into it into much detail.

20 First I'd like to address this issue of the hydraulic
21 gradient or the hydraulic head.

22 Oh, sorry, I missed something. I'm going to kind of
23 backtrack. I'm sorry.

24 THE COURT: That's okay.

25 MR. LAKE: With the -- with some amount of water

1 bypassing, I think it's important to recognize that what we
2 also saw with the pumping test is this idea that pumping lowers
3 the water level, and that's the important part. I mean, that's
4 important because for various reasons, and again our
5 hydrologists would shout at me for simplifying this much, but
6 it's the level that matters, not where water may be flowing at
7 any particular location. So it's basically the bucket analogy
8 again.

9 If you look at the Lower White River Flow System like
10 a bucket, and I'll admit it's not a bucket, but it has some
11 things in common with a bucket, and one of those things is that
12 you have a spout, that spout is the Muddy River Springs, and if
13 the Lower White River Flow System is a bucket, and the Springs
14 are a spout, the spout's at the top. At least the Pederson
15 Springs and then the Springs that are especially important to
16 the Moapa dace are at the top.

17 So water might be swirling around in the bucket in
18 various ways, but the important part is when is water going to
19 stop flowing out of the spout. And you could pump -- I mean,
20 there might be -- and this is a 50,000 acre-foot bucket. But
21 like we saw in the pumping test, like you don't have to pump
22 that amount of acre-feet to make the spout go dry. You just
23 have to make the water level decrease so much that it's below
24 the spout. And, you know, we know that that's -- I mean, from
25 the data now, we know that that's less than 8,000.

1 So I think talking about the water budget and the
2 possibility that there might be some internal heterogeneity in
3 the system is a distraction, at least as far as the dace is
4 concerned. Because the question that the State Engineer asked
5 and that was answered at the hearing is what are the impacts,
6 and the impacts on the Springs are stark.

7 And moving on to Kane Springs, I think first -- the
8 first bit of evidence that's being introduced or being
9 discussed to exclude Kane Springs is the idea of a hydraulic
10 head or a hydraulic gradient. And this is -- Ms. Peterson
11 talked about this yesterday. You know, you go from that well
12 that Lincoln and Vidler have at the boundary at Kane Springs
13 Valley, and you go to basically Central Coyote Springs Valley
14 where --

15 THE COURT: You're talking about the 6,000-foot
16 difference?

17 MR. LAKE: No. I'm talking about the 60-foot
18 difference.

19 THE COURT: Okay. Oh, is it 60 feet?

20 MR. LAKE: Yeah. Well, there's a 60-foot difference.

21 THE COURT: Oh, 60 feet.

22 MR. LAKE: And that's drawing a line from Kane
23 Springs Valley to like Central Coyote Springs Valley. It's
24 actually bypassing the monitoring -- the CSVM-4 monitoring well
25 that's in Northern Coyote Springs Valley.

1 Now, the difference in elevation between those two
2 wells so that the top level of water -- and that's the
3 important part again. This is like the top of the bucket.
4 This is the top of the water in the bucket. The difference
5 between those two locations is 5.5 feet, and that was shown in
6 the hydrograph that Lincoln and Vidler put up yesterday showing
7 the two responses. That slide was introduced to discuss the
8 issue with the transducer.

9 But if you go back to that slide and look at it, and
10 unfortunately I don't have a copy that I can put up, but if you
11 go back up to that slide and look at it, the scale on that
12 shows you the difference between elevations, and it's 5 feet.
13 That's a 55-foot difference over several miles. I think it's
14 over 2 miles.

15 THE COURT: Okay. I think you need you to explain
16 that to me one more time.

17 MR. LAKE: Okay.

18 THE COURT: So there's a 60-foot difference between
19 the water lines.

20 MR. LAKE: So there's a -- I'm going to use a visual
21 here, and I'm going to try to describe as well as I can for the
22 record what I'm doing with this piece of paper.

23 But the slope is like this. It's --

24 THE COURT: So you're holding a piece of paper at
25 like a slopy angle.

1 MR. DOTSON: Does this work?

2 (Pause in the proceedings.)

3 MR. LAKE: So it's basically you see that the aquifer
4 is flat, essentially flat.

5 THE COURT: Okay.

6 MR. LAKE: And throughout a lot of its extent, and
7 we're talking about, you know, especially in Coyote Springs
8 Valley and the Muddy River Springs area you see this
9 anomalously flat surface, and that's not normal in groundwater.
10 Groundwater usually slopes a little bit one way or the other.

11 THE COURT: Because it has to flow somewhere.

12 MR. LAKE: Yeah. Sometimes a lot. Like in the case
13 of the Pahranaगत shear zone, you have thousands of feet of
14 difference.

15 But what you're seeing in between, I would say
16 Central Coyote Springs Valley, sort of in the vicinity of where
17 the development would be, going north and east from there, so
18 I'm -- I'm going to use the State Engineer's map here for this.

19 THE COURT: Okay.

20 MR. LAKE: I'll stand over there so everybody can
21 see.

22 THE COURT: Okay. Can you hear him?

23 We just still need to make sure that we can hear.

24 (Pause in the proceedings.)

25 MR. LAKE: Okay. Thank you.

1 This central part, so CSI-4, MX-5, CSVN-1, this is
2 the flat, the anomalously flat part. Now, you have the slope
3 increases here in Northern Coyote Springs Valley trending
4 towards Kane Springs Valley. So you start to see the increase
5 in slope around here. It continues through CSVN-4.

6 THE COURT: And let me be clear. When you're talking
7 about slope, are you talking about slope in the aquifer? Are
8 you talking about slope in the land above?

9 MR. LAKE: In the aquifer.

10 THE COURT: Okay. Thank you.

11 MR. LAKE: So this is the difference. So when you
12 drill the well, this is the difference in groundwater level at
13 the top, like the top water level of the well, the top of the
14 water. It's the elevation of that surface, and that's actually
15 also what you're seeing in all these hydrographs except for the
16 spring flow ones. Like, these blue lines, that's what's also
17 being represented.

18 I think we can put this down now. Thanks.

19 THE COURT: Okay. So are you -- so then as it moves
20 north, this aquifer or the top of the aquifer basically starts
21 to slope up (indiscernible)?

22 MR. LAKE: It starts to slope, but not very much.

23 THE COURT: Okay.

24 MR. LAKE: And that's what I wanted to talk about.
25 So between CSVN-4 and Coyote Springs Valley and KMW-1 -- that's

1 about a 2-mile difference -- there's a 5.5-foot slope. Now
2 that's more slope than you see in Central Coyote Springs
3 Valley, but it's still like -- I think it was Dr. Felling
4 who -- or Mr. Felling who testified. It's still very flat.

5 So the actual slope, you know, when you look at
6 5.5 feet over 2 miles, and this is in the record at Record on
7 Appeal 707 and also at 34534. The slope is 0.00042, and that's
8 why people are saying it's flat, because it's barely anything.
9 And that very, you know, flat surface is one indication that
10 there's a hydraulic connection here. And as many people have
11 already discussed, another indication is that pumping test
12 impacts were observed at that KMW-1 well. So we saw pumping
13 test impacts in Kane Springs.

14 This means that even if there is a fault structure
15 there, and there could be, the evidence was inconclusive. The
16 State Engineer acknowledged that in Order 1309. It's not
17 acting as a barrier. You have these two very indicative
18 phenomenon where water is flowing, and water is at the same
19 level. And that shows that there's a connection. And by
20 connection it means a connection that could lead to impacts in
21 one of the other basins. And because that's the important part
22 here. Lowering water levels, lowering spring flows.

23 The Fish and Wildlife Service actually -- and State
24 Engineer both acknowledged this when Lincoln and Vidler applied
25 for their water rights in Kane Springs Valley. Ruling 5712 --

1 and this has also been discussed -- acknowledges the close
2 hydrologic connection. It discusses how Lincoln and Vidler's
3 pumping test suggests that impacts would radiate across the
4 supposed boundary between the basins.

5 Fish and Wildlife Service agreed, and that's why you
6 have an incidental take statement issued in conjunction with
7 that project. Because Fish and Wildlife Services analysis
8 concluded that, yes, you know, pumping has a high likelihood of
9 causing take of the dace. Pumping in Kane Springs has a high
10 likelihood of causing take of the dace. So Lincoln and Vidler
11 need an incidental take statement.

12 And that's really -- that's really the extent of what
13 I think I can talk about without being completely redundant.

14 So if there are no further questions, I will
15 conclude.

16 THE COURT: Okay. Perfect timing. That's great.
17 We're almost straight up at noon.

18 Okay. So thank you.

19 So at this point, why don't we break for lunch. Back
20 at 1:00.

21 Just so I am clear on the order of who's next, I've
22 got Muddy Valley, Lincoln Pacific and then Lincoln Vidler. So
23 you guys are up in the afternoon. And then if we still have
24 some time, I guess we'll start going into the replies.

25 (Proceedings recessed at 11:57 a.m., until 1:00 p.m.)

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ARGUMENT FOR MUDDY VALLEY IRRIGATION COMPANY

MR. DOTSON: Good afternoon, Your Honor. Rob Dotson again, along with Steve King on behalf of Muddy Valley Irrigation Company.

And this is -- well, just some housekeeping items first. I will get a printout of this to provide to your clerk, and then also what I have instructed have happen with my staff in Reno and I hope has happened, is to file a notice with just the slides, not my notes that -- my little cheat sheet portion into the record for my opening. And I will do the same thing for this, and then for my reply presentation, as well, assuming that I have a PowerPoint for that, which I plan on having.

THE COURT: Okay.

MR. DOTSON: So as I already described in our little discussion earlier, this is my opportunity on behalf of the irrigation company to address the issues that -- where we support the Order 1309. And as I think we made clear in our opening, in our briefs, and I think throughout our briefs, in fact, is that we're seeking a remand, only a portion. Really, it's in, like, two paragraphs and the supporting documents of 1309.

There's a lot of things about 1309 that we agree with and, in fact, our problem is really that some of 1309, to us, doesn't seem consistent with that -- those particular offending paragraphs.

1 So it is our position that certain portions of 1309
2 should be maintained and affirmed. And in fact, I think you'll
3 recall in my opening discussion, I kind of -- baited maybe
4 isn't -- is too strong of a term, the State Engineer to try to
5 suggest, hey, maybe we can get a stipulation out of them,
6 and -- but we didn't quite get that, Your Honor.

7 But what we did is a statement that, if you do choose
8 to remand, that they would request that you simply strike that
9 element, right. Or if you should -- or instead of remanding,
10 I'm sorry, I misstated it.

11 Instead of remanding, simply strike --

12 THE COURT: Oh, that I would strike it.

13 MR. DOTSON: -- that element. That's what I
14 understood to be the statement.

15 Now, this is also a time for me to do a little
16 mea culpa. Because unlike Mr. Taggart and some of the other
17 people in this room that have made their lives in water law, I
18 am not a water law lawyer and I will admit that freely and
19 openly. I'm a -- I'm a country litigator who moved to Reno to
20 ski for a few years in 1994 and, I don't know, I lost track of
21 time. And so, that's me.

22 But I -- and I have learned as I've listened, in
23 particular to Vidler's arguments yesterday, that I had some
24 misunderstanding that I want to correct. And I think it's
25 understandable, my misunderstandings, but -- and I think that

1 some of the things I have heard from the Court might indicate
2 that you have some of those same misunderstandings.

3 THE COURT: Could be.

4 MR. DOTSON: And so I want to talk about some of
5 those issues as -- and those would mostly be at the end of the
6 presentation. But as I go through it, I'll be discussing some
7 of those things.

8 So in support of the State Engineer's Order 1309, we
9 agree that there has to be a designation and a management
10 conjunctively, jointly, both, likely. Because I've learned a
11 little bit about those statements and that I think that that
12 nomenclature in the state law, the delineation or the
13 designation of a basin, are things that those words do matter
14 and they're similar enough that it's easy to become confused.
15 And in fact, I think that sometimes the State Engineer uses it
16 and it doesn't necessarily mean the term of art that they mean.

17 And one of the things that as I was -- so I also
18 wasn't at the hearing that we've been talking about. I --
19 first thing I filed in this thing was the petition for judicial
20 review. But I looked through all the record, and one of the
21 issues we're going to talk about is something that I didn't see
22 in the record but I've heard over the last few days and I want
23 to bring out.

24 And this is that first point: I said -- we said,
25 Muddy Valley Irrigation Company said in its answering brief in

1 support of this that no party has the right to challenge the
2 creation of the Lower White River Flow System. And I'll talk
3 about majorly four categories and I am going to go through
4 those right now.

5 And the reason for that was that because I didn't
6 think it was still timely. Because I thought that's what 1303
7 did. And I said that because in the very first paragraph, the
8 recitals -- and the thing about water law, that my observation
9 may be incorrect, is that they -- they rely -- they do a lot of
10 recitals. And sometimes in contract, recitals mean very
11 little, right. It's just a waste of -- these are the parties
12 and this is what this is about. And other times, there's huge
13 fights over recitals.

14 But in this instance, I think that there's a lot of
15 important stuff that come out of the recitals in the orders in
16 this case and we're going to spend some time with those.

17 But the very first recital at page 70 of the record
18 is,

19 Whereas, the purpose of this interim order
20 is to designate a multi-basin area known to
21 share a close hydrologic connection as a joint
22 administrative unit which shall be known as the
23 Lower White River Flow System.

24 Well, I read that and I understood that to mean that
25 this was a 534.030 designation of this entire area that we were

1 now discussing, and then everybody who showed up at the hearing
2 then knew that that was the designation. If you read on, on
3 the next page it goes through each of the basins and it points
4 out when those were designated, which was also a head-fake for
5 me, Your Honor. Because I'm, like, okay, now they're using the
6 term of art and we're talking about this Lower White River Flow
7 System and it includes Kane Springs, at least that's what's in
8 my head.

9 I think based upon what Vidler said and what the
10 State Engineer said, my understanding was incorrect. There's
11 no 534.030 designation for Kane Springs. And to the extent my
12 briefs would suggest otherwise -- and I think fortunately just
13 because of loose language it doesn't really say that otherwise,
14 but I'll tell you that's what I was thinking when I drafted it.
15 And so if it reads that way, that's wrong.

16 But all of the powers and rights of the State
17 Engineer to the initial toolbox, as it's been called, to
18 address and secure and protect and exercise its rights, protect
19 the public policy under 534.020 apply at least to those other
20 basins, everything except King Sprains, and maybe not including
21 that area of the Black Mountains too. I guess that's up to you
22 to figure out. But as I'm speaking now, I'm recognizing that.

23 However, as to everybody else, 1303 -- 1303 told them
24 in the first paragraph what we were doing, right. And then it
25 keeps going on and it tells them what they were doing. And so

1 to suggest that this was new, they should have appealed 1303
2 and there should have been a petition for judicial review, in
3 my answering brief --

4 THE COURT: So let me ask you -- oh, so let me ask
5 you. So I had the question --

6 MR. DOTSON: Yeah. Go ahead.

7 THE COURT: -- yesterday --

8 MR. DOTSON: That's what I was getting to --

9 THE COURT: Oh, okay.

10 MR. DOTSON: -- that question.

11 THE COURT: All right. That's fine.

12 MR. DOTSON: Yeah. But go ahead and ask it. You
13 asked was --

14 THE COURT: Well, I mean the question is --

15 MR. DOTSON: Can you repeal a petition for judicial
16 review.

17 THE COURT: Well, no, no. The question is can you
18 appeal an --

19 MR. DOTSON: I'm sorry --

20 THE COURT: -- interim order.

21 MR. DOTSON: An interim order. That's the question.

22 THE COURT: Right.

23 MR. DOTSON: Well, I would have said yes and I
24 thought that's what it said earlier. But earlier in the -- was
25 it Monday, I think I heard Coyote Springs say they did appeal

1 it. I must have missed this in the order, and that there was a
2 settlement.

3 And so that's something that I just want to be very
4 candid about. Because in my answer, and I think others might
5 be able -- I'm happy to yield the floor to counsel --

6 MR. ROBINSON: Okay.

7 MR. DOTSON: -- if he wants to answer that
8 question --

9 MR. ROBINSON: Yeah.

10 MR. DOTSON: -- for us --

11 THE COURT: Sure.

12 MR. DOTSON: -- just because in the interest of
13 being -- he can use my time.

14 THE COURT: Sure.

15 MR. DOTSON: In the interest of being clear about it.
16 Because I said no party appealed and they're forever barred --

17 MR. ROBINSON: Okay.

18 MR. DOTSON: -- from that.

19 MR. ROBINSON: Mr. Dotson is thoroughly confused.

20 THE COURT: Okay.

21 MR. DOTSON: All right. I may be.

22 MR. ROBINSON: I think we can stipulate to that.

23 First moratorium shutdown of Coyote Springs was the May 16th,
24 2018 letter. We challenged that in a petition for judicial
25 review.

1 THE COURT: Okay.

2 MR. ROBINSON: That case was settled in August of
3 2018. 1303 came out in January, I believe, of 2019.

4 THE COURT: Okay.

5 MR. ROBINSON: We challenged that. We filed a
6 petition for judicial review.

7 THE COURT: Okay.

8 MR. ROBINSON: And the State Engineer was a
9 respondent. We did a lot of briefing. And by the time we got
10 to decide various motions, the 1309 hearing was two weeks away
11 and we agreed to stay the petition for judicial review of 1303.

12 THE COURT: So where is that?

13 MR. DOTSON: Yeah.

14 MR. ROBINSON: 1303 has been rescinded. And so that
15 case is gone.

16 THE COURT: Oh, so it made it moot.

17 MR. ROBINSON: Yes.

18 MR. DOTSON: All right. All right. So I -- I
19 think -- I think that makes me right and not confused, by the
20 way, Your Honor.

21 THE COURT: Okay.

22 MR. DOTSON: And so let me keep talking through this
23 because now, now we're at the same place I was at about 10:30
24 last night in my hotel room and -- which is okay.

25 So I was wrong when I said no party had -- had filed

1 a petition for review. And I didn't see that in the record,
2 candidly. It may be here, but it may have also just failed to
3 show up.

4 And so I think that proves that you can file a
5 petition for -- for judicial review of an interim order, and I
6 don't see why you wouldn't when it does what this does. And
7 that I'm not sure what effect that has, because contrary to
8 what my colleague just said, I would disagree that 1309
9 rescinds that portion of 1303.

10 Because here's what 1309 says on the record at
11 page 67. It says --

12 THE COURT: Wait, let me --

13 MR. DOTSON: -- in Number 6 --

14 THE COURT: Let me just clarify.

15 MR. DOTSON: Sure. Go ahead.

16 THE COURT: Really quickly.

17 MR. DOTSON: Yeah.

18 THE COURT: So Mr. Robinson.

19 MR. ROBINSON: Yes, ma'am.

20 THE COURT: On the -- of the petition for judicial
21 review on 1303, was the issue whether or not the Nevada State
22 Engineer has the authority to jointly manage or conjunctively
23 manage?

24 MR. ROBINSON: All of the above.

25 THE COURT: Okay.

1 MR. DOTSON: So page 67 of the order, page 66 -- or
2 66 of the order, page 67 of the decree -- or of the record
3 says: All other matters set forth in the interim 1303 that are
4 not specifically addressed herein are hereby rescinded.

5 Well, this issue is specifically addressed in 1309.
6 And so I don't think that sentence can be argued to rescind
7 1303. It doesn't because it is addressed in 1309. And so I
8 question the timeliness of -- of the -- and the ability to
9 raise an objection to the Lower White River Flow System, and
10 that's a technical argument.

11 Sometimes people call those --

12 THE COURT: Well, that's a technical legal argument.

13 MR. DOTSON: It's a technical legal argument --

14 THE COURT: Yeah. It is. Sure.

15 MR. DOTSON: -- that has to be determined *de novo*.
16 And because I have a terrible poker face, I'm anything -- I got
17 to be transparent because I just can't -- I used to
18 cross-examine witnesses walking away from them.

19 So I wanted to raise it to Your Honor because I got
20 two hours and 56 minutes. I'm not going to need it all.
21 Because I could see that there was some confusion here. And I
22 appreciate Counsel's statements so that we can get the record
23 at least as straight --

24 THE COURT: Let me --

25 MR. DOTSON: -- as we can.

1 THE COURT: Let me clarify it. Is any of that in the
2 record on appeal?

3 MR. ROBINSON: Yes. It's in our petition. It's in
4 our briefs and --

5 THE COURT: No. I mean the petition for a judicial
6 review of 1303.

7 MR. ROBINSON: Yes.

8 THE COURT: Okay. All right. I just want to make
9 sure.

10 MR. ROBINSON: He hasn't read our petition, nor has
11 he read our briefs.

12 THE COURT: Wait, did --

13 MR. TAGGART: Your Honor, I thought that that was
14 offered and it wasn't allowed based on a motion to strike.

15 MR. BOLOTIN: And there was certain -- I'd have to go
16 back and look at the record --

17 MR. DOTSON: Let's put on the record who is speaking,
18 please, so we get this --

19 THE COURT: Yes. Sorry, yes.

20 MR. BOLOTIN: This is James Bolotin, Deputy Attorney
21 General for the State Engineer.

22 There was certain parts related to 1303 were in the
23 record obviously.

24 MR. DOTSON: Sure.

25 MR. BOLOTIN: But then there were certain documents

1 that CSI did not introduce during the administrative process
2 and they sought to do a request for judicial notice, I believe,
3 with their opening brief.

4 THE COURT: Right.

5 MR. BOLOTIN: And we opposed the judicial notice
6 because --

7 THE COURT: It was outside the record.

8 MR. BOLOTIN: -- they had a chance to put it in the
9 record and it wasn't in the record.

10 THE COURT: Okay. All right. Well, I'll look
11 through the record just to make sure.

12 MR. DOTSON: And it's a big record, so --

13 THE COURT: Oh, yeah.

14 MR. DOTSON: So let's get to the second point.
15 Because here's the good news, Your Honor. I don't think you
16 actually have to find -- as with -- as with many things in the
17 law, you get to the same result on multiple paths. And I think
18 the path is that the designation on the management --
19 designation of that management area, the Lower White River Flow
20 System, can be upheld.

21 And although this would be a highly technical --
22 well, maybe not highly technical, a technical basis to reject
23 their petitions, those who would challenge this issue, I think
24 it is a valid one.

25 The next issue on this point is, I think the State

1 Engineer -- we think State Engineer possesses the legal
2 authority to create and manage the Lower White River Flow
3 System as a single basin made up of various sub-basins.

4 Third, that the creation of the Lower White River
5 Flow System is based on substantial evidence.

6 And fourth, that the creation and management of the
7 Lower White River Flow System makes just logical sense. It
8 works. Sometimes, and we've -- I talked about this in my
9 opening. And this is -- this -- this is where I'm going to use
10 the same common sense argument that, and the power of the
11 court, to enforce its decree for this point as well. And that
12 was the argument I used against the State Engineer on the
13 amount of flow in the Muddy River and allowing a huge reduction
14 while still finding that not to conflict with the decree.

15 I think you can use the logic of the decree and, just
16 like the jury instruction that says that our jurors can --
17 don't have to check their common sense at the door, neither
18 does -- do the judges, especially when it's the decree court
19 who's ruling on the decree and enforcing it.

20 So getting to that first point, the time to challenge
21 the creation of the joint management of the Lower White River
22 Flow System has long passed. Now, maybe it's already been
23 challenged. Maybe it's in some other court. I don't know.

24 But it is clear, this I do know, because even though
25 I'm not a water law specialist, I take -- I took the CLEs when

1 I first started getting involved in this and -- and I can read
2 statutes.

3 And as the Supreme Court justice who is my father's
4 former law partner who swore my wife and I in Iowa said, you
5 know, Rob, the advice I give was read the stuff that it's about
6 and you can do most anything because if it's too complicated,
7 we can't really enforce it at the Supreme Court. And I think
8 that was pretty good advice that's worked pretty well for me
9 since '94.

10 And we read a lot -- what this Court needs to do is
11 really look at the cases and look at the statutes and think
12 about those things. And I think there's, you know -- there's
13 some science overlay, but those are just facts just like facts
14 in any other case. And most of what you're going to be doing
15 is applying law.

16 This statute 533.4 -- or 450, mostly dyslexic,
17 requires a party to seek judicial review of any order or
18 decision of the State Engineer within 30 days. I said in my
19 briefs nobody did it because that's what I thought. Even if
20 they did, it sounds like it at least hasn't been pursued. It
21 may be stale. It may have been dismissed. I don't know. If
22 it was dismissed, then this technical situation still exists
23 and it's an impediment to those who are challenging this, so at
24 least those that were included within that 1303 order.

25 Based upon the record that I saw, it does -- didn't

1 appear that any party had sought review within that period of
2 time. But I will concede, and so that's why I put it in the
3 slide, that the oral argument in -- before Your Honor this week
4 has indicated to the contrary. And obviously, we've had a
5 representation to the contrary.

6 Order 1303 remains in full force and effect regarding
7 the creation and management of the Lower White River Flow
8 System. And that would be my reading unless there's a petition
9 for judicial review someplace else in this building.

10 Okay. But you know what, this is the -- 1309 did not
11 create the Lower White River Flow System. In fact, even to the
12 extent that 1303 has the words that I described, I don't think
13 that makes sense because -- and I'm actually -- because I have
14 so much time and we're a little ahead, I'm actually going to
15 take some time to look at 1169.

16 Because in my opening and in some of the discussion
17 by the State Engineer and some of the things that SNWA has
18 argued, there has been the contention that this is not a new
19 thing, and it's not. If you look at 1169, we're going to --
20 actually going to look at this quote, it warns that development
21 of the carbonate water is risky and effects may be disastrous
22 for developers and current users.

23 So I'm going to switch here. It's not what I
24 intended to do. This is 1169. This was entered in 2002 before
25 I ever did anything in the water law. But look at the very

1 first sentence: Holding in abeyance the carbonate-rock aquifer
2 system groundwater applications.

3 This -- so 1303, or the letter that counsel
4 referenced, which as we've heard discussion about actually this
5 week, that's not the first time things were -- the brakes were
6 pumped in this aquifer system. Not at all.

7 And I want to actually take the time to go through a
8 few other things. So -- all right. So here are all these
9 recitals.

10 THE COURT: And this is slide?

11 MR. DOTSON: This is not a slide.

12 THE COURT: Oh.

13 MR. DOTSON: This is from the actual amended --

14 THE COURT: Order itself.

15 MR. DOTSON: -- record, which I have a little
16 complaint about because it's so monstrous, it's really clunky.
17 But this is the record on appeal at page 659. And so I
18 literally have just loaded the amended record onto -- that's
19 what's on the -- on this -- in front of you, actually.

20 So at the end of the first page we've got a -- the
21 first recital that's kind of interesting. In 1984, the Water
22 Resources Division of the United States Department of Interior,
23 Geologic Survey, proposed a 10-year investigation of the entire
24 Carbonate Terrane, I don't know if it's terrane or terrain --

25 THE COURT: Terrain?

1 MR. DOTSON: Maybe that's a fancy way of spelling
2 terrain, which includes the carbonate-rock aquifers of the
3 areas referenced above. This study was proposed because the
4 water resources of Carbonate Terrane were not well-defined.
5 The hydrology and geology of the area are complex and the data
6 was sparse. And it cites to this -- let me get farther, lower
7 here. Sorry. It cites to this memorandum, August 3rd, 1984
8 from Terry Kaiser -- or Katzer, Nevada Office Chief, Water
9 Resources Division.

10 Well, that's going to become pretty important because
11 look at this next recital: Whereas, it has been known since
12 1984 that to arrive at some reasonable understanding of the
13 carbonate-rock aquifer system, substantial amounts of money
14 would be required to develop the science. A significant period
15 of study would be required and that, unless this understanding
16 is reached, the development of carbonate water is risky and the
17 resultant effects maybe be disastrous for the developers and
18 current users.

19 My client was one of those current users that is
20 referenced in this order. This is a coming straight from 1169,
21 Your Honor. And this is 2002 that this is happening and it's
22 quoting something from 1984. I was still in high school in
23 1984.

24 These are all -- this is a whole list that Engineer
25 Ricci put in of challenges, and I'm not going to go through

1 them all, because even if I've got 2 hours and 46 minutes, we
2 all know we don't want to hear me talk that long.

3 But there is -- one of these that stuck out was the
4 fact that there was no significant historical pumping of
5 groundwater from the carbonate-rock aquifer system. The
6 groundwater models can only be used as a limited predictive
7 tool for estimating the principal location and magnitude of the
8 impacts of pumping groundwater from the system.

9 One of the takeaways that you're going to see as you
10 review this, and we're going to look at some of them, is they
11 thought there was a lot of water that could be pumped without
12 doing much. Otherwise, obviously, none of the things that
13 happened would have happened.

14 And but they recognized even then, the relationship
15 between geothermal systems, the hot springs that we're talking
16 about that are in the headwaters to the Muddy River, and the
17 deep carbonate-rock aquifers in groundwater flow systems is not
18 well understood.

19 So everybody knew they were on maybe thin ice as they
20 were making these applications. And there were hundreds of --
21 well, I guess it would be thousands of acre-feet of
22 applications that were held in abeyance by this order. And
23 we've heard, it's in the record, it's in this document in
24 reference.

25 Now we're down to page 3 of the order, and this is

1 record on appeal 661: Because assurances that the adverse
2 effects of development will not overshadow the benefits -- all
3 right. Will not overshadow, the benefits cannot be made with a
4 high degree of confidence. The development of the
5 carbonate-rock aquifer system must be undertaken in gradual
6 stages, together with adequate monitoring in order to predict
7 through the use of a calibrated model the effects of the
8 continued or increased development with a high degree of
9 confidence.

10 And obviously, this is all leading up to the State
11 Engineer at that time, Hugh Ricci's thought that, well, we've
12 got to finally get some pumping done because we've granted
13 thousands of acre-feet of water and we really don't know how
14 this carbonate-rock aquifer thing is going to work.

15 I'm not going to read all of this, but at the end of
16 the next recital,

17 This approach would hopefully avoid the
18 havoc that could be created by the curtailment
19 of water by those who have come to rely on
20 its -- it if impacts occur requiring curtailment
21 of the water use.

22 There was reference earlier to yellow lights. Well,
23 these are red lights. This is, you got to stop. They
24 literally did stop and say we've got to get this pumping done.

25 The 1995 water resources investigation report

1 estimates the total water budget for all southern Nevada
2 aquifers from the natural recharge to the mountains and
3 subsurface inflow to the study area to be about 160,000
4 acre-feet annually, and discharges from major discharge areas
5 to be about 77,000 acre-feet annually.

6 I have this in red because it's particularly
7 important to me. Because if you go down and you look at that
8 footnote, you'll see that the discharge areas are identified as
9 Muddy River Springs, 36,000 acre-feet annually.

10 Now, you'll recall from my opening that we'll
11 compromise. We'll live with the result of this order. We're
12 not going to appeal the determination that the -- the flow
13 predevelopment was 33,000 or can be used, 33,090 can be used.
14 But you can see that even as of 2002, they were using a much
15 higher number. Which, as you review the other -- the other
16 portions of the record that I referred to, particularly S --
17 the SNWA report which is found beginning at page 41,930 of the
18 record, there were periods of time where the flow was clearly
19 higher than that. And you can make an argument that the flow
20 was clearly higher than that and I guess that's what the State
21 Engineer was saying here. But we're not -- to be clear on the
22 record, that's not part of our petition for a judicial review.

23 Importantly, and this is a concept that I think
24 Mr. Lake was discussing earlier when we were talking about
25 recharge and subsurface flow in this next recital: Whereas, it

1 is believed that all of the recharge and subsurface inflow
2 cannot be captured for use.

3 In other words, that 160,000 acre-foot number that we
4 saw up above in this whole area of southern Nevada, they were
5 recognizing that, well, we can't get it all. Plants are going
6 to use some and, you know, you just -- it's not -- you can't --
7 it's not just a -- it's not a budget where it's like my
8 checking account where it can be measured with that precision.

9 So they had a big public hearing and apparently had
10 it down here. And that's, you know, I guess interesting and
11 perhaps important because of the ability to designate. And
12 I -- I'm going to move away from this now, but the point that
13 I'm making is, going back to my PowerPoint, is that it's not
14 like 1309 in 2017, wow, look at this thing that just happened.
15 That's not what occurred. And I know SNWA had suggested, well,
16 really there's -- there was documents back from the '60s and
17 things like that. Well, these are legal actions that are being
18 taken involving the White River Flow System recognized and
19 named by basin in 2002.

20 So in January 2014, and I don't know why I did this
21 in my brief because there's this whole series of rulings that
22 come in. For some reason, I picked, like, the second one here.
23 But it had -- they all have similar language. And so this is
24 reiterating what was obviously understood apparently back, at
25 least in '84, that there is a close hydrologic connection

1 between these various sub-basins. So they're already calling
2 them sub-basins, noting -- noted that -- or actually, that's
3 me. That's my statement, sorry.

4 Noted that they share virtually all the same source
5 and supply of water. So even if they are only now recognized
6 and the nomenclature of sub-basin is used, back in 2014, it was
7 understood.

8 And that is supportive in why the State Engineer's
9 action in 1309 should not have been any surprise, with the
10 exception perhaps of Kane Springs because, obviously, it wasn't
11 included in those earlier discussions, though, I can't say what
12 was included or wasn't included in the actual record with
13 and -- and what the science was in the '80s, obviously.

14 And Vidler showed the carbonate-rock aquifer in that
15 1169 references it as well, this underlayment. But it also
16 talks about aquifers within the carbonate rock. So there seems
17 to have been, at least as of 1169, an understanding that they
18 aren't all connected.

19 Order 1303 recognized it as a joint administrative
20 unit. And then they sought input about the geographic
21 boundary. And clearly, based upon the record, it was then that
22 Kane Springs and that -- was added and that this line was
23 moved.

24 Actually, before I -- well, let's just -- let's just
25 go ahead. Go ahead.

1 So let's talk about the legal authority to do it.
2 And this is -- I kind of foreshadowed this earlier. Yeah,
3 we've heard a lot about the fact that the word basin is not
4 defined in the statute. That's really interesting. And I
5 remember figuring that out, like, in 2010 because I -- I'd
6 probably been working in this area for about a year before I
7 realized that. And -- and I keep thinking, well, it's got to
8 be someplace, but it's not.

9 And I think this -- the arguments you've heard this
10 week, Your Honor, kind of explain why. It -- it would have
11 been -- well, creating a legal construct that doesn't
12 necessarily fit within the natural world. And so having it be
13 more flexible makes the law able to be more flexible.

14 So but in this instance, we know that there is the
15 stated policy. And you've heard a lot about 533.024 and -- and
16 the policy of conjunctive management, and I talked about this
17 in our answering brief. And we discussed how, you know, you --
18 there -- we cite to some cases that this isn't just a
19 throwaway, though, either. It is guidance. The legislature
20 does provide guidance to the State Engineer here about the
21 public policy of the state. And by the way, when we get to the
22 end, it does make common sense too.

23 Now, there are some limitations put on that. And the
24 State Engineer, at least in their briefing, certainly cited to
25 this. And this is the protection of, in this instance, the

1 decreed water rights from my client and others similarly
2 situated.

3 And there has been no showing that -- that the State
4 Engineer's action isn't authorized by that, and in fact, isn't
5 even necessary for there to have been a statute. If you just
6 had a decree and you have just an enabling act that says, hey,
7 you've got to help manage these decrees -- let's pretend we had
8 a different system, right, which could happen, I suppose. And
9 the State Engineer is not awarding permits and certificates and
10 all that and it's just decreed rights. But the State Engineer
11 is kind of like a water master.

12 Well, isn't that really what he's doing here? What
13 he's doing is, he is making sure that the water that has been
14 decreed under the prior appropriation document continues to
15 flow and serve. That's what the creation of this area does.
16 Because what he's identifying is, that is the area that impacts
17 these -- this decreed water.

18 Now, there's a question about what -- how much can be
19 pupped. And on that, you know that we disagree with the State
20 Engineer about the 8,000. We disagree about the number, but we
21 don't disagree that there has to be a cap and there has to be
22 control. And in fact, it is our position that this statute and
23 the decree is what authorizes the State Engineer to take
24 whatever action is necessary to make sure that that water is
25 protected.

1 In fact, to not do so, he would have to violate that
2 statute. He would have to violate your decree. And frankly,
3 we think that's what's happened with the 8,000. But there is
4 some number of less than that that probably would be perfect
5 and would be fine.

6 Now, this comes back to my mistaken understanding.
7 534.030 allows the State Engineer to, quote, designate basins
8 and to make other describing boundaries. Now, you've been
9 focusing on that word, area. I focused on that as well in that
10 statute. Well, in that statute and in 534.020.

11 And it doesn't say that the area has to be -- it uses
12 the example in the language of within the -- the basin, but it
13 doesn't limit the -- it doesn't say it has to be within a
14 basin.

15 The State Engineer may -- and now, this is 534.020:
16 The State Engineer may make rules and regulations within an
17 area designated by him wherein his judgment the groundwater
18 basin is being depleted.

19 Well, he made the determination that all of these
20 basins, save and except Kane Springs, were designated basins.
21 And if you look at 1303 on the second page, it goes through
22 those. I'm just going to click off so I can tell what slide
23 I'm on. I am on Slide 6 now, Your Honor.

24 What's more is there is substantial evidence in the
25 record to support the creation of the White River Flow System.

1 We've talked about a lot of that already. And but what is
2 substantial evidence, that which a reasonable mind might accept
3 as adequate to support a conclusion.

4 Importantly, just because there is contrary evidence
5 doesn't mean there's not substantial evidence. It doesn't mean
6 everything would have to be -- if that were the case, we'd
7 have -- never have a decision in any court, frankly, because
8 you better not get to trial if there really is no question of
9 fact and there's no substantial evidence -- there's no evidence
10 if -- if not substantial, in a contrary position.

11 So the mere existence of a geologic study proposed by
12 Coyote Springs doesn't mean that the -- that the State Engineer
13 can't make a decision that runs contrary to that geologic
14 study. What the -- what the State Engineer has to do is, it
15 has to -- he has to or they have to look at that evidence,
16 assuming it's valid evidence, and then weigh it in the
17 decision, which that clearly did happen.

18 In this instance when you look at 1309, the -- the
19 State Engineer goes through the evidence. And it is clear,
20 based upon the conclusion and those words there, that greater
21 weight was placed on the hydrographs and the pumping and his
22 own professional judgment than the determination and the expert
23 testimony regarding, in the example I gave, the geologic
24 testimony that might separate certain areas from others.

25 He made the determination that the results of the

1 1169 aquifer test show hydrologic connection between the
2 various sub-basins. And that's a basis, in MVIC's view, and
3 provides substantial evidence that you have to create this
4 area, whether you call it a basin or you call it several basins
5 that are jointly administered and conjunctively administered as
6 well, obviously, is probably form over substance.

7 It seems to me because he -- you know, again,
8 listening to the evidence -- this wasn't really the way I
9 walked in this -- this week, but listening to the arguments and
10 listening to the -- looking at the law and considering it, if
11 in 1968 all of these basins were created by him, why would it
12 not be within his authority to say, well, these are all
13 sub-basins of one actual basin, which makes more sense
14 scientifically and logically, than to try to just figure out
15 how each of these six or seven basins works if they were
16 separately administered.

17 The test showed that pumping within one or more of
18 the sub-basins affected water levels in adjacent basins that
19 shared the same supply of water and that the level of water
20 decline encompassed 1,100 square miles.

21 So there was argument yesterday from Vidler about
22 it's only six inches, right. Six inches over 1,000 -- and some
23 places it's more than six inches, by the way. But even if it
24 were only six inches, over 1,100 miles, that's a lot of water.
25 In --

1 THE COURT: Let me just -- let me just clarify
2 something.

3 MR. DOTSON: Yeah. Sure.

4 THE COURT: So because you just said, made the
5 argument that if the -- if in 1968 the State Engineer created
6 all these basins that, you know, it would still be within his
7 authority to change the areas of these basins. My
8 understanding is that he didn't actually create that basins; is
9 that correct?

10 MR. DOTSON: That's true. I guess God created the
11 basins --

12 THE COURT: Oh.

13 MR. DOTSON: -- and -- or a supreme being, in my view
14 and that --

15 THE COURT: Well, I mean --

16 MR. DOTSON: -- and that the --

17 THE COURT: I don't mean create that way.

18 MR. DOTSON: I know.

19 THE COURT: I mean delineate.

20 MR. DOTSON: He -- he and the federal government, and
21 if you look at the -- maybe this isn't in 1169, but it is --
22 it's in something I've read recently, that the geologic -- the
23 federal government through, I think, the geologic survey in
24 conjunction with the State Engineer's office, and made a
25 determination of these areas.

1 And if you look at the map, and it's -- that's in the
2 record and I think there's one in the record that -- that
3 actually has more topography shown. You know, generally
4 speaking, what it seems like they're trying to do is they're
5 trying to pick valleys where it's a closed valley or a
6 close-to-closed valley, but most of them aren't closed valley.

7 You know, the basin that I'm most familiar with is
8 Lake Tahoe, which rests on the state line, of course, because
9 California moved the state line on us so they could steal
10 60 percent of my lake. But that is a closed basin, except for
11 where the Truckee River comes out, right. So consequently, it
12 filled up, kind of like what Mr. Taggart was saying. Well, if
13 it just keeps snowing and the water doesn't go anywhere, well
14 then it fills up. Well, that's happened there.

15 And so the State Engineer didn't create the basins,
16 either you know, metaphysically or by himself, but they did
17 work conjunctively with the federal government to identify
18 them. And doesn't that make sense.

19 Counsel for -- for Coyote Springs made an interesting
20 argument yesterday about California law, maybe it was two days
21 ago, about we -- there's a rule against segmentation in
22 California because you could make mistakes and things like
23 that. But the truth is human experience tells us that it's
24 always easier to deal with a smaller thing than a bigger thing.

25 I also found that argument interesting because that's

1 exactly what they're asking to do. He warn -- Coyote Springs
2 was warning against segmentation, but yet, they're asking this
3 Court to administrator it by each basin, which as we'll see
4 later just doesn't make logical sense.

5 Can I switch to this ELMO for a moment? Is there a
6 way to switch the -- I just turned it on. I want to talk about
7 that 6 inches.

8 THE CLERK: Did someone unplug it?

9 MR. DOTSON: Well, that -- well, it has power.

10 THE COURT: Is it --

11 THE CLERK: I noticed there was some cords, the
12 lights are on.

13 THE COURT: No. The lights are on.

14 THE CLERK: But I mean --

15 THE COURT: Is it plugged down there?

16 THE CLERK: I think there's other cords to it. I
17 have it on -- on now and it isn't --

18 MR. DOTSON: Oh, you have it on?

19 THE CLERK: -- working.

20 MR. DOTSON: I've got it on.

21 THE CLERK: We have never used it in here, so --

22 MR. DOTSON: Well, let's never mind then.

23 THE COURT: Not yet.

24 MR. DOTSON: I guess I'm not going to do this. Well,
25 I'll draw and then I'm going to try to -- and I'll hold it up

1 and then we can put it in as an exhibit if you want, if anybody
2 wants, but --

3 So you asked Counsel for Center for Biological
4 Diversity a question about water level and -- and this is why I
5 was trying to help him with this because I thought maybe
6 drawing a picture might be helpful.

7 And so -- so say that this lower line, which is
8 conveniently blue -- we'll make this red instead, the surface.
9 Let's say the red line is the surface of the earth and the blue
10 straight line below it is the water level, the water table in
11 that area. And right here, that water comes out as a spring,
12 right.

13 THE COURT: And you're pointing to a --

14 MR. DOTSON: I'm pointing to a little X I put in
15 the --

16 THE COURT: -- a midpoint where --

17 MR. DOTSON: Yeah.

18 THE COURT: Okay.

19 MR. DOTSON: On the -- on the red line. And then
20 that water, which in my hypothetical here is the Muddy River,
21 right, that water then flows down and joins with other springs
22 and that becomes the Muddy River. And that's why when we talk
23 about the elevation of the spring on the -- it's important.

24 Now, they use that term, again, because I'm
25 relatively new, in this room at least, to water law, they talk

1 about the elevation of the head. What they're talking about
2 then, I'll draw a line, is -- and I drew two parallel red
3 lines. Let's say I drill -- somebody drilled a well and the
4 head was where that water table was. That's where you first
5 hit water. That's that elevation. It's that many feet below
6 the surface, whatever. And it has an actual elevation on the
7 earth I guess, as well.

8 But the point, well, that I would make and I think
9 was trying to be made earlier is, let's say that the water
10 level is actually only six inches above that point where the
11 spring is. Once the water level goes down to -- let's take
12 this -- let's call this number one. Let's say the water level
13 goes down to point two, now there's no way for this water to
14 get up to here. It can't bump up.

15 And so that's why there's so much discussion in this
16 case, and you'll see in the record when the experts talked --
17 talk about the height and the change in the water level.
18 That's why it's a concern, especially with regard to a spring.
19 Because, you know, I don't know, maybe the water level is 10
20 feet above that spring right now. But even if there's 700 feet
21 below, if you lose 20 feet, it doesn't matter. That's the --
22 that's the concern that I think was trying to be articulated
23 there.

24 Now, so that's why six inches is still a lot of
25 water. And I think it was, you know, I think it's clear from

1 the reaction after the 1169 pump test, which wasn't as much.
2 When you read 1169 and you read how many acre-feet were
3 supposed to be pumped for two years and how many feet were --

4 THE COURT: That's much more --

5 MR. DOTSON: -- fortunately for my client, that much
6 wasn't pumped and -- and you know, I want to speak for a moment
7 about that.

8 You know, MVIC has been patient. Water law takes a
9 long time. But the record here, Your Honor, makes it clear
10 that for 30 years off and on my client has been suffering
11 injury. The pump test caused injury. But in my own mind, it's
12 kind of like I have something wrong with my knee and it's
13 actually interfering with my skiing a little bit and I won't --
14 going to probably have to have it scoped or some surgery done.

15 Now, God forbid, hopefully it doesn't result in the
16 amputation of my leg, but to my client, MVIC, they -- this is
17 all kind of the surgery to fix and cure their water right so
18 their water right gets back, right. And that pump test, as you
19 can see from all the hydrographs you've seen changed and -- and
20 it caused damage, but it was understandable damage. It was not
21 like -- it wasn't an assault on MVIC. It was in order to
22 figure this out and ultimately protect those rights.

23 And that's fine and that's the process that the State
24 Engineer was undergoing with 1169. That, I would argue, and
25 I'm suspect the -- I would argue in favor of the State

1 Engineer. I'm sure the State Engineer would say the same,
2 that's what's happening right now. That's what happened in
3 1303. That's what's happening in 1309.

4 They're trying to -- the State Engineer is trying to
5 execute his public trust obligations and not allow people to
6 too much rely on water rights that will eventually have to be
7 curtailed, because eventually my client will run out of
8 patience and we are a prior appropriation state and will say
9 no, no mas, we are done.

10 The State Engineer took a lot of other evidence that
11 was adverse to joint administration and -- but what's
12 interesting here is although there's some arguments about
13 geology and about interconnection, it's mostly a technical
14 argument that is being made.

15 And the existence, the mere existence of some factual
16 information that contradicts a vast majority of other
17 information in support of a joint area means that there is
18 substantial evidence to support it. And that his finding is
19 supported by substantial evidence.

20 Now, we're getting to the state -- the creation of
21 the Lower White River Flow System makes logical sense.

22 THE COURT: And this is slide?

23 MR. DOTSON: This is -- let's just see. Because
24 my -- I couldn't even send a printout to get a print -- this is
25 Slide 8, Your Honor.

1 So there's a few books that exist out there, and one
2 of them is this guy named James Davenport and he's referenced
3 sometimes in the law. And I think he's still alive. And this
4 is a quote from that book: Where groundwater and surface water
5 systems are interconnected, they should not be viewed as
6 separate sources in water management decisions.

7 Okay. And it's kind of like a treatise, I guess, is
8 what it is. It is a treatise on water law. And it just does
9 make common sense. If we know that there's an interconnection
10 between these water sources, and in particular in a situation
11 such as this, and this is very frequent as you've, I'm sure,
12 identified during the arguments this week, that the surface
13 water were the -- were the easiest -- that was the easiest
14 water to put to beneficial use. So of course those are the
15 oldest rights. And it's going to be true probably everywhere
16 in the state.

17 And many, if not all, of those systems -- I'm sure
18 not all, but many of those systems are decreed rights, such as
19 this. And so if you don't take into account the effect of
20 groundwater pumping on those decreed rights, you will
21 invariably violate the decree, which is where I started
22 yesterday.

23 And so to the extent that the creation of a joint
24 area for management, the Lower White River Flow System in this
25 instance, is being done by the State Engineer so that he can

1 protect those rights. He's following the law and it's making
2 common sense, given the whole purpose of that office.

3 Now, there was some discussion by Coyote Springs
4 about, well, what I care about is what happens in Basin 210.
5 Here's the problem: The water can flow from one basin to
6 another and it is undeterred. It does not care about the
7 construct of artificial lines on a map. That water molecule
8 doesn't know anything about the 232 basins that we've designed.
9 It does not care.

10 It's going to flow. And since we know that it flows
11 from these basins to each other and that that is the water that
12 eventually comes out and serves my clients, it would be
13 improper for the State Engineer to not consider that. And
14 therefore, it is proper that the State Engineer did consider
15 it.

16 Also, as much as everyone would like in this room,
17 and I'm sure we would all like it, the State Engineer, nor the
18 state, nor even you, Your Honor, can cause more water to exist
19 within the Lower White River Flow System. The amount of water
20 that is there is the amount of water that is there. And by
21 simply deciding you segment it into separate basins, six or
22 seven separate basins, and then you try to administrator it
23 within those separate basins, all you're doing is using the
24 legal construct that we've done for convenience and setting
25 yourself up for disaster.

1 You can't just administer Basin 210 and ignore the
2 other basins around it. Let's just pump all the water we can
3 out of 210 and then we'll, I guess, have all the water from the
4 other basins flowing towards it and no water coming out of the
5 Muddy River. That's why the State Engineer in Order 1169 did
6 what he did, because he realized you couldn't just do that.

7 Now, and I don't know if this is -- this is the place
8 for it, but one of the attacks that we've heard against the
9 State Engineer relates to the public trust doctrine which, in
10 my opening, I indicate is consistent with support of the
11 decree.

12 And I think I cited to and I want to just read from
13 *Mineral Country versus Lyon County*, and this is Judge Stiglich
14 speaking in the majority. And this is -- you don't have to go
15 very far into the opinion. This is on the third paragraph: We
16 further hold that the state engineers -- that the state's --
17 I'm sorry, let me start over.

18 We further hold that the state statutory water scheme
19 is consistent with the public trust doctrine by requiring the
20 State Engineer to consider the public interest when allocating
21 and administering water rights. That's from the majority.

22 So just -- I just thought -- I didn't have a really
23 good place to put that in, but that ties into the concept of --
24 and you know, we're not taking a position with regard to the
25 dace. I think it's clear that when there's water, which helps

1 my client, apparently that is great for the dace too.

2 But there's a lot of other issues here too. And the
3 public interest factor doesn't obviously just end when the
4 water right is granted. That's what that language says. It
5 continues while you administer. And that's the importance --
6 well, one of the importance -- part of the importance of that.

7 It also means in my opening, and I would suggest this
8 is supportive of the state engineers, that sometimes the State
9 Engineer and the Court has to make those tough decisions
10 because of the public trust doctrine so that we can rely upon
11 these decreed rights. And each of the junior rights that
12 took -- and I don't know how many times you're going to hear
13 this, I'm sorry, took with the understanding they got -- they
14 were granted those rights with the understanding that they were
15 less senior.

16 And as you saw from the 1169 recitals that I took the
17 time to put in front of you, it was very clear in 2002 the
18 jeopardy that existed as to how certain are these water rights
19 that we've been granting and nobody's been pumping, and how
20 important it was that, unlike some areas where you pump right
21 after you get the water right, that hadn't happened here. And
22 so he had to actually order everybody to pump so that he could
23 figure out what the reaction of the system would be.

24 Okay. A few other attacks on the State Engineer,
25 that there should be a separate administration of ground and

1 surface water. Again, I think we've -- I've already talked
2 about that. It just doesn't make logical sense, right. Not
3 only is there an encouragement of conjunctive management, but I
4 don't care where AB 51 got granted or didn't. The bottom line
5 is, he -- there's a decree that was entered in this Court in
6 1920, and that is his job to defend. And it was said, you
7 know, the -- well, I think I'll have it in here probably about
8 take the -- you know, granteth and taketh away. Maybe that's
9 what he has to do.

10 But the second argument that is being made is the
11 basin-by-basin management argument. I've already -- I've
12 already said that doesn't really seem to make sense because it
13 will result in segmentation. It will result in the very
14 disaster that was warned of in 1984 and revisited in 2002 and
15 acknowledged and tried to be prevented in Order 1303 and in
16 1309.

17 The decree was entered at a time where neither of
18 those legal constructs were memorialized in statute. And the
19 decree does not defer to either concept. You can look
20 throughout the decree, and I've already encouraged you to do so
21 because it's your court that you're enforcing. And they're not
22 limiting those -- the protection of those sources of water to,
23 as I say at the last bullet point, to the county line, to a
24 particular basin. There's no such limitation in the decree;
25 and therefore, there's no such limitation to this Court in

1 supporting the State Engineer in his efforts to protect the
2 decree. And that is a reason not to overturn that portion of
3 the decree.

4 The State Engineer was right to protect the tree --
5 the decree. The State Engineer can giveth and he can taketh
6 away. Indeed, he must. Each of these water rights that was
7 granted after 1920 -- actually, after 1905 because the 1920
8 decree refers back and identifies that those waters were put to
9 beneficial use in 1905, they all take subsequent.

10 And NRS 533.0245 is all the farther that the -- that
11 the state -- all the other -- all the instructions that the
12 State Engineer needs to support his decision, if that decision
13 is what is necessary to protect the decree. In fact, to do
14 otherwise would allow his actions to damage the decreed rights.

15 In other words, if this Court were to say, you know
16 what, you don't have authority to create this joint management
17 area, then what this Court would be doing is it would be
18 telling the State Engineer, listen, I know you've said the only
19 way you could protect these decreed rights is to administer all
20 these rights together, but I'm not going to let you do that.

21 Well then, how is he going to protect the decreed
22 rights? I guess he'd have to go from basin to basin. Maybe he
23 could do that. I mean, I think in my answering brief I argued
24 that he should do that. He can do that. It's really a -- I
25 think that's where I did the -- that was in the reply, the rose

1 by any other -- I quoted Shakespeare. But it wouldn't make any
2 difference. He'd have to do it that way.

3 But the problem is, because the gradient is so
4 flat -- SNWA today showed a map where the blue lines and the
5 flows from different basins and certain paths are recognized
6 because there's a lot of gradient, so there's a lot of flow.
7 But if the flow is just a matter of -- if the gradient
8 variations are a matter of a few feet or a few inches and the
9 slope is so incredibly tiny, then it's not going to take much
10 and it's going to be difficult to rely upon those -- it makes
11 it very difficult on a basin-by-basin basis, you could see,
12 because of the fact that that gradient is not nearly so strong
13 as it is in other parts of the state. That's the importance,
14 at least to me as I understand it, of the comment from the
15 experts that, oh, yeah, this is incredibly flat.

16 So how can the State Engineer -- this is my fourth
17 bullet point, and for the record --

18 THE COURT: Which slide?

19 MR. DOTSON: -- this is on page 10 of 11. How would
20 it possibly make sense for the State Engineer not to adjust his
21 decisions based upon new science?

22 In 1491, except for Norwegians who had figured out
23 that the world was round, everybody thought the world was flat.
24 Are we still -- well, I mean, some of us are, but most of us
25 aren't walking around still thinking the world is flat and that

1 that sun is spinning around this earth.

2 It would make no sense if whoever was Caesar at the
3 time sat down a rule that -- I guess it wouldn't have been
4 Caesar. I'm mixing up my -- if the queen --

5 THE COURT: History.

6 MR. DOTSON: -- said no, you -- you cannot use that
7 new technology and you must not sail any farther than this.

8 No. You're not going to do that. You're going to
9 pay attention to the natural world around it as we understand
10 it now. And what is clear is that our understanding of the
11 natural world is evolving. And in these legal documents, it is
12 one of the things I actually do dig about this area of the law,
13 you can actually see that evolution of technology.

14 There are things that are -- that the methodologies
15 that were used in the CSI geologic study, that's great. I
16 mean, we're actually looking into the earth, right. And I'm
17 sure we're going to get new and better things in that regard.
18 And that will allow us to figure out, hey, maybe there's a
19 pocket of water in -- in one of these basins that is totally
20 isolated. But that's going to take further study.

21 The study -- the information we have right now is
22 that the water looks flat from all these wells. And if we
23 don't administer and let the State Engineer administer these,
24 at least jointly if not in one basin, we are going to send
25 ourselves to a disastrous conclusion.

1 There was a comment -- and this doesn't really
2 necessarily fit about headward waters versus tributaries. And
3 you had this -- a question about that. I don't think with
4 regard to my client, with regard to the State Engineer's
5 decisions here, that it makes any difference.

6 The point is, the decree says sources of water. Any
7 water that is in the river at the point of diversion for my
8 client is supposed to be my client's water. That's the whole
9 point of that second grant. And I -- you know, I only mention
10 this because of the -- of the question that was -- that was
11 posed. This is my last slide. I think this is Slide 11.

12 Some have criticized the State Engineer and said,
13 well, wait a second, we'll just -- the State Engineer, if you
14 let him do this, he's just going to start strapping together
15 basins all over the place. And I don't think I've actually
16 heard the slippery slope term be used, but that what's it
17 sounds like to me. It sounds like, okay, somebody's making the
18 slippery slope argument.

19 But well, number one, there's a lot of areas in law
20 where we do just recognize there's a slippery slope, right.
21 But that doesn't keep us from having to administer the law in
22 those areas. And we have -- we put certain right -- certain
23 limitations on free speech. It doesn't -- just the mere fact
24 that there may be some challenges doesn't mean we don't allow
25 that to happen and we have to allow that to happen here.

1 In this instance, that determination of administering
2 jointly several basins and making them sub-basins is supported
3 by substantial evidence. And no matter what -- well, I would
4 encourage that this Court's decision state as much. Because I
5 think that's what the State Engineer is saying, saying I have
6 substantial evidence.

7 And if this Court finds that there was substantial
8 evidence, then that supports that decision. And if in the
9 future there's a determination made that, I don't know what
10 basin it would be, but say -- say the basin that Lake Tahoe is
11 in and the basin that Carson City is in, and as far as I know,
12 there's no hydrologic connection but we're going to
13 administrator them together.

14 Well, there's probably not going to be substantial
15 evidence for that, right. It just doesn't make sense, even
16 though they are adjacent. So and then there could be a
17 petition for judicial review at that point and you, or whoever
18 the judge is that happens to get that, in that hypothetical I
19 guess it would be probably a judge in Carson City --

20 THE COURT: Yes. Not here.

21 MR. DOTSON: -- Judge Wilson can decide, oh, yeah,
22 there's -- there is or there isn't substantial evidence.
23 That's why we have the system we have. And the mere fact that
24 we would have to employ our legal system isn't a reason to not
25 allow an application of the law. That's not a reason to say,

1 okay, sorry, I guess we're just going to have to let these
2 decreed rights be violated and conflicted with because that's
3 too hard and we can't -- we can't figure that out. That
4 wouldn't make any sense.

5 So I think I've already made that clear with the
6 opening on my mea culpa, my third point. It was my belief that
7 534.030 designation had occurred to all of these basins. It
8 hasn't. I think it's pretty clear that it's -- but it's -- but
9 it does apply to most of them, everything but Kane Springs.
10 And therefore, 534.020 applies to six of these basins.

11 Another little housekeeping item, on 1303 if you go
12 to Footnote 21, there's a typo there. And it says, id -- was
13 it Footnote 21? Oh, not 1309, sorry.

14 For Footnote 21, it says id, and the Footnote above
15 it is 532.120. But if you look at the language that is cited
16 at Footnote 21, it states: Whereas, within an area that has
17 been designated by the State Engineer as provided for in NRS
18 534 wherein the judgment of the State Engineer the groundwater
19 basin is being depleted, the State Engineer in his or her
20 administrative capacity may make such rules and regulations and
21 orders as are deemed essential for the welfare of the area
22 involved.

23 That's clearly 534.120. And I think that some people
24 may have argued that he didn't rely upon 534.120. But that
25 language, even though he's citing to 532.120, is clearly almost

1 a direct quote. So that's further support legally for his
2 decision in 1303.

3 Now, lastly, I guess, the State Engineer makes a
4 determination that 8,000 acre-feet can be pumped. And as you
5 know, we do not agree with that so I'm not supporting that. We
6 do support that some cap below that should be arrived at. And
7 we say that because if you just read the order and you look at
8 the science that he cites to, it clearly just doesn't make
9 logical sense because it couldn't physically return the flow of
10 the river back to its predevelopment flows if you are just
11 maybe reaching a steady state.

12 Yesterday, the State Engineer -- and this is just
13 kind of a friendly clarification or amendment, in support of
14 the order said the perineal yield of the area of the Lower
15 White River Flow System was 8,000 acre-feet. And maybe that is
16 correct in water-speak, but so as to avoid the confusion, I
17 think that meant above the decree. So in other words, above
18 the decreed flows.

19 In my argument on behalf of the State Engineer would
20 be that that must mean it's 8,000 plus 33,900 is the perineal
21 yield of this area, because that's how much the flow is coming
22 out of the Muddy River, there should be coming out of the Muddy
23 River, 33,900. The problem is, that math just doesn't make
24 sense which is why we didn't support him on the 8,000.

25 But clearly, there is some perineal yield above, or

1 at least my client thinks, there's some system perineal yield
2 above the flow of the Muddy River. In other words, there is --
3 you know, maybe it's not the 100,000 acre-feet that somebody at
4 one point in time thought could be pumped from this area, but
5 there is some amount that can be pumped from this area. And
6 this Court, although we urge a reversal of the 8,000 acre-feet,
7 should support the State Engineer's determination that some cap
8 that is consistent with the additional available water over and
9 above the decree can be developed and put to beneficial use
10 from the groundwater of this area.

11 Court's indulgence while I consult with my
12 co-counsel. All right. So after consulting with -- consulting
13 with Mr. King, he has a -- he has a great breadth and depth of
14 knowledge in water law. And he has pointed out to me that, in
15 fact, the Davenport book and other sources identify that they
16 don't really call them designated or delineated. They talk
17 about the basins having been mapped.

18 And that actually makes perfect sense, and it makes
19 sense considering the argument we've seen this week and some
20 statements from the -- from -- well, from multiple parties.
21 But sometimes there's adjustments to the boundary lines of the
22 maps for these basins. It's not that somebody's out there with
23 a bulldozer changing the physical world. It's that they're
24 recognizing this artificial construct that we've utilized to
25 ease the administration burden for the State Engineer doesn't

1 match the physical reality. And so therefore, they've modified
2 it. So they've been mapped.

3 Thank you, Your Honor.

4 THE COURT: Okay. Thank you. All right. So should
5 we take maybe a short 10-minute break? Is that --

6 MR. ROBINSON: Perfect.

7 THE COURT: All right. Then I think next up is
8 Georgia-Pacific. All right. Am I -- I think that's who it is.
9 Yeah. I have Georgia-Pacific and then Lincoln Vidler.

10 (Proceedings recessed at 2:17 p.m., until 2:28 p.m.)

11 THE COURT: Okay. So the timer is ready. So
12 whenever you're ready, Mr. Foletta.

13 MR. FOLETTA: Okay. Thank you, Your Honor.

14 **ARGUMENT FOR GEORGIA-PACIFIC AND REPUBLIC ENVIRONMENTAL**

15 MR. FOLETTA: Lucas Foletta for Georgia-Pacific and
16 Republic.

17 I just wanted to make a couple comments -- this is
18 going to be very brief -- in response to the Center for
19 Biological Diversity's petition for judicial review and the
20 brief they filed in support of that.

21 They make -- and the procedural kind of posture is a
22 little awkward obviously because we all have our own petitions,
23 and we're filing briefs against others, and both the --

24 THE COURT: I've never had anything like this before.

25 MR. FOLETTA: Yeah. Both the Center and we are

1 asking that the, you know, change be made to the order in
2 effect as to the same issue. In fact, the pump limit, but, of
3 course, they want the -- they think the number should be lower,
4 and we think the number should be higher.

5 So, but they make two basic arguments. One is that
6 the 8,000 acre-foot limit is not based on substantial evidence
7 itself. And the other is that the State Engineer failed to
8 appropriately assess the impact of the declining stream flows
9 on the dace. So they're kind of connected, but as I read their
10 brief, that's how they've articulated their position.

11 So with respect to the first issue, whether there's
12 substantial evidence to support the 8,000 acre-foot limit.
13 Obviously our position in our case is that there isn't
14 substantial evidence to support the 8,000 acre-foot limit
15 because we think the weight of the evidence is that the limit
16 should be higher.

17 That said, assuming for the sake of this argument
18 that the issue is really what CBD thinks about the limit, what
19 I would do is just, one, I would incorporate by reference my
20 comments from yesterday about, you know, our views about why
21 there isn't substantial evidence to support even the 8,000
22 acre-foot number, let alone a lower number. So, you know, we
23 talked about just the fact that there was not a consensus about
24 what the limit should be in the expert testimony, that there
25 was a range of testimony as to what the number should be, from,

1 you know, like zero to up to 30,000 acre-feet and that the
2 State Engineer had made -- commented on some limitations of the
3 evidence that he had in front of him.

4 All those critiques are equally applicable to the
5 position that the Center for Biological Diversity is taking.
6 So that's kind of a long way of saying we also don't think that
7 there's substantial evidence that could support the Center's
8 position, right, that the number should be lower.

9 I would just add sort of one thing for the Court to
10 consider, to put a cap on that, and I didn't talk about this
11 before, but it has to do with Kane Springs. And I don't want
12 my friends with an interest in Kane Springs to get mad at me
13 because we are not advocating for the inclusion of Kane Springs
14 in the Lower White River Flow System.

15 But if we're assuming that the order is -- if we're
16 assuming that the order is legitimate in all respects other
17 than those that the Center has raised, then what I would say is
18 that one thing that stands out about the order and that -- and
19 this is I think this is a criticism of the Center's position as
20 well is that Kane Springs was added to the LWFS -- LWRFS in
21 1309. It wasn't in there in 1303.

22 You recall the hearing was all about what we should
23 do with respect to the Lower White River Flow System, and so --
24 and people were commenting on the 1303 reports, right. So with
25 respect to Kane Springs, there was a lot of evidence or

1 analysis of what the impact is of including Kane Springs in the
2 basin. There was some. There was an SNWA report that I think
3 concluded that Kane Springs could contribute about 4,000
4 acre-feet annually a year to the system as a whole. That
5 analysis is not reflected in either the State Engineer's
6 position or the Center's position, which would suggest that the
7 8,000 acre-foot number is lower than it should be if you assume
8 that Kane Springs should be in the basin.

9 And so --

10 THE COURT: If you're doing the math that they
11 should -- that they would be contributing 4,000, then that
12 would raise the number.

13 MR. FOLETTA: It would raise the number. I'm not
14 saying it raises it one to one, but the number, it supports the
15 idea that the number is not too low and indeed should be
16 higher. And so I don't -- this isn't reflected in the Center's
17 analysis. And so again I think that analysis suffers from a
18 lack of substantial evidence. And consequently if the State
19 Engineer were to be reversed along those lines, I don't think
20 that would be appropriate.

21 The other thing I wanted to address is the second
22 issue, which is the State Engineer's assessment as the Center
23 characterizes it, of the impact of declining stream flows on
24 the dace. You know, we have talked about in our briefing -- I
25 think we talked about a little bit the other day sort of the

1 position that the Fish and Wildlife Service had took in the
2 hearing, and Ms. Peterson talked to you about that and showed
3 you I think a transcript where there was a back and forth and
4 some questions about whether they felt that there was a take
5 occurring or not.

6 What our position is with respect to the Center's
7 argument is that there really again isn't substantial evidence
8 to support the notion that -- that the declining -- that there
9 are declining stream flows and that that is the cause of one of
10 the concerns about the dace. In other words, there are other
11 things going on that undermine the assertion that it's all
12 about kind of stream flows and that we should be looking closer
13 at that, right.

14 So, for example, we had the memorandum of agreement
15 that you've heard about multiple times. I'm not going to show
16 it to you, but there's a page of the memorandum of agreement.
17 It's at the record at 531.4041 I believe, and it's pretty
18 interesting because it shows you how the parties to that
19 agreement had come up with a rubric to kind of work through the
20 dace issue. And so as the stream flows decline from 3.2 down
21 to I think 2.7 CFS, the pumping also declines. That was the
22 basic agreement. So stream flows are declining. Pumping
23 declines as that happened, and that's the basic framework.

24 The interesting part about it is 3.2 was the starting
25 point, not the endpoint, right. So you started at 3.2. And I

1 think the first requirement is that the parties confer with the
2 Fish and Wildlife Service at that point when it gets to 3.2.
3 As you go down to 2.7, it goes from 3.2 to 3.0 to 2.9 to 2.8 to
4 2.7. Then pumping declines and some other things happen. But
5 the point is the agreement doesn't reflect the notion that
6 3.2 is the bare minimum -- 3.2 CFS is the bare minimum. Yet
7 that is the number that I think the Center seizes on a bit and
8 the order itself is focused around.

9 So I would agree I think -- somebody earlier talked
10 about this because there was a question about kind of the scope
11 of the agreement, to whom it applies and where it applies and
12 so forth.

13 The point of the agreement from our perspective is
14 that it undermines the assertion, the evidentiary sort of basis
15 for the claim that 3.2 is the right number and that we've got
16 to maintain that number. Because even the Fish and Wildlife
17 Service entered into an agreement that said that's not the
18 floor, right.

19 The CBD also I think overlooks the impact of invasive
20 species on the tilapia -- not the tilapia, on the dace. And we
21 talked about this in our brief, and this is another factor
22 that's --

23 THE COURT: Is that the tilapia?

24 MR. FOLETTA: The tilapia is the invasive species.

25 So we talked about this in our briefing, but in

1 response to their position, the idea is that this is a nonflow
2 related factor that is impacting the viability of the dace in
3 connection, which there's evidence to support the notion that,
4 again, things other than flow levels need to be addressed to
5 ensure the integrity of the species.

6 And so the opinion that the center references you to
7 in their briefing identifies conservation actions that don't
8 relate to spring flows. That's the point here, including,
9 quote, "The eradication of nonnative fish, such as tilapia,
10 from the historic range of the Moapa dace." So this is the
11 record at 47159.

12 At the hearing, the Fish and Wildlife Service
13 introduced a white paper that showed that -- that talked about
14 kind of the history of the dace in this area, and it said that,
15 quote -- or excuse me, tilapia, quote, "invaded the Muddy River
16 Springs area in 1995 and dramatically reduced the population of
17 the dace." That's the record at 48721.

18 It further went on to say, quote,

19 Current knowledge of this system suggest
20 that the negative interaction between tilapia
21 and Moapa dace was so severe that the recovery
22 of the species depended upon the removal of
23 tilapia from the system, a major recovery action
24 only recently completed in full.

25 That's the same page in the record.

1 So the point there is not only that there are other
2 things affecting the dace, but that the mitigation efforts that
3 have taken place to date to try to secure the viability of the
4 dace are, according to this white paper, recently completed and
5 that, you know, it takes time, the passage of time to
6 understand the effects of the other things that have been done
7 other than maintaining stream flows, let's say pursuant to the
8 MOA, to understand what is happening with the dace, what needs
9 to be done down the road, and consequently it undermines this
10 kind of -- this conclusion that we should be looking closer and
11 closer at stream flows to the exclusion of some of these other
12 things.

13 With that, Your Honor, I do not have any further
14 comments on the Center's (indiscernible). Thank you.

15 THE COURT: Thank you.

16 (Pause in the proceedings.)

17 THE COURT: The floor is yours.

18 **ARGUMENT FOR LINCOLN COUNTY AND VIDLER WATER**

19 MS. PETERSON: Thank you, Your Honor. Karen Peterson
20 from Allison MacKenzie law firm representing Vidler Water
21 Company, and I also have Mr. Klomp here with me at the counsel
22 table. He's going to -- we have a really short PowerPoint on
23 this section, and I just wanted to explain that we did file an
24 answering brief in response to --

25 THE COURT: You had an intervening brief, right.

1 MS. PETERSON: -- the Center for Biodiversity's. So
2 I'm going to address some of the arguments that they made on
3 Monday. I'm responding to arguments they made on Monday, but
4 they made arguments today that were kind of covered the same
5 things. So I am responding to Monday.

6 THE COURT: Okay.

7 MS. PETERSON: I just wanted you to know that.

8 So one of the things in the argument on Monday, the
9 Center for Biological Diversity indicated and it kind of
10 inferred that there might be an incidental take statement that
11 Lincoln and Vidler might have. And so we just wanted to point
12 out, and it is in the record, that we do have an incidental
13 take statement that allows, if we meet certain criteria and
14 there's take before that criteria -- take before the criteria,
15 that we are allowed the incidental take, and it's set fourth --

16 First of all, Slide 1 shows the request that Lincoln
17 and Vidler made for formal and informal consultation for the
18 Kane Springs Valley project. And that is in the record there
19 49906. And actually the U.S. Fish and Wildlife put in our
20 complete biological opinion, which included the incidental take
21 statement, into the record in 1309.

22 So if you could go to Slide 2.

23 And there, we're on page 37 of the exhibit, the U.S.
24 Fish and Wildlife exhibit. And again the record on appeal
25 citations are noted there, and the top paragraph indicates that

1 the, you know, after the U.S. Fish and Wildlife has done its
2 review that our project is not likely to jeopardize the
3 continued existence of the dace. The project could contribute
4 to groundwater level declines and spring flow reductions;
5 however, implementation of the projects conservation actions
6 will minimize these impacts.

7 And then going -- and again, we didn't put -- I mean,
8 it's -- I don't know how many pages, 50 or something like that.
9 So obviously we didn't put anything in.

10 But then going down to the next paragraph, there was
11 discussion about Section 9, and our biological opinion does
12 reference Section 9 right there. And then the second part on
13 the slide that we've highlighted indicates under the terms of
14 Section 7 before and 762 of the act,

15 Taking that is incidental to and not
16 intended as part of the agency action, and
17 that's what I was just referring to, is not
18 considered a prohibited taking provided that
19 such action -- such taking, sorry, is in
20 compliance with the terms and conditions of this
21 incidental take statement.

22 And then if you could turn to the next slide, slide
23 Number 3. Again, that's another section and the next page
24 about the Moapa dace. And then it's interesting that it notes
25 our biological opinion and our incidental take statement

1 acknowledges that the amount of groundwater pumping under our
2 project is substantially smaller than the amount of pumping
3 that could potentially occur under the Order 1169 pumping.

4 And then again, it does allow that a small
5 unquantifiable amount of take in the form of habitat loss would
6 occur if the spring flows reach 3.0 CFS at the Warm Springs
7 gage. And if they decrease below 3.0, the amount of the
8 incidental take for this project would be exceeded for the
9 Moapa dace.

10 So our stipulation that we have with the State
11 Engineer that was filed with U.S. Fish and Wildlife to our
12 applications, that has a trigger point of 3.2, but actually the
13 incidental take statement allows a little bit lower.

14 And then do we have one more slide? Yeah.

15 And then this is the final determinations with regard
16 to the effect of the take. So we just wanted to point that out
17 to Your Honor.

18 And then we have put the citations to the record
19 there.

20 So the other thing that we cited in our brief, and I
21 again wanted to reiterate here is the *Mineral County versus*
22 *Lyon County* case, and you've heard a lot about it today and/or
23 Monday, but -- and the public interest that's being analyzed,
24 and there seems to be an argument that public interest is
25 supposed to be analyzed continually by the State Engineer, like

1 while we're holding our groundwater permits, and that's not at
2 all what is supposed to occur with regard to the public
3 interest determination that the State Engineer is supposed to
4 make. It's supposed to be made at the beginning in the
5 application process.

6 And, of course, then when the State Engineer grants
7 any applications, those become vested property rights. They
8 become adjudicated property rights, and that's under the
9 Fillipini (phonetic) case and all that line of cases. And so
10 there's not some kind of continuing obligation by the State
11 Engineer to continually look at the public interest. That's
12 exactly what *Mineral County* said is not supposed to happen
13 because there's supposed to be certainty with regard to water
14 rights.

15 And again, we've cited in our briefs with regard to
16 the *Mineral County* case the Nevada Legislature has enacted a
17 comprehensive statutory scheme outlined in NRS Chapters 532,
18 533 and 534 that regulate the procedures by which water rights
19 may be acquired, changed or lost.

20 And the Nevada Supreme Court goes on to say in
21 *Mineral County versus Lyon County* the statutory scheme in
22 Nevada therefore expressly prohibits reallocating adjudicated
23 water rights that have not been abandoned, forfeited or
24 otherwise lost pursuant to an express statutory provision.

25 And finally Nevada's comprehensive statutes are

1 already consistent with the public trust doctrine because the
2 statutes both require that water allocations be based on public
3 interest and that the allocation satisfy all of the elements to
4 safeguard public trust property.

5 There's no authority for the State Engineer to
6 create -- based on that, we don't think there's any authority
7 for the State Engineer to create any new procedures for the
8 public trust which are not authorized by the statutes.

9 And the other thing I also wanted to note about the
10 biological opinion, turning back to that, is that it is an
11 approval that's in place that again provides some certainty to
12 water right holders. We know where we stand. We know what the
13 rules are with regard to the Moapa dace and what the U.S. Fish
14 and Wildlife has allowed us to pump with our mitigation
15 procedures in place so that we are not impacting the Moapa
16 dace.

17 And again, that provides some certainty to water
18 right holders. We know what's going to happen, not like
19 something here where the State Engineer says, oh, no, the State
20 may be liable for a take, and therefore, Lincoln and Vidler,
21 you're not going to be able to use your water rights anymore
22 because I'm going to throw you -- I'm going to throw Kane
23 Springs into the Lower White River Flow System.

24 The other brief that we filed, and answering brief
25 that we filed had to do with Southern Nevada Water Authority

1 and Moapa Valley irrigation company -- Muddy Valley Irrigation
2 Company. I'm sorry.

3 And we -- as we put in our brief, we disagreed with
4 the calculations of the predevelopment flows. We disagreed
5 with the calculations of the irrigated acreage that SNWA holds.
6 We disagreed with their quantifications of their water rights
7 that they hold or their ICS credits that they're claiming.

8 We also argued that the State Engineer did not modify
9 the Muddy River Decree under Order 1309 and did not modify
10 SNWA's water rights or didn't modify Muddy Valley Irrigation
11 Company's water rights, and there's been arguments made to the
12 Court about this Court being, you know, the decree court. And
13 that makes me a little nervous because while the Eighth
14 Judicial District Court is the decree court now, this is a
15 petition for judicial review of Order 1309. And if there's any
16 interpretations of the decree or any kind of enforcement of the
17 decree, that needs to be done in the proceeding where all of
18 the water right holders in the decree have notice and are
19 entitled to participate.

20 And so again, I get a little concerned that we're
21 going to go outside the realm of, you know, a petition for
22 judicial review by the Court somehow -- I interpret the relief
23 that they're asking is that the Court interpret the decree in
24 this proceeding, and I'm not sure that that's appropriate.

25 The State Engineer, what the State Engineer did in

1 Order 1309 is indicated that all the water right holders under
2 the decree are getting their water. That's what he was talking
3 about in the paragraphs that they have appealed. And the State
4 Engineer under the decree is the watermaster for that decree.
5 And the decree -- it's in the record under the Muddy River
6 Decree, and it's at the record on appeal at 33.793, which
7 indicates that there's going to be a watermaster for this
8 decree, and the State Engineer is going to approve that
9 watermaster. And actually, as it stands today, the State
10 Engineer is the watermaster of the decree.

11 THE COURT: So that's like an actual term of art,
12 watermaster?

13 MS. PETERSON: Yeah. Yeah.

14 THE COURT: Okay.

15 MS. PETERSON: And so what the watermaster does, and
16 again, this is in the decree, and it's at page 33793, that the
17 watermaster under the decree supervises, controls and regulates
18 the distribution of the water.

19 And again, the watermaster doesn't necessarily have
20 to be the State Engineer, but in this case for this decree, the
21 watermaster is the State Engineer. So the watermaster knows
22 that the water is being delivered, and everybody is getting
23 their water because his office is supervising, controlling and
24 regulating the distribution of the waters of the decree.

25 And so I guess -- and I think you picked up on it,

1 that it is an order and a judgment and a decree of the Court.
2 And again, that's in the Muddy River Decree. It's in the
3 record at 33771. And the Muddy River Decree also, you know, it
4 orders, adjudged and decrees. It uses those words. It's a
5 judgment of the Court. And that's at 33786.

6 So again, if there's any modification or
7 interpretation or enforcement, I mean, that needs to be done by
8 the decree court I'm going to call it, and again, everybody has
9 to have notice of that under the decree.

10 And with regard to this enforcement of the decree, in
11 *U.S. versus Orr Ditch Company*, it's 600 F.3d 1152. It's a 2010
12 case, and it's a federal case because it involved a federal
13 decree, but it was a case in which the surface water right
14 holder was contending that groundwater rights that had been
15 granted by the State Engineer under state law interfered with
16 the federal decree. And the federal decree court said that the
17 decree court did have jurisdiction to consider those claims.

18 And so I just want to point out that if there's any
19 enforcement that needs to be done of the decree, that's brought
20 in the decree court. It's not brought in front of the State
21 Engineer because we're talking about enforcing a judgment
22 that's been entered by a court of law. So that would be the
23 place to go if there's any enforcement that needs to be done
24 under the decree.

25 And the other thing I wanted to point out is that if

1 there's claims of impairment under the decree, you know, the
2 Muddy Valley Irrigation Company needs to go to court -- or
3 SNWA, they need to go to court. And it's not like you just
4 stop pumping in the -- what they're contending 1100 square
5 miles of potential water decline. I mean, what you have to do
6 is -- because you're impacting somebody's property rights. I
7 mean, you have to prove that their pumping impacts your water
8 rights. That's what you do. So that would be what would have
9 to be done in the District Court, not any way in this
10 proceeding.

11 So and then the other thing I wanted to point out,
12 and there was a slide in the Center opening, is that the slide
13 that indicated that SNWA's report that after the 1169 pump
14 tests, but that there where no water level declines or no
15 discernible impacts from pumping north of that Kane Springs
16 wash fault.

17 And I also wanted to let you know that Muddy Valley
18 Irrigation Company adopted all of the studies of the Southern
19 Nevada Water Authority in the proceedings below in 1309. And
20 so if they adopted all the studies and joined in on all of the
21 studies that the SNWA submitted, that they would also concur in
22 those opinions that there is no discernible impact from
23 pumping, you know, north of that -- north and west, whatever
24 was on that slide of Kane Springs wash fault.

25 So and I know we heard just recently that they're not

1 saying there can't be any pumping, but I heard on Monday that
2 any pumping in the Lower White River Flow System affects the
3 Springs. That's what I heard on Monday. So.

4 And I also heard on Monday from Muddy Valley
5 Irrigation Company that one of the objects of this proceeding
6 was to return the Muddy River flows to predevelopment flows,
7 and I just want to point out that when you look in Order 1303
8 as to what the scope of this proceeding was, it was not to
9 return Muddy River flows to predevelopment flows. That's not
10 one of the questions that the State Engineer asked everybody to
11 address in 1303. Remember, those were the five questions. One
12 was the boundaries, how much water can be pumped, can you move
13 water between the carbonate and the alluvium. So there was --
14 I mean, this proceeding is not about returning Muddy River
15 flows to predevelopment flows, and --

16 THE COURT: When you're talking about this
17 proceeding, this proceeding in this Court or the proceeding
18 that was -- that --

19 MS. PETERSON: 1309.

20 THE COURT: 1309. Okay.

21 MS. PETERSON: That -- I mean, the five --

22 THE COURT: Whatever precipitated 1309, that
23 proceeding?

24 MS. PETERSON: The four specific matters that we were
25 supposed to address in 1309 -- well, from Interim Order 1303,

1 1303 hearing, which resulted in Order 1309 where the geographic
2 boundary of the Lower White River Flow System, aquifer recovery
3 subsequent to the Order 1169 aquifer tests, long-term annual
4 quantity and location of groundwater that may be pumped in the
5 Lower White River Flow System and the effect of movement of
6 water rights between the alluvial and carbonate wells within
7 the Lower White River Flow System.

8 And I don't see in there that we're supposed to
9 return the Muddy River flows to predevelopment flows.

10 And again, as I've indicated in our briefs, we
11 disagree with what the level of those flows are.

12 And I'm very concerned -- this is my last point --
13 that Mr. Dotson asked you, as his request for relief to affirm
14 that predevelopment flows were equal to 33,900 acre-feet
15 annually, and he was taking that from Order 1309. And he asked
16 you to affirm that the river flow has flowed 13 -- 30,600
17 acre-feet since 2015. I think the average river flow was
18 30,600 acre-feet since 2015. And I have two problems with
19 that.

20 Number one is, he's asking you to affirm parts of
21 Order 1309 that they're appealing. Those are the specific
22 paragraphs. They're pages 60 and 61 of Order 1309. They're
23 found at the record on appeal at pages 61 and 62, and those are
24 the exact paragraphs that they're appealing. And yet they want
25 you to affirm those factual matters.

1 He's asking you to affirm those factual matters in
2 this proceeding. And the reason he wants you to do that is so
3 that if there is a Phase 2 in this proceeding and we have to
4 determine what conflicts are, there's already going to be a
5 finding by this Court that the predevelopment flows of the
6 Muddy River were 33,900 acre-feet and that the flows since 2015
7 are 30,600. So they're already going to have their conflict
8 determination made because they keep on contending that they've
9 lost 3,300 acre-feet -- 3,300 acre-feet since 2015. And that's
10 going to be the law of the case, and that's going to go into
11 Phase 2, and that is not appropriate, and that is scary. So
12 you, please, cannot do that.

13 THE COURT: I can hear the desperation in your voice.

14 MS. PETERSON: It's -- it's not right.

15 So that's all I have. Thank you.

16 THE COURT: Okay. Thank you.

17 Mr. Klomp.

18 MR. KLOMP: I join in Ms. Peterson's --

19 THE COURT: Oh, are you -- is that everything?

20 MR. KLOMP: Yeah. We were sort of together.

21 THE COURT: Okay. That's fine.

22 So then now we are going to -- there were five.

23 MR. KLOMP: One quick matter, Your Honor.

24 THE COURT: Yes.

25 MR. KLOMP: There's a thumb drive right here, and I

1 don't know that somebody.

2 UNIDENTIFIED SPEAKER: I think that's Mr. Taggart's.

3 THE COURT: Okay. Mr. Taggart, do you want to take a
4 minute before you start?

5 (Pause in the proceedings.)

6 MR. TAGGART: No, I can go now.

7 (Pause in the proceedings.)

8 MR. TAGGART: Okay. We're good.

9 THE COURT: So you'll have a copy of this for us?

10 MR. TAGGART: Oh, I was going to cover that. No,
11 this is just a document from the record on appeal. I was just
12 going to show this as a demonstrative.

13 THE COURT: All right.

14 MR. TAGGART: And I will cite to it as just from the
15 record on appeal.

16 THE COURT: That's fine.

17 MR. TAGGART: All right. So I will not have a
18 third -- or I don't know how many it would be.

19 THE COURT: PowerPoint or --

20 MR. TAGGART: A PowerPoint for this reply.

21 THE COURT: Okay. Thank you.

22 MR. TAGGART: So that 17 minutes means I talked for
23 three hours and 45 minutes already?

24 THE COURT: Yes. Impressive that you haven't lost
25 your voice.

1 (Pause in the proceedings.)

2 **ARGUMENT FOR SNWA AND LVVWD**

3 MR. TAGGART: So if it pleases the Court, again, Paul
4 Taggart on behalf of the Water District and the authority.

5 A couple housekeeping matters. One, there was a
6 discussion earlier, we've talked at length about the original
7 map that had the -- the original map that mapped the basins,
8 and we talked about it being in 1968. I'm alerted by my
9 associate that that map and that report is not in the record.
10 We cited to a 1968 USGS report when we talked about that map.
11 So I just want to be clear, we cited to 9348 through 9422 of
12 the ROA, and that's actually a 1968 USGS report about
13 something, not the map. So we don't have a map of the
14 original -- the original locations of the basins, but what we
15 have is the 1971 map that I showed this morning, which is part
16 of Waterford, Nevada. So that's just a housekeeping thing.

17 The other thing is that I thought we cited to
18 (indiscernible)'s rulings. I've told you that this morning
19 that we did in our briefs, but I'm told we didn't. So I
20 apologize for that.

21 The -- I'll be brief since I only have a few minutes
22 anyway. A couple of things. I'm here now to reply to
23 arguments made against our arguments regarding the conflicts
24 determination by the State Engineer. And I'll just remind the
25 Court that there was clear statements made at the prehearing

1 conference about what would and would not be ruled upon, and we
2 think this fell within that, and I think Your Honor recalls
3 that when I read that transcript into the record.

4 So a couple things have been said. One, no one has
5 filed any complaint about the water. We have. So that's an
6 inaccurate statement. A number of inaccurate statements have
7 been made about our position here.

8 One, we did file a notice of alleged violation. It's
9 up on the screen, and it's in the record at pages 48131 and
10 48132. We attached to this document the same analysis that we
11 talked about earlier, the depletion analysis that our experts
12 completed about the amount of ICS credits that were not
13 generated because of captured water. We included all that
14 information and filed that with the State Engineer. And there
15 is a file stamp on there that's dated July 3rd, 2019.

16 And so I agree that conflicts requires an evidentiary
17 hearing. We didn't get to have that, but I also struggle to
18 understand how were supposed to wait for that. If we file
19 something with the State Engineer and he doesn't consider it,
20 how long are we supposed wait?

21 When we filed this with the Court, this petition for
22 judicial review, and again, completely disagree with my
23 colleague about this, we invoked the jurisdiction of the decree
24 court, and it should be scary because water has been taken from
25 decreed right owners, and there's nothing in this action of

1 invoking the power of the decree court that requires notice to
2 all decree owners. This is an enforcement action under the
3 decree. And there's been --

4 THE COURT: Well, let me ask then, is an enforcement
5 action proper in a PJR?

6 MR. TAGGART: Yes. When that case that we've been
7 citing to, *Orr Ditch*, when it was filed, the -- you know,
8 that's what they were asking, that the application be denied so
9 that they wouldn't have an impact to their water. We've asked
10 that the Court simply interpret the decree, and that is not
11 modifying the decree. You know, I've been through having to
12 name all the owners in a decree, and you do that when you amend
13 a decree, not when you ask for a decree to be enforced, not
14 when you ask for a decree to be interpreted by the decree
15 court.

16 The parties to the alleged action have to be part of
17 the case. All of those were part of this -- I believe all of
18 those have been noticed, and all of those are here.

19 So our PJR specifically states that, you know, the
20 subject matter of this appeal involves decreed waters of the
21 Muddy River Decree, and so in our view we've done that.

22 We're not asking, again, as you know, we're not
23 asking you to adjudicate the conflicts question. We'd rather
24 not have that happen here. We'd rather you strike the language
25 in the order and have that done properly in an evidentiary

1 hearing.

2 So the issue of whether it's proper here or not is
3 probably academic. The key is that we should have that
4 evidentiary hearing initially.

5 Just because the State Engineer is a water
6 commissioner or a watermaster for this Court doesn't mean we're
7 getting our water. And that's the whole point of some of the
8 arguments that we've made.

9 So I think that the easiest thing for the Court is to
10 understand the scope issue, to -- and the fact that so much of
11 what the State Engineer relied upon in his analysis on
12 conflicts is not available in the record for folks to see and
13 understand how it was done. So for those reasons, it's
14 fundamentally unfair to allow that conflict finding to stand.
15 And for that reason, we ask that you reverse that, but uphold
16 the remainder of 1303, and we've -- and that's the extent of
17 our argument.

18 And I am done.

19 THE COURT: Okay.

20 MR. TAGGART: I will provide you with the PowerPoints
21 tomorrow morning.

22 THE COURT: Okay.

23 MR. TAGGART: And provide those to all of the parties
24 in the case as well. Thank you.

25 THE COURT: Thank you.

1 THE CLERK: Is it just the PowerPoints (inaudible)?

2 MR. TAGGART: Yeah, it'll just be the ones that I
3 spoke about already. All right.

4 THE CLERK: Okay. Because you've given me some.

5 MR. TAGGART: And are we doing that as --
6 Yes.

7 THE CLERK: I just don't want to --

8 MR. TAGGART: I think I've given you two of three.

9 THE CLERK: Okay. So it's just this last one that
10 you --

11 MR. TAGGART: But are we doing it all as one exhibit
12 and adding to it or --

13 THE CLERK: No. I'm putting them in the order as you
14 guys go. So when they get it on appeal they can (inaudible).

15 THE COURT: Okay. So you have a number already for
16 when I gave it to you?

17 THE CLERK: I do. So yours will be 14.

18 MR. TAGGART: Okay. Thank you.

19 Thank you, Your Honor.

20 (Pause in the proceedings.)

21 THE CLERK: All right. So this you're not giving?

22 MR. TAGGART: No, not this.

23 THE COURT: No, this is just on the record on appeal.
24 So it's a --

25 UNIDENTIFIED SPEAKER: She kind of needs them for

1 her --

2 THE COURT: Oh, you need it. Well, if you want to go
3 through --

4 MR. TAGGART: Well, I can provide you with this.

5 THE COURT: Okay.

6 MR. TAGGART: It's easy. It's only two pages. I'll
7 get a copy made.

8 THE CLERK: So you gave one -- you gave me two
9 yesterday. No, I think I only got --

10 MR. TAGGART: Right. On Monday I would have started
11 and given you one regarding conflicts.

12 THE CLERK: Right. Let me find my (inaudible). So
13 right now I have -- I have one for Monday.

14 MR. TAGGART: Yes.

15 THE CLERK: And then one that you gave last night.

16 MR. TAGGART: Yes.

17 UNIDENTIFIED SPEAKER: Your Honor, are we in recess?

18 THE COURT: We're -- I guess we're sort of in --
19 informally. Do you guys want to take a formal recess?

20 UNIDENTIFIED SPEAKER: Yeah.

21 THE COURT: Okay. Why don't we recess for five
22 minutes and come back at --

23 UNIDENTIFIED SPEAKER: I just wasn't sure.

24 (Proceedings recessed at 3:10 p.m., until 3:20 p.m.)

25 THE COURT: Okay. Whenever you're ready.

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ARGUMENT FOR COYOTE SPRINGS

MR. ROBISON: Thank you, Your Honor. Kent Robison for Coyote Springs Investment, LLC.

I would ask the Court's indulgence. We're going to do a little tag team situation here for you. I'm going to make some comments, and then Ms. Winston is going to talk a little bit about some of the issues we've discussed. Mr. Herrema is going to then going to discuss some of the science, and then I think I'll close it down after Mr. Herrema is finished.

First of all, Your Honor, I misspoke today or certainly misunderstood when I was asked whether or not the petition we filed challenging Interim Order 1303 was part of this record. It is not. I thought the question was whether 1303 was part of the record.

THE COURT: Oh, no, no, no. 1303 obviously is. Okay.

MR. ROBISON: All right. Well, speaking of 1303, I'm going to read the first paragraph of Interim Order 1303:

Whereas the purpose of this interim order is to designate a multibasin area known to share a close hydrologic connection as a joint administrative unit.

Your Honor, that's what was at issue in 1303 litigation. But I also want to point out the fact that -- and I'll get into this more in detail, the Court expressed concern

1 or interest in the term area in the statute. And if you go to
2 the second page of 1303, it's very clear how the State Engineer
3 wants to implement the word area.

4 Now, there are not seven basins at stake here that's
5 being swept into the big bathtub called the mega basins. There
6 are five, and then there are two of the basins that are
7 designated as areas because they are not completely designated
8 basins, only an area within the basin is part of this case.
9 And that's Black Mountain, and that's I think the Warm Springs,
10 and that's why throughout 1303, 1309 and the various petitions
11 that the word area is used, and we'll get into that in a little
12 bit more detail in the statute.

13 So the Black Mountain Area hydrographic basin is
14 discussed in 1303. Garnet Valley hydrographic basin is
15 discussed in 1303. The California Wash hydrographic basin was
16 designated pursuant to 534.030. Hidden Valley hydrographic
17 basin was designated. So the Muddy River Springs area was
18 partially, partially designated.

19 So what we have, Your Honor, on 1303 is partial
20 designations of areas within a basin, and then the other basins
21 which are identified as designated except, of course, Kane
22 Springs is not identified as a designated basin, nor can it be
23 because it is not.

24 1309 on the other hand, Your Honor, does the same
25 thing. It identifies the Black Mountain area hydrographic

1 basin, area being the operative word. It's an area within a
2 basin, and that's how the State Engineer has used the term.

3 But more importantly, the order says this: The
4 various basins, a northwest portion of the Black Mountain area
5 as described in this order is hereby delineated. Not
6 designated, delineated. So my partner Ms. Winston is going to
7 get into that in a little bit more detail. But what we've lost
8 sight of over the last -- what's it been, three weeks?

9 THE COURT: It feels like it, although we've been
10 moving along quite quickly. So --

11 MR. ROBISON: We've lost sight of this simple word
12 the engineer and the legislature and the courts have used for
13 years, and that's the word basin.

14 The overlay for our closing argument in rebuttal goes
15 back to the Pyramid Lake Indian tribe versus Ricci case.

16 First,

17 It is undisputed that Nevada's groundwater
18 resources have long been managed on a perennial
19 yield basis for the entire hydrographic basin.
20 Such system is specifically contemplated by the
21 Nevada groundwater code, which provides the
22 State Engineer to take various acts on a basin
23 wide basis.

24 They cite for that proposition 534.034, but that's
25 been argued much differently than as defined and described in

1 this decision by the State Engineer himself.

2 Method of designation for groundwater basin, see
3 534.035. Establishment of groundwater boards in an individual
4 basin, see 534.050. Permits required before a well may be
5 dried -- drilled in a designated groundwater basin.

6 It is in fact this authority that the State Engineer
7 has identified 235 groundwater basins, and there they are, and
8 the word used in this absolutely clear language by the State
9 Engineer is that the authority of the engineer to identify
10 these basins. And as we have said, there has been so much
11 reliance on the definition given to the word basin by the State
12 Engineer himself over decades of all users, courts and
13 legislature.

14 Finally, the State Engineer says this:

15 It is patently reasonable for the State
16 Engineer to manage these basins in a manner
17 consistent with statutory authority. This
18 approach is also reasonable for the reason that
19 managing a basin on the base of its perennial
20 yield requires and ensures that the basin will
21 remain in balance.

22 We always have to come back to this proposition in
23 this case, Your Honor, that there was a fault, (indiscernible)
24 fault. Over here is the legal issue, statutory authority to
25 eradicate basins and make them a basin, which we're calling the

1 mega basin. Statutory authority, it stops. If there is no
2 statutory authority and the State Engineer has exceeded the
3 legislative authority, we don't get to the other side of the
4 fault, which is the science. And I'm now going to yield the
5 floor to Ms. Winston and be back with you in a little bit, Your
6 Honor.

7 THE COURT: Okay. Thank you.

8 **ARGUMENT FOR COYOTE SPRINGS**

9 MS. WINSTON: Thank you, Your Honor. Hannah Winston
10 on behalf of CSI.

11 I'm going to address three issues in this argument.
12 The first is the use of the terms designate or designation
13 versus delineation. The second issue is whether the creation
14 of the mega basin or combining multiple basins into one,
15 whether that is a legal question or a factual one. The third
16 issue I'm going to address is this idea of conjunctive
17 management versus joint administration or joint management.

18 I'm going to walk through the statutes on designating
19 basins, so I really welcome the Court, encourage the Court to
20 ask any questions as we go through them.

21 Designation is a term or designate is a term that is
22 used throughout NRS Chapter 534. The word delineate is not
23 used in NRS Chapter 34 or NRS Chapter 33. That is a State
24 Engineer word.

25 THE COURT: Do you mean 534?

1 MS. WINSTON: Either one. 534 --

2 THE COURT: I only heard you say 34 and 33. So, but
3 you mean 533 and 534?

4 MS. WINSTON: Correct. Yes.

5 THE COURT: Okay.

6 MS. WINSTON: Sorry about that, Your Honor.

7 So the first statute I'd like to pull up is
8 NRS 534.011, and these are just from the statutes. It's not
9 necessarily an exhibit.

10 NRS 534.011 is important. It's part of the
11 definitions for the chapter, and it provides that an area of
12 active management means an area in which the State Engineer
13 is -- I'm going to sum it up so I'm not just reading it to you
14 because you can read -- it's an area where a basin needs
15 particularly close attention. And Subsection 2 is important
16 because it says that that area has also received a designation
17 under NRS 534.030.

18 So now, Mark, if we could go to that statute,
19 NRS 534.030.

20 NRS 534.030 provides the process for designating a
21 basin. And as we just saw in NRS 534.011, designating a basin
22 means we're designating it for additional or particular
23 management. So it's an area of active management. That's what
24 we mean when we say we're designating a basin.

25 So there's two ways to initiate the process to

1 designate a basin for more management. Either under
2 Subsection 1, the petitioners or water right holders in a basin
3 can actually petition the State Engineer and say we need you to
4 come in and please designate.

5 In the absence of a petition, we look at
6 Subsection 2. The State Engineer can actually initiate this
7 proceeding himself. And, of course, we've seen this before.
8 There's multiple basins. And what you can see on the -- I
9 believe this is CSI's Exhibit 2.

10 MR. ROBISON: I believe so.

11 MS. WINSTON: The basins that are shown in gray are
12 ones that have gone through this process and been designated.

13 Important to this case is that Kane Springs Valley
14 has not gone through that process. And to figure out what the
15 process is, we look at 534.030. So if the State Engineer
16 thinks that a basin needs to have this additional management,
17 it needs to be designated, then the State Engineer can hold a
18 hearing. And important to this case is Subsection (2) (a) and
19 (2) (b). You'll see in (2) (a) that the State Engineer shall
20 hold a public hearing within the basin. Okay. So when we're
21 designating a basin, we're not designating seven basins at one
22 time. We're designating a basin in that or a portion therein.
23 And that basin -- or the hearing has to be held within the
24 basin. It makes sense.

25 THE COURT: Let me ask you a question. So under the

1 statutory framework that we have, is it your position that you
2 do not dispute the fact that the State Engineer can manage the
3 basins with an eye towards how those -- how the water flows
4 within those basins, but if the dispute is him changing those
5 six basins and delineating it into one basin?

6 MS. WINSTON: That's correct.

7 And what's important about your question, Your Honor,
8 is that that's -- that's really the issue here. How do you
9 manage seven basins together if the science shows that they're
10 related or there's a hydraulic connection between basins? Is
11 the answer to erase the boundary lines between them that have
12 been established since 1968? No. We have tools to manage
13 them. So we start with 534.030. This statute works in
14 conjunction with NRS 534.120 and .110. So 534.030 provides the
15 process to designate, and NRS 534.110 and 534.120 provides the
16 State Engineer with the tools to implement that management.

17 So I want to pull up NRS 534.110, please. And I'd
18 like to go to Subsection 6, which I think is important to the
19 Court's question as well. Because if the State Engineer is
20 managing basins by the basin, sees that there is a hydraulic
21 connection, what can he do? Well, if the State Engineer
22 determines after following the proper steps that an
23 investigation is warranted, curtailment is warranted, then the
24 State Engineer can implement curtailment, but only in a basin,
25 right, not amongst several basins together.

1 And the curtailment has to be restricted to conform
2 to priority rights, not amongst seven basins, but in the basin
3 because curtailment only happens by the basin.

4 THE COURT: So let me ask. So if the State Engineer
5 is looking at how each of the basins are interconnected and how
6 drawing in certain basins affect other basins, is it your
7 contention then that the Nevada State Engineer cannot consider
8 the senior surface water rights of other parties in other
9 basins and how that is affected by junior groundwater right
10 holders in connecting these things?

11 MS. WINSTON: No. I believe that the State Engineer
12 does have to consider groundwater and surface flow rights.

13 THE COURT: Even if it's different, but potentially
14 basins that affect each other?

15 MS. WINSTON: Right. So this -- it's actually the
16 third issue I was going to address, but I'll just jump right
17 in.

18 THE COURT: Okay.

19 MS. WINSTON: There's been a lot of discussion about
20 conjunctive management versus joint administration or joint
21 management.

22 THE COURT: And I guess for me there's a difference
23 between when you're talking -- when you're defining joint
24 management, if you're talking about joining together several
25 basins as one versus jointly managing, you know, six or seven

1 separate basins.

2 MS. WINSTON: Correct. So the word joint management
3 or joint administration, those terms, those are not in
4 NRS Chapter 533 or 534. Those are State Engineer terms, okay.
5 So to the State Engineer, apparently since 1309, joint
6 management or joint administration means literally combining
7 seven basins, erasing their boundaries and viewing that as one
8 hydrographic basin. That is how the State Engineer views joint
9 management.

10 My position is the State Engineer can do -- consider
11 the effect of pumping between multiple basins without combining
12 the basins into one. He can still implement the tools that are
13 available to him without erasing those boundaries because it
14 has, as we briefed, and as Mr. Robison is going to address,
15 that has very severe consequences.

16 If the State Engineer is just managing seven basins
17 and this interconnectedness between the basins, then he can
18 still curtail by the basin if he maintains the boundaries
19 between the established basins. He can still curtail and
20 respect and give priority to priority rights in each basin
21 while being mindful of the impact of the connection of water
22 between the basins.

23 Where I think that this conjunctive management issue
24 has gotten a bit confused is conjunctive management; that word
25 is in the statute, right. It's in the declaration of

1 legislative policy. And let's bring that up. That's at
2 NRS 533.024.

3 UNIDENTIFIED SPEAKER: I didn't download 533. I
4 downloaded 532.

5 MS. WINSTON: Oh, okay. Then we remember what it is
6 says. We read it so many times.

7 THE COURT: Okay.

8 MS. WINSTON: So in that one it says it's the policy
9 of the State of Nevada to conjunctively manage water regardless
10 of the source. Source means groundwater or surface flows. And
11 there was some argument today that some petitioners have taken
12 a position that this is the first time that the State Engineer
13 has ever conjunctively managed groundwater and surface flows.
14 That is not CSI's position. Of course the State Engineer has
15 to disc consider decreed rights. That is prior appropriation.
16 That's reflected in the statutory scheme. The issue of first
17 impression is combining basins to make them one. That is the
18 issue of first impression.

19 So the State Engineer can assess the effective
20 groundwater pumping on surface flows. The State Engineer can
21 look at the interconnectedness of basins and manage each basin
22 by the basin. That's how the statutes are written. That is
23 how it's been done historically. But the State Engineer cannot
24 combine those basins into one. That is where CSI takes issue.

25 I'd like to pull up NRS 534.120. So I mentioned

1 earlier that 534.030 provides the process to designate a basin.
2 NRS 534.120 provides the tools: How do you manage a basin that
3 has been designated? And this is the provision of the statute
4 that you brought up to Mr. Robison in his opening argument.

5 So I think now we have a better understanding.
6 Within an area that has been designated by the State Engineer
7 as provided for in this chapter, so that means as an area of
8 active management. There's also critical management areas that
9 can be defined. And as SNWA articulated earlier, only Diamond
10 Valley has that actual critical management area designation.

11 If we look through the rest of the statute, there are
12 different tools available. So in Subsection -- you don't have
13 to zoom in -- but in Subsection 2, the State Engineer can
14 require periodical statements of water elevations. The State
15 Engineer can determine whether there are preferred uses for the
16 water. The State Engineer can issue temporary permits. The
17 State Engineer could temporarily stop pumping in certain areas.
18 So there's different things that the State Engineer can do in
19 those designated basins that are part of his tools in his
20 toolbox when a basin has been designated.

21 Part of the problem with the State Engineer or some
22 other petitioners in trying to justify 1309 as having occurred
23 under these statutes for designating basins is that Kane
24 Springs has never gone through the designation process. So the
25 State Engineer cannot use these tools in Kane Springs Valley.

1 And I mentioned earlier 1169 was issued under
2 NRS 533.368, which is to conduct an investigation to see if
3 there's additional water for appropriation, not to assess the
4 boundaries, not to decide that these basins should be combined
5 and treated as one. That's not the purpose of 1169. Because
6 1309 comes from the pump test and everything that occurred
7 after, 1309 cannot all of a sudden stem or be rooted in
8 534.120, .110 or .030. That's just not where we are, and it's
9 just sort of a after-the-fact justification to try and make
10 1309 lawful.

11 Now I want to talk about the State Engineer's use of
12 the word delineate.

13 So in Order 1309, the State Engineer says that he is
14 delineating the Lower White River Flow System as that one
15 hydrographic basin.

16 As I mentioned earlier, the word delineate is not in
17 the statutes. That is the State Engineer's word. And when you
18 talk about delineating, that's really creating, right. He's
19 creating. He's determining that this is one basin.

20 After all of the argument that we've heard over the
21 past couple of days, we still have not identified one statute
22 that allows the State Engineer to determine, establish,
23 redefine the basins. There's been a lot of discussion about
24 the map that shows the 232 hydrographic basins. And that map,
25 as we briefed, came from the Rush Report from 1968. The USGS

1 in conjunction with the State Engineer developed that map and
2 established those 232 hydrographic basins.

3 If the State Engineer had authority to change those
4 established basins, it would have to be in a statute, and the
5 State Engineer has not identified any statute that would give
6 him that authority.

7 There's also been a lot of discussion about what a
8 basin is. The State Engineer in his answering brief almost
9 feigns confusion as to what CSI means when they refer to the
10 term basin. Obviously this is disingenuous given how water has
11 been managed, how the basins has been referred to over the
12 years.

13 The State Engineer has argued that nothing in
14 Nevada's water law constrains the State Engineer's view of what
15 a basin is. But what the State Engineer thinks a basin is is
16 truly irrelevant. The legislature uses the word basin
17 throughout the statutory scheme. And this is where I find it
18 so striking that we have no statutory interpretation from the
19 State Engineer to explain what a basin is or why the State
20 Engineer alone somehow has authority to define what a basin is
21 whenever he wants and on whatever terms he decides.

22 The State Engineer does not argue that the word is
23 ambiguous. So we just start with the plain language. That is
24 how statutory interpretation works. A basin is just a geologic
25 feature. It's akin to a valley. It's a geologic feature

1 that's also a mountain. So mountain ranges get identified, and
2 they get named, just like Nevada's basins do.

3 And what's interesting is the State Engineer's Water
4 Words Dictionary actually defines Nevada basins. And it does
5 so by referencing the basins that were established by the USGS
6 in conjunction with the State Engineer. Those are the 232
7 hydrographic basins.

8 Rather than actually go through any type of statutory
9 interpretation or statutory analysis, the State Engineer just
10 dismisses of it and says the legislature left it up to the
11 State Engineer to determine what a basin is. That is not how
12 statutory interpretation works. The State Engineer can only
13 act where authorized to do so. There is no statute that says
14 the State Engineer gets to decide what a basin is or what that
15 term means.

16 The State Engineer is also dismissive of the fact
17 that Coyote Springs looks at the fact that the legislature uses
18 the term basin in a singular versus plural. That is a tool of
19 statutory interpretation. We assume, the presumption is if the
20 legislature says a basin, any basin, a particular basin or a
21 portion thereof or a portion therein, that means one basin.
22 The presumption is if the legislature wanted to reference
23 multiple basins, then the legislature would have done so. And
24 the State Engineer hasn't provided any authority or any
25 explanation as to how you could possibly read the term a basin

1 as multiple basins. That would violate tools of statutory
2 construction. That would violate the plain language of the
3 statute.

4 The next issue that I want to address is the State
5 Engineer's attempt to characterize the combining of multiple
6 basins into one as a factual issue versus a legal issue.

7 So we know why the State Engineer wants it to be
8 factual: Because more deference is given to factual findings.

9 The problem is the basins have been established since
10 1968. As I referenced earlier, if there was an intention by
11 the legislature to give the State Engineer the ability to
12 change those basins, then it would have said so. It has not
13 done that.

14 The second issue is that where the State Engineer is
15 authorized to conduct factual investigations, which is now what
16 he wants to characterize as 1309 constituting, that combining
17 these basins into one hydrographic basin is a factual finding.
18 If that were true, the legislature would still have to
19 authorize that. So throughout the statutory scheme, we'll see
20 where the State Engineer is authorized to conduct factual
21 investigations.

22 We start with 1169. We saw it earlier. Under
23 NRS 533.368, the State Engineer is authorized to conduct a
24 study or investigation to see if additional water is available
25 for appropriation. So that's a factual finding that is

1 expressly authorized by statute.

2 Another example, NRS 534.110, Subsection 6, that
3 statute authorizes the State Engineer to conduct a study to
4 determine if it's necessary to initiate curtailment
5 proceedings.

6 So if, even if the determination of combining
7 multiple basins into one, even if we could call that a factual
8 determination, there still has to be statutory authorization to
9 allow that to happen. And here there's no statute that says
10 the State Engineer can conduct an investigation to change the
11 basin boundaries or to combine multiple basins into one.

12 The last issue I told you I was going to address is
13 this joint administration versus conjunctive management, and
14 the one thing I wanted to show the Court.

15 And Mark, if you'll pull up NRS 532.167.

16 Under this statute, the legislature requires the
17 State Engineer to develop a water budget for every basin in
18 Nevada.

19 And we've talked a lot about water budgets, that that
20 is a tool that the State Engineer can use to assess water in
21 each basin. The State Engineer can assess whether those basins
22 have a hydraulic connection, how they impact each other. And
23 then the State Engineer can enter his rules and regulations
24 where appropriate if he finds that there's a depletion of
25 water.

1 And with that, I will pass it on to Mr. Herrema. I
2 probably said that wrong. I call him Brad.

3 **ARGUMENT FOR COYOTE SPRINGS**

4 MR. HERREMA: Good afternoon, Your Honor.

5 THE COURT: Good afternoon.

6 MR. HERREMA: Brad Herrema on behalf of CSI. I'm
7 going to just hit a few highlights on the substantial evidence
8 issues. I know you've heard a lot over the last almost three
9 days here, not quite three weeks, but so I'll try to be brief.
10 I appreciate the attention I know you've paid and the time you
11 put into the briefing as well.

12 Just kind of harkening back to what I talked about on
13 Monday, it's clear, and I think it's become clear to you that
14 1309 has put the Lower White River Flow System basins into a
15 state of uncertainty.

16 Mr. Taggart said, you know, it makes sense that the
17 State Engineer would do this fact-finding process before policy
18 setting. But it's not -- it's still not clear to me why the
19 State Engineer felt that it needed to issue an order like 1309
20 when it was finding facts unless, of course, the State Engineer
21 wanted to have those validated either through the statute of
22 limitations running or a process like this.

23 One other thing I heard from both Mr. Taggart this
24 morning and Mr. Dotson this afternoon, they both seized on this
25 word segmentation that I used when I was talking on Monday to

1 sort of explain to the Court how I'm trying to wrap my head
2 around what's happening here.

3 And they both have I think sort of challenged my
4 argument in saying well, you're inconsistent because you've
5 said that on the one hand that the State Engineer shouldn't
6 segment this, but on the other hand you're saying what the
7 State Engineer should do is look at this basin by basin and not
8 combine these six, seven basins into one single basin. And
9 that confuses the concept of what segmentation is.

10 The segmentation issue in California CEQA law,
11 California Environmental Quality Act law, is breaking something
12 up processwise into smaller pieces so that you don't ever have
13 to look at the whole of it when the impacts of the whole might
14 be -- might not be able to see the forest if you're only
15 looking at the individual trees. And that's what the concern
16 is here with breaking things up into 1309 as a single order
17 with supposedly just fact-finding and then deferring a process,
18 which we don't know what it will be. We don't know when it
19 will be.

20 Mr. Bolotin said in his argument, you know, if things
21 don't get figured out, then the State Engineer will have to
22 start some process. And so we have this black cloud looming
23 over all of our heads now because we don't know what the State
24 Engineer is planning to do next, but he's sure trying really
25 hard to make sure that these factual findings are approved.

1 THE COURT: So when you were referring to the
2 segmentation, you're talking about dividing the fact-finding
3 process from the determination of the conflicts of the
4 different water right holders; is that correct?

5 MR. HERREMA: I'm talking about separating this
6 ruling, this order on the fact-finding from whatever the
7 process will be. We don't know. Some people have
8 characterized it as the beginning of a curtailment process.
9 Others have said, you know, maybe because of this black cloud
10 over us people will have to work it out, and something, you
11 know, a miracle will happen. I don't know what it will be, but
12 that's the segmentation I'm talking about.

13 And the reason I brought it up on Monday and why I
14 think it's part of the substantial evidence review is because
15 we don't know what all of this is going to be used for. We
16 can't tell if it's suitable for that purpose. And so how can
17 the State Engineer claim that there's substantial evidence for
18 findings that will support what, we don't know. That's the
19 context of the segmentation argument.

20 I don't need to repeat the substantial evidence
21 standards. They've been repeated many times over the past
22 couple of days. I would just hit a couple real quickly.

23 Even where the issues involve technical or
24 complex scientific issues, the State Engineer's
25 orders must be sufficiently explained and

1 supported to allow for judicial review.

2 That's *Eureka County*.

3 And even under deferential substantial
4 evidence review, Courts must not merely rubber
5 stamp agency action. They must determine that
6 the agency articulated a rational connection
7 between the facts presented and its decision.

8 And so it's not enough for the State Engineer just to
9 say this is what he's decided.

10 And then we talked a little bit the other day. I
11 think it's been cleared up. The State Engineer himself views
12 that the legislature has mandated that he use the best
13 available science.

14 A couple more things in regard to the -- both the
15 determination of a hydraulic connection and the State
16 Engineer's reliance on the 1169 pump test and then I'll touch
17 on the 8,000.

18 In regard to the reliance of the State Engineer on
19 the 1169 pump test, Mr. Taggart stated that some folks have
20 characterized the pump test as perhaps not well thought out.
21 That certainly was not what my argument was. I think
22 Ms. Winston has done an excellent job today of explaining what
23 the genesis of that pump test was, what the statutory
24 authorization that the State Engineer thought he was operating
25 under was for that pump test. And I think that informs the

1 manner in which that pump test was constructed.

2 So if the pump test had been designed for other
3 purposes, such as potential curtailment of existing rights as
4 opposed to an investigation of what water might be available
5 for additional appropriation, it may have been designed
6 differently.

7 If the parties understood what the criteria were that
8 the State Engineer was going to use for determining whether
9 there was a close connection that justified merging these six,
10 seven basins into a single basin, they also might have designed
11 the pump test differently.

12 And just in regard to those criteria, I'm not going
13 to walk through them. Mr. Taggart said CSI knew before it
14 submitted its report and testimony to the State Engineer what
15 those criteria were. That's absolutely not true. There's
16 nowhere that -- that it's shown that the State Engineer had
17 disclosed what those criteria were before 1309.

18 In regard to what the pump tests can and can't be
19 used for, Mr. Bolotin brought yesterday his demonstrative
20 exhibit here with -- we've got multiple. They did their
21 multiplying.

22 THE COURT: I can't see that one.

23 MR. HERREMA: He brought his demonstrative here with
24 a handful of hydrographs shown. I'd like to just clarify.
25 This has eight well hydrographs on it, two spring flow

1 hydrographs. There were a total of 79 wells in alluvial or
2 carbonate aquifers that were monitored as part of that 1169
3 pump test. And they had well data collected either
4 continuously, monthly, quarterly. There were also a total of
5 10 surface water gauging sites included in the monitoring that
6 worked so.

7 I know this is a demonstrative exhibit, but when you
8 look at it, please keep in context that there are 70 other well
9 hydrographs and eight spring flow hydrographs that are not
10 shown on the bigger.

11 I did want to show you just a couple other
12 hydrographs.

13 Mark, if you could bring those up.

14 These hydrographs here, these are Coyote Springs
15 Valley, CSVM wells 3, 4 and 5. We'll walk through them.

16 I don't think they're marked on the bottom with
17 the --

18 THE COURT: This is slide?

19 UNIDENTIFIED SPEAKER: 53.

20 THE COURT: 53.

21 MR. HERREMA: I don't think they're marked on the
22 bottom of the ROA cites. The ROA cites are 35653 through
23 35655. They're part of the expert report that Coyote Springs
24 submitted to the State Engineer back in July of 2019. So the
25 first is CSVM-3. This is a well that's at the north end of the

1 Coyote Springs Valley.

2 THE COURT: This is the one that's what, 2 miles away
3 from the Kane Springs Valley well?

4 MR. HERREMA: It's further north. I'm not sure
5 exactly where it is.

6 The next one I have is CSVM-4 --

7 THE COURT: Oh. Maybe that's the one that's --

8 MR. HERREMA: -- and this is actually shown on
9 Mr. Bolotin's chart here. You can see it's just south --
10 southwest of the KMW 1.

11 And this is the well that the -- or the hydrograph
12 that the State Engineer uses for establishing a close
13 connection.

14 The next one I'd like to show you though is CSVM-5.
15 And this is a hydrograph that's not on the State Engineer's
16 demonstrative exhibit here. This is a well that is west of --
17 it's in the western portion of the Coyote Springs Valley. And
18 it's something -- west of something that Mr. Robison has
19 described as the highway fault. It's a fault that was
20 identified by CSI's consultant after the State Engineer issued
21 1303 and said, you know, we're going to have this evidentiary
22 hearing process.

23 Then CSI engaged a company called Zonge, Z-o-n-g-e,
24 and they did the CSAMT process that Mr. Morrison talked about
25 real briefly yesterday. And so this well is west of the

1 highway fault that was identified.

2 So one of the concerns that I talked about on Monday
3 was the fact that this test took place 25 and a half months.
4 It's a very short amount of time, and it has to be viewed in
5 the context it took place. And I mentioned on Monday that it
6 took place at the end of a long dry period.

7 Mark, could you bring up the precipitation record.

8 I had intended to have this on Monday, and I
9 apologize that I didn't have it.

10 Here you can see the -- on the bottom here the
11 precipitation record got a --

12 THE COURT: And what slide is this?

13 UNIDENTIFIED SPEAKER: This would be 54.

14 MR. HERREMA: You can see the ROA cite on the
15 left-hand side there.

16 Now, this -- there's a dark blue line, and what it
17 shows during -- it's called cumulative departure from the mean.
18 And so that's a term of art. It's taken me a long time to kind
19 of wrap my head around what it means, but if you take a median
20 amount of precipitation during a -- over a long stretch of time
21 and you start at that particular point in time, and then you
22 see cumulatively how are we doing? Are we trending along the
23 line, along the mean where we think the average would be? If
24 we're above the mean, then that line would be higher. If we're
25 below, then that line would be lower. You plot that each year

1 as a trend though. It's cumulative.

2 And so what you see here with this blue line dipping
3 down, that's a dry period where we had this pump test taking
4 place. And for all the reasons I talked about previously, you
5 have to view those pump test results and the data that they
6 provided in that context.

7 In regard to the inclusion of Kane Springs, I think
8 Coyote Springs has made its position quite clear.

9 Now, there was a discussion with Ms. Peterson
10 yesterday. She brought out a ruler and showed the 6 inches and
11 sort of how much that actually means in terms of these
12 different water levels.

13 Mr. Lake talked today about an analogy of having a
14 couple buckets next to each other or one bucket maybe with some
15 type of structure in the middle that -- or in it that separated
16 different parts from each other, and it caused differences in
17 what we call hydraulic head. And what you've been asking
18 throughout the hearing, you know, what are you talking about
19 when you're talking about elevations. We're talking about
20 something called hydraulic head. And frequently it's recorded
21 as the water level as opposed to -- or as compared to meet sea
22 level.

23 So we can talk about the altitude of different cities
24 like Las Vegas, Los Angeles, Denver. We can also talk about
25 the -- what the hydraulic head in these wells is, and that's a

1 number above a baseline. And so you can compare wells if you
2 use that common baseline. So we know that the water level in
3 the wells, regardless of what's happening in terms of the
4 ground surface, we know that the water level in these wells,
5 it's different by about 60 feet. And the State Engineer has
6 said, well, regardless of that you've got a similar response to
7 the pump test. And so they must be connected.

8 And as Mr. Lake was talking about, you could have
9 these connected buckets where if one drops because of the
10 differences in the connection the other might drop. But the
11 converse is not necessarily true, and particularly given the
12 way that the pump test was set up. No one disputes that there
13 was no pumping from the Kane Spring Valley during the 1169 pump
14 tests. So you might be able to claim that there's an impact on
15 what's happening in Kane Spring because of the pumping lower
16 down in Coyote Spring Valley during the 1169 pump test, but
17 there's no way to claim that there's -- there's no way to know
18 what the impacts of Kane Spring pumping might be because that
19 wasn't part of the test.

20 And, in fact, Ms. Peterson did show a plot of two
21 hydrographs yesterday that showed when they did test the
22 pumping in the Kane Spring Valley well there wasn't a response
23 in the Coyote Spring Valley well.

24 Now, one other thing on the Kane Spring exclusion
25 issue. Yesterday Mr. Morrison brought up or mentioned very

1 briefly a critique of the Zonge work as lacking credibility was
2 I think the word that he used. I don't think that's a fair way
3 to characterize his concerns with their work. His briefing,
4 his answering brief, there was a criticism of the way that they
5 laid out specific testing lines for this geophysical testing
6 that they were doing, but I don't know that that goes to the
7 credibility of the witness. I think that was not really a fair
8 characterization.

9 And also I would just point out that the Water
10 District, Moapa Valley Water District acknowledges that faults
11 can act as low permeability structures at the bottom of Kane
12 Springs Valley, but they say perhaps it doesn't hydraulically
13 isolate one basin from the other.

14 The fault found by that Zonge study at the base of
15 Kane Springs, in CSI's opinion, it acts similarly to the low
16 permeability layer between the Pahranaagat Valley and Kane
17 Springs. It does create a steep water level gradient that
18 hydraulically separates Kane Springs and Coyote Springs. And
19 the same reason that the State Engineer excluded Pahranaagat and
20 Delmar basins from the Lower White River Flow System would
21 require or mandate the exclusion of Kane Spring Valley from the
22 Lower White River Flow System as well.

23 I think someone -- maybe more than one person that
24 said well, this is a remarkably flat basin. And if you look at
25 60 feet of difference in water level elevation over 22 miles,

1 you know, that's not much of a slope at all, but that's like
2 saying it's remarkably flat from the sixth floor of your
3 apartment building to a park 22 miles away as long as you don't
4 mind that first step walking off the apartment building.

5 Finally, I'd like to reiterate that 1309 doesn't
6 explain why Ruling 5712 conclusions are -- I'm sorry, why
7 the -- yes, the Ruling 5712 conclusions are overruled. The
8 1169 pump tests don't refute the facts that were in 5712, and
9 the State Engineer's decision to exclude Kane Springs Valley
10 from the Lower White River Flow Systems is arbitrary, as it
11 dismisses the difference in hydraulic head that he previously
12 found to be conclusive evidence in 5712 that Kane Spring Valley
13 should be excluded from the 1169 pump test.

14 In regard to the 8,000 acre-foot cap, it's been made
15 clear that this number was come up with primarily, and I think
16 the State Engineer's brief is very clear that this 8,000
17 acre-foot number is based on a desire to protect senior Muddy
18 River rights.

19 And the question I think it begs is if it's necessary
20 to protect those rights, why set this cap that they've sort of
21 backed into with this effects analysis as opposed to doing what
22 the State Engineer previously talked about doing following and
23 creating a groundwater model, which is what he said in 1169 he
24 was going to do? And considering his responsibility, as
25 Ms. Winston talked about, to create a water budget or establish

1 a water budget for each of these individual basins, why do you
2 need to go -- to back into this number based on affects when
3 he's got other options.

4 Now, Mr. Taggart showed his clients -- I didn't see
5 the title of it. I don't know if it was a notice of violation
6 or a request for action. And whatever the demonstrative was
7 that he showed in regard to his client's request that the State
8 Engineer take action on the depletion in the Muddy River flows.

9 THE COURT: It was a notice of alleged violation.

10 MR. HERREMA: Okay. The notice of alleged violation.
11 Thank you.

12 Now, I would just note the date on that, July 3,
13 2019. I think that's the same date that expert reports were
14 due to the State Engineer in the 1303 hearing process. So this
15 is -- this is something that wasn't done outside of that, this
16 current process. It was I think occasioned by the work that
17 they were doing for the 1303 hearing expert reports, but if you
18 have that available, and the water authority has availed itself
19 of that.

20 Mr. Taggart talked earlier about different types of
21 curtailment. He said there's conflict curtailment mechanisms
22 that the State Engineer can undertake. The water authority has
23 availed itself of it.

24 So why set this 8,000 acre-foot affects-based cap
25 now, create the black cloud that we're all under with no idea

1 what's going to happen next, particularly when the State
2 Engineer hasn't defined how the 8,000 is available within the
3 subbasins or how it will limit pumping to the 8,000 acre-feet?

4 In regard to the availability of the 8,000, I think
5 too many people during the proceeding have sort of talked about
6 the system as if it's one big bathtub without any
7 heterogeneities in it. So using this concept, this rough
8 justice concept of impacts at only one particular location to
9 set this cap, it doesn't take into consideration the
10 variability and what's happening in the Lower White River Flow
11 System.

12 It doesn't consider the fact that not every well
13 has -- pumping from neither each individual well has the same
14 impacts on the flow system, and there may be flow paths where
15 water goes -- discharges from completely different parts of the
16 basin.

17 Mr. Dotson brought up 1169 earlier. He showed
18 Footnote 12, which is on page 4 of 1169. I'd invite the Court
19 to take a look at that, and you'll see what the State Engineer
20 said there about all of the different points of discharge from
21 the Lower White River Flow System basins. There's many more
22 than just Muddy River Springs.

23 And so this 8,000 acre-foot cap doesn't take into
24 account that there may be the ability to pump water that would
25 not otherwise be discharging from that Muddy River Springs

1 area.

2 In fact, during the pump test, there was 14 and a
3 half thousand acre feet of pumping of which 5300 occurred in
4 Coyote Spring Valley. There was only a resultant 300 acre-foot
5 to 450 acre-foot impact on spring flow. And so that suggests
6 that there must be other things going on in terms of the
7 effects of that pumping and where that water is coming from.

8 Mr. Taggart showed a chart. I think it was this
9 morning, with all of the basins, the 232 basins, and then a
10 bunch of arrows in between them. And those arrows were showing
11 the way water flowed in between different basins. And so when
12 there's communication between the basin, one might contribute
13 to another, and that was what those arrows showed.

14 Now, these types of movements also occur within the
15 individual basins, and not just basin to basin, but within the
16 individual basins you have water coming in, water going out,
17 water moving in different directions.

18 Mark, could you bring up the chart.

19 (Pause in the proceedings.)

20 This is what Coyote Springs attempted to do in --

21 THE COURT: What page is this or what slide is this?

22 UNIDENTIFIED SPEAKER: This will be 55.

23 MR. HERREMA: Is there an ROA cite on the bottom
24 there, Mark?

25 UNIDENTIFIED SPEAKER: Yes.

1 MR. HERREMA: Now, this is from CSI's expert report.

2 THE COURT: It says ROA 41017?

3 MR. HERREMA: Yes. Thank you.

4 And this is a type of analysis, and Ms. Winston
5 touched on it a little bit in her argument as well, but this is
6 the type of analysis that the State Engineer should -- this is
7 just Coyote Spring Valley, but this is the type of analysis
8 that can be done not only in Coyote Spring Valley as part of
9 the water budget that the State Engineer is required to
10 develop, but it also can be done to talk about the
11 relationships between the different basins.

12 And this is the way to develop that number that is --
13 if they feel that they need to come up with a combined
14 perennial yield for all these basins, this is the way to do it,
15 not this backed out impacts analysis of 8,000 that they've come
16 up with.

17 What that doesn't take into account is the flow paths
18 that might exist, the faulting structures that I talked about
19 in terms of the work that Zonge did. There's a -- I think it's
20 deuterium is the way it's pronounced. It's an isotope that
21 is -- that you can look at to understand how water moves around
22 within the basins. If you look at the prior page in CSI's
23 expert report, which I don't have the slide of unfortunately,
24 but it's the immediately previous ROA cite. You'll see the
25 water budget that CSI did that supports these arrows here on