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.	 **Supreme Court No. 85137** District Court Case No. A816761

JOINT APPENDIX

VOLUME 7

APPENDIX – CHRONOLOGICAL TABLE OF CONTENTS

			000288
Order 1169		2	JA_000289-000299
Ruling 5712		2	JA_000300-000322
Ruling 5987		2	JA_000323-000326
Ruling 6255		2	JA_000327-000357
A Regional Interbasin Ground-Water System in the White River Area, Southeastern Nevada		2	JA_000358-000381
Settlement agreement Among the State Engineer, State of Nevada, Tracy Taylor, P.E., Nevada State Engineer, Jason King, P.E., Acting Nevada State Engineer, Lincoln County Water District and Vidler Water Company		2	JA_000382-000397
Excerpt from Center for Biological Diversity. Groundwater Management and the Muddy River		2	JA_000398

Springs, Report in Response to Nevada State Engineer Order 1303. Tom Meyers.			
Excerpts from Rebuttal Report – Tom Meyers		2	JA_000399-000404
Amended Stipulation for Withdrawal of Protests		2	JA_000405-000416
Coyote Spring Valley Water Supply		2	JA_000417-000419
US Dept. of Interior Memorandum Request for Formal and Informal Consultation on the Kane Springs Valley Groundwater Development Project in Lincoln County		2	JA_000420-000487
Excerpts of Testimony of Richard K. Waddell on Behalf of U.S. National Park Service		2	JA_000488
Excerpts of Testimony of Richard K. Waddell on Behalf of U.S. National Park Service		2	JA_000489
Excerpt of Post-Hearing Brief of Nevada		2	JA_000490

Cogeneration Associates Nos. 1 and 2 pertaining to Amended Notice of Hearing Interim Order #1303 Following the Hearing Conducted September 23, 2019, Through October 4, 2019, Before the Nevada State Engineer			
Excerpts of Hearing for 1303 on 09/23/2019		3	JA_000491-000494
Excerpts of Hearing for 1303 on 09/24/2019		3	JA_000495-000500
Excerpts of Hearing for 1303 on 09/25/2019		3	JA_000501-000505
Excerpts of Hearing for 1303 on 09/26/2019		3	JA_000506-000510
Excerpts of Hearing for 1303 on 09/27/2019		3	JA_000511-000515
Excerpts of Hearing for 1303 on 09/30/2019		3	JA_000516-000521
Excerpts of Hearing for 1303 on 10/01/2019		3	JA_000522-000526
Excerpts of Hearing for 1303 on 10/02/2019		3	JA_000527-000531
Excerpts of Hearing for 1303		3	JA_000532-

on 10/03/2019			000536
Excerpts of Hearing for 1303 on 10/04/2019		3	JA_000537-000541
Orders Granting Motions to Intervene	02/26/2021	3	JA_000542-000545
Coyote Springs Investment, LLC's Opening Brief on Petition for Judicial Review	08/27/2021	3	JA_000546-000614
Lincoln County Water District and Vidler Water Company, Inc.'s Opening Brief	08/27/2021	3	JA_000615-000709
Respondents' Answering Brief	11/23/2021	4	JA_000710-000762
Minute Order	12/03/2021	4	JA_000763-000764
Coyote Springs Investment, LLC's Reply in Support of Opening Brief	01/11/2022	4	JA_000765-000802
Lincoln County Water District and Vidler Water Company, Inc.'s Reply Brief	01/11/2022	4	JA_000803-000866
Transcript re: Petition for Judicial Review	02/14/2022	5	JA_000867-001056
Transcript re: Petition for Judicial Review	02/15/2022	5-7	JA_001057-001382
Transcript re: Petition for Judicial Review	02/16/2022	7-8	JA_001383-001678

Transcript re: Petition for Judicial Review	02/17/2022	8-9	JA_001679-001938
Findings of Fact, Conclusions or Law, and Order Granting Petitions for Judicial Review	04/19/2022	9	JA_001939-001978
Coyote Springs Investment, LLC's Motion for Attorney Fees	05/05/2022	9	JA_001979-001998
Appendix of Exhibits to Coyote Springs Investment, LLC's Motion for Attorney Fees	05/05/2022	10	JA_001999-002220
Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for Attorneys' Fees	05/10/2022	11	JA_002221-002386
Errata Providing Exhibit to Declaration of Karen A. Peterson in Support of Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for Attorney's Fees	05/11/2022	11	JA_002387-002401
State Engineer's Omnibus Opposition to Respective Motions for Attorney's Fees	05/19/2022	12	JA_002402-002507
Lincoln County Water District's and Vidler Water Company, Inc.'s Reply in Support of Motion for Attorneys' Fees	06/27/2022	12	JA_002508-002518

Coyote Springs Investment, LLC's Reply in Support of Motion for Attorney Fees	06/27/2022	12	JA_002519-002528
Recorder's Transcript re: Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for Attorney Fees; Coyote Springs Investment, LLC's Motion for Attorney Fees; State Engineer's Motion to Retax Petitioners Apex Holding Company, LLC and Dry Lake Water, LLC's Costs	07/05/2022	12	JA_002529-002554
Order Denying Coyote Springs Investment, LLC's and Lincoln County Water District and Vidler Water Company, Inc.'s Motions for Attorney's Fees	07/22/2022	12	JA_002555-002564
Notice of Entry of Order Denying Coyote Springs Investment, LLC's and Lincoln County Water District and Vidler Water Company, Inc.'s Motions for Attorney's Fees	07/22/2022	12	JA_002565-002578
Coyote Springs Investment, LLC's Notice of Appeal	08/04/2022	12	JA_002579-002584
Lincoln County Water District's and Vidler Water Company, Inc.'s	08/09/2022	12	JA_002585-002587

Notice of Appeal			

APPENDIX – ALPHABETICAL TABLE OF CONTENTS

Coyote Springs Investment, LLC's Reply in Support of Motion for Attorney Fees	06/27/2022	12	JA_002519-002528
Coyote Springs Investment, LLC's Reply in Support of Opening Brief	01/11/2022	4	JA_000765-000802
Errata Providing Exhibit to Declaration of Karen A. Peterson in Support of Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for Attorney's Fees	05/11/2022	11	JA_002387-002401
Excerpt from Center for Biological Diversity. Groundwater Management and the Muddy River Springs, Report in Response to Nevada State Engineer Order 1303. Tom Meyers.		2	JA_000398
Excerpt of Post-Hearing Brief of Nevada Cogeneration Associates Nos. 1 and 2 pertaining to Amended Notice of Hearing Interim Order #1303 Following the Hearing Conducted September 23, 2019, Through October 4, 2019, Before the Nevada State Engineer		2	JA_000490
Excerpts from Rebuttal Report –		2	JA_000399-

Tom Meyers			000404
Excerpts of Hearing for 1303 on 09/23/2019		3	JA_000491-000494
Excerpts of Hearing for 1303 on 09/24/2019		3	JA_000495-000500
Excerpts of Hearing for 1303 on 09/25/2019		3	JA_000501-000505
Excerpts of Hearing for 1303 on 09/26/2019		3	JA_000506-000510
Excerpts of Hearing for 1303 on 09/27/2019		3	JA_000511-000515
Excerpts of Hearing for 1303 on 09/30/2019		3	JA_000516-000521
Excerpts of Hearing for 1303 on 10/01/2019		3	JA_000522-000526
Excerpts of Hearing for 1303 on 10/02/2019		3	JA_000527-000531
Excerpts of Hearing for 1303 on 10/03/2019		3	JA_000532-000536
Excerpts of Hearing for 1303 on 10/04/2019		3	JA_000537-000541
Excerpts of Testimony of Richard K. Waddell on Behalf of U.S. National Park Service		2	JA_000488
Excerpts of Testimony of Richard K. Waddell on Behalf of U.S.		2	JA_000489

National Park Service			
Findings of Fact, Conclusions or Law, and Order Granting Petitions for Judicial Review	04/19/2022	9	JA_001939-001978
Lincoln County Water District and Vidler Water Company, Inc.'s Opening Brief	08/27/2021	3	JA_000615-000709
Lincoln County Water District and Vidler Water Company, Inc.'s Petition for Judicial Review	07/13/2020	1	JA_000033-000117
Lincoln County Water District and Vidler Water Company, Inc.'s Reply Brief	01/11/2022	4	JA_000803-000866
Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for Attorneys' Fees	05/10/2022	11	JA_002221-002386
Lincoln County Water District's and Vidler Water Company, Inc.'s Reply in Support of Motion for Attorneys' Fees	06/27/2022	12	JA_002508-002518
Lincoln County Water District's and Vidler Water Company, Inc.'s Notice of Appeal	08/09/2022	12	JA_002585-002587
Minute Order	12/03/2021	4	JA_000763-000764
Notice of Entry of Order Denying	07/22/2022	12	JA_002565-

Coyote Springs Investment, LLC's and Lincoln County Water District and Vidler Water Company, Inc.'s Motions for Attorney's Fees			002578
Notice of Hearing		1	JA_000205-000225
Notice of Pre-Hearing Conference		1	JA_000244-000249
Order 1169		2	JA_000289-000299
Order 1169A		2	JA_000284-000288
Order 1303		1	JA_000186-000204
Order 1309		1	JA_000118-000185
Order Denying Coyote Springs Investment, LLC's and Lincoln County Water District and Vidler Water Company, Inc.'s Motions for Attorney's Fees	07/22/2022	12	JA_002555-002564
Orders Granting Motions to Intervene	02/26/2021	3	JA_000542-000545
Recorder's Transcript re: Lincoln County Water District's and Vidler Water Company, Inc.'s Motion for	07/05/2022	12	JA_002529-002554

Attorney Fees; Coyote Springs Investment, LLC's Motion for Attorney Fees; State Engineer's Motion to Retax Petitioners Apex Holding Company, LLC and Dry Lake Water, LLC's Costs			
Respondents' Answering Brief	11/23/2021	4	JA_000710-000762
Ruling 5712		2	JA_000300-000322
Ruling 5987		2	JA_000323-000326
Ruling 6255		2	JA_000327-000357
Settlement agreement Among the State Engineer, State of Nevada, Tracy Taylor, P.E., Nevada State Engineer, Jason King, P.E., Acting Nevada State Engineer, Lincoln County Water District and Vidler Water Company		2	JA_000382-000397
State Engineer Record on Appeal Documents	11/09/2020	1	
State Engineer's Omnibus Opposition to Respective Motions for Attorney's Fees	05/19/2022	12	JA_002402-002507

Transcript re: Petition for Judicial Review	02/14/2022	5	JA_000867-001056
Transcript re: Petition for Judicial Review	02/15/2022	5-7	JA_001057-001382
Transcript re: Petition for Judicial Review	02/16/2022	7-8	JA_001383-001678
Transcript re: Petition for Judicial Review	02/17/2022	8-9	JA_001679-001938
Transcripts of Proceedings – Public Hearing Pre-Hearing Conference on 08/08/2019		2	JA_000250-000283
US Dept. of Interior Memorandum Request for Formal and Informal Consultation on the Kane Springs Valley Groundwater Development Project in Lincoln County		2	JA_000420-000487

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, LLP/Las Vegas)
Kent R. Robison (Robison, Sharp, Sullivan & Brust)
Hannah E. Winston (Robison, Sharp, Sullivan & Brust)

Lincoln County Water District
Dylan V. Frehner (Lincoln County District Attorney)
Wayne O. Klomp (Great Basin Law)
Vidler Water Company, Inc.
Karen A. Peterson (Allison MacKenzie, Ltd.)

///

///

Adam Sullivan, P.E.

James N. Bolotin (Attorney General/Carson City)
Jeffrey M. Conner (Attorney General/Carson City)
Aaron D. Ford (Attorney General/Carson City)
Steven G. Shevorski (Attorney General/Las Vegas)
Laena St Jules (Attorney General/Carson City)

DATED this 27th day of December, 2022.

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

Electronically Filed
7/28/2022 1:24 PM
Steven D. Grierson
CLERK OF THE COURT

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.

A P P E A R A N C E S

FOR LAS VEGAS VALLEY WATER DISTRICT, AND SOUTHERN NEVADA WATER AUTHORITY:	PAUL G. TAGGART, ESQ.
FOR NV STATE ENGINEER, DIVISION OF WATER RESOURCES:	JAMES N. BOLOTIN, ESQ. Sr. Deputy Attorney General MICHELINE N. FAIRBANK, ESQ.
FOR LINCOLN COUNTY WATER:	WAYNE O. KLOMP, ESQ.
FOR VIDLER WATER COMPANY:	KAREN A. PETERSON, ESQ.
FOR NV COGENERATION ASSOCIATES NOS. 1 AND 2:	FRANCIS C. FLAHERTY, ESQ.
FOR MUDDY VALLEY IRRIGATION:	ROBERT A. DOTSON, ESQ. STEVEN D. KING, ESQ. SCOTT MIDDLETON, ESQ.
FOR CENTER FOR BIOLOGICAL DIVERSITY:	SCOTT LAKE, ESQ. LISA T. BELENKY, ESQ.
FOR REPUBLIC ENVIRONMENTAL TECH., AND GEORGIA-PACIFIC GYPSUM:	LUCAS M. FOLETTA, ESQ.
FOR DRY LAKE WATER, LLC, AND APEX HOLDING COMPANY:	CHRISTIAN T. BALDUCCI, ESQ.
FOR BEDROC LIMITED, LLC, WESTERN ELITE ENVIRONMENTAL, AND CITY OF NORTH LAS VEGAS:	NO APPEARANCES NOTED
FOR MOAPA VALLEY WATER DISTRICT:	GREGORY H. MORRISON, ESQ.

FOR COYOTE SPRINGS INVESTMENT:	KENT R. ROBISON, ESQ. EMILIA K. CARGILL, ESQ. BRADLEY J. HERREMA, ESQ. HANNAH E. WINSTON, ESQ.
FOR SIERRA PACIFIC POWER CO., AND NEVADA POWER COMPANY:	JUSTINA A. CAVIGLIA, ESQ.
FOR THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS:	SEVERIN A. CARLSON, ESQ.

I N D E X

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

*** * * * ***

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

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

THE COURT: Thank you.

Nevada State Engineer?

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

THE COURT: Okay. Great. Thank you.

Lincoln Valley Water District.

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

THE COURT: Okay. Thank you.

Vidler Water Company.

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

THE COURT: Great. Thank you.

Nevada Cogeneration Associates No. 1 and 2.

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

THE COURT: Okay. Thank you.

Muddy Valley Irrigation Company.

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

THE COURT: Thank you.

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

THE COURT: All right. Thank you.

Center for Biological Diversity.

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

THE COURT: Okay. Thank you.

Republic Environmental Technologies.

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

THE COURT: Thank you.

Let's see. Dry Lake Water and Apex?

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

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

THE COURT: Thank you.

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

UNIDENTIFIED SPEAKER: No.

THE COURT: No. All right.

Let's see. Moapa Valley Water District.

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

THE COURT: Okay. Thank you.

Coyote Springs.

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

THE COURT: Okay. Thank you.

Let's see. Sierra Pacific Power Company --

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

THE COURT: Great. Thank you.

Sierra Pacific Power Company and Nevada Power Company?

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

THE COURT: Thank you.

Church of Jesus Christ of Latter-day Saints?

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

THE COURT: Okay. Thank you.

Have I missed anyone?

(No audible response.)

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

(Pause in the proceedings.)

THE COURT: Ready.

MR. TAGGART: Good morning, Your Honor.

THE COURT: Good morning.

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

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

MR. TAGGART: Yeah.

ARGUMENT FOR SNWA AND LVVWD

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

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

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

THE COURT: Okay.

MR. TAGGART: Okay.

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

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

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

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

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

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

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

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

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

that report.

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

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

So --

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

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

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

THE COURT: Sure.

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

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

MR. TAGGART: But it's not.

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

THE COURT: I see -- I see --

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

THE COURT: I see Mr. Robison.

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

not covered by the briefs, is improper.

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

MS. PETERSON: Yes. Thank you.

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

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

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

THE COURT: Sure.

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

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

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

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

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

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

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

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

Your Honor. This is way beyond the record.

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

MR. TAGGART: Okay. So when --

(Pause in the proceedings.)

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

THE COURT: Okay.

MR. TAGGART: So what I want --

THE COURT: Oh, is it not working?

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

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

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

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

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

(Pause in the proceedings.)

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

MR. DOTSON: We got it back.

THE COURT: Oh, you got it?

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

We've got to find the page.

(Pause in the proceedings.)

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

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

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

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

(Pause in the proceedings.)

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

Can you go to the next slide, please.

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

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

previously designated those basins in 1303; right?

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. TAGGART: Yes.

THE COURT: Okay.

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

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

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

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

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

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

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

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

(Pause in the proceedings.)

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

THE COURT: I do.

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

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

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

So I'll leave it at that.

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

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

Okay. All right. So the --

Could you go to Slide 30, please.

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

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

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

here.

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

(Pause in the proceedings.)

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

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

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

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

think my point is, let him do that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Pause in the proceedings.)

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

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

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

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

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

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

So I just want to make that clear.

So Rob, could you go to Slide 39.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: You mean to Coyote Spring Valley?

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

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

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

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

A question --

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

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

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

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

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

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

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

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

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

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

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

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

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

This is a traditional method of making the factual

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

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

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

actual decision.

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

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

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

1913 the water law was adopted, the surface water.

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

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

THE COURT: And this is slide 57?

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

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

THE COURT: Interaction.

MR. TAGGART: -- interaction.

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

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

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

THE COURT: Conjunctive management.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Then he had --

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

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

THE COURT: Okay.

MR. TAGGART: It's not perennial yield.

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

MR. TAGGART: It's different.

THE COURT: Okay.

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: So let me --

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

MR. TAGGART: Right.

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

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

MR. TAGGART: Right. Uh-huh.

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

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

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

So when the State Engineer wrote 1309 and --

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

MR. TAGGART: Yes.

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

MR. TAGGART: Right.

THE COURT: Okay.

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

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

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

THE COURT: And change it.

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

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

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

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

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

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

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

THE COURT: Right.

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

THE COURT: Right.

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

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

THE COURT: Right.

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

So whether the -- you know, whether the public

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

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

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

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

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

THE COURT: Right.

MR. TAGGART: And --

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

MR. TAGGART: Right.

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

MR. TAGGART: Right.

THE COURT: Okay.

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

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

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

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

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

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

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

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

And then 534.110, Sub 6.

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

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

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

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

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

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

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

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

THE COURT: And this is Slide 17?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So he had that.

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

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

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

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

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

Then he set a condition on the 8,000.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

it there.

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

THE COURT: All right. Thank you.

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

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

All right. Let's do that.

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

THE COURT: Whenever you're ready.

MR. ROBISON: Ready, Your Honor.

On behalf of Coyote Springs, Kent Robison.

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

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

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

THE COURT: Pun intended.

MS. WINSTON: Hello, Your Honor.

THE COURT: Hello.

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

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

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

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

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

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

MS. WINSTON: That is correct, Your Honor.

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

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

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

THE COURT: Sure.

MS. WINSTON: Short answer would be yes.

THE COURT: Okay.

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

THE COURT: It depends; right?

MS. WINSTON: It depends.

THE COURT: I'm a lawyer.

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

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

So I think your question does raise an important

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

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

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

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

MR. ROBISON: CSI 53 and 54.

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

MR. ROBISON: These additional slides to CSI 1.

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

MR. ROBISON: Absolutely.

THE COURT: Okay. Great. Thank you.

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

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

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

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

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

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

hydrologist, but I have practiced this.

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

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

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

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

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

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

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

The first place I want to start is NRS 534.030.

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

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

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

MS. WINSTON: It was my --

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

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

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

THE COURT: So for my -- okay.

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

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

MR. TAGGART: Because they only have four hours.

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

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

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

THE COURT: The opening briefs. Yes.

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

THE COURT: The opportunity in the reply, yes.

MS. WINSTON: -- in his reply.

THE COURT: Yes. Yes. That is correct.

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

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

MR. TAGGART: Okay. All right.

THE COURT: Okay. Thank you.

MS. WINSTON: Thank you, Your Honor.

So let's get back to where we were.

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

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

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

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

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

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

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

MS. WINSTON: I just -- okay.

UNIDENTIFIED SPEAKER: Yeah, I --

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

THE COURT: The Muddy River arguments.

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

THE COURT: No.

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

the answering brief.

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

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

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

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

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

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

MS. WINSTON: Okay.

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

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

THE COURT: Sure. So and I think --

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

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

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

THE COURT: Right.

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

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

MS. WINSTON: Okay.

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

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

THE COURT: Yes.

MR. ROBISON: We filed intervention briefs.

THE COURT: Right.

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

THE COURT: Correct.

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

THE COURT: Right.

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

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

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

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

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

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

THE COURT: Okay. Let me find it.

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

THE COURT: Okay. Go ahead.

MR. DOTSON: Can I?

THE COURT: I always welcome --

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

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

THE COURT: Right.

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

THE COURT: Oh. Well, I mean --

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

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

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

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

UNIDENTIFIED SPEAKER: Muddy.

THE COURT: Muddy Valley Decree.

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

MS. WINSTON: Okay.

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

MS. WINSTON: Okay.

THE COURT: Is that clear?

MS. WINSTON: Yes, Your Honor.

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

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

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

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

THE COURT: I agree with you on that.

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

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

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

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

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

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

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

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

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

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

THE COURT: In the reply.

MS. WINSTON: Yes.

THE COURT: That sounds good.

MS. WINSTON: Thank you, Your Honor.

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

with the Muddy River Decree and the Endangered Species Act.

THE COURT: For this portion.

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

THE COURT: Yes, please.

MR. ROBISON: Thank you, Your Honor.

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

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

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

MR. ROBISON: Too many valleys.

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

MR. ROBISON: Correct.

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

MR. ROBISON: Right.

THE COURT: And also the way they came with their

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

MR. ROBISON: Right.

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

MR. ROBISON: Just very briefly.

THE COURT: Okay.

ARGUMENT FOR COYOTE SPRINGS

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

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

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

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

THE COURT: Okay. Thank you. All right.

So next I think is --

UNIDENTIFIED SPEAKER: Apex I think is up next.

THE COURT: Is it Apex?

UNIDENTIFIED SPEAKER: Yeah, I think so.

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

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

MR. ROBISON: Center.

THE COURT: Center for Biological Diversity?

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

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

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

THE COURT: Okay.

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

ARGUMENT FOR CENTER FOR BIOLOGICAL DIVERSITY

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

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

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

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

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

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

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

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

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

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

And this is part of the public interest.

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

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

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

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

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

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

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

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

THE COURT: Can you spell his name for me.

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

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

The examiner is Patrick Donnelly (phonetic), the

Center for Biological Diversity's Great Basin Director.

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

Answer: Yes.

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

Answer: Yes.

Question: In the general sense then --

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

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

Answer: Yes.

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

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

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

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

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

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

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

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

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

take.

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

Section 9 is pretty short and simple. It says,

> Any person is prohibited from taking any endangered species within the United States or the territory of the United States. It is also unlawful for any person to attempt to commit, solicit, cause to be committed any offense defined as take.

So it's a pretty inclusive definition there.

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

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

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

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

Communities, 515 U.S. 687.

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

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

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

So person is defined as,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

cite for this is 16 USC § 1536(a)(2).

THE COURT: Can you say that one more time.

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

THE COURT: Which is Section 7?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Of that particular entity.

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

Any expansion on that is going to require more consultation.

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

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

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

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

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

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

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

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

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

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

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

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

come up in the Walker Lake case too.

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

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

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

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

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

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

THE COURT: Oh, no, simplify it.

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

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

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

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

And I believe that is all I have.

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

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

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

THE COURT: That's okay.

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

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

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

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

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

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

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

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

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

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

THE COURT: Oh, 60 feet.

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

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

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

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

MR. LAKE: Okay.

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

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

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

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

MR. DOTSON: Does this work?

(Pause in the proceedings.)

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

THE COURT: Okay.

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

THE COURT: Because it has to flow somewhere.

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

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

THE COURT: Okay.

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

THE COURT: Okay. Can you hear him?

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

(Pause in the proceedings.)

MR. LAKE: Okay. Thank you.

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

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

MR. LAKE: In the aquifer.

THE COURT: Okay. Thank you.

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

I think we can put this down now. Thanks.

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

Okay. So thank you.

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

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

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

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.

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

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

Instead of remanding, simply strike --

THE COURT: Oh, that I would strike it.

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

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

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

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

THE COURT: Could be.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DOTSON: Yeah. Go ahead.

THE COURT: -- yesterday --

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

THE COURT: Oh, okay.

MR. DOTSON: -- that question.

THE COURT: All right. That's fine.

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

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

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

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

MR. DOTSON: I'm sorry --

THE COURT: -- interim order.

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

THE COURT: Right.

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

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

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

MR. ROBINSON: Okay.

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

MR. ROBINSON: Yeah.

MR. DOTSON: -- for us --

THE COURT: Sure.

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

THE COURT: Sure.

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

MR. ROBINSON: Okay.

MR. DOTSON: -- from that.

MR. ROBINSON: Mr. Dotson is thoroughly confused.

THE COURT: Okay.

MR. DOTSON: All right. I may be.

MR. ROBINSON: I think we can stipulate to that. First moratorium shutdown of Coyote Springs was the May 16th, 2018 letter. We challenged that in a petition for judicial review.

THE COURT: Okay.

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

THE COURT: Okay.

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

THE COURT: Okay.

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

THE COURT: So where is that?

MR. DOTSON: Yeah.

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

THE COURT: Oh, so it made it moot.

MR. ROBINSON: Yes.

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

THE COURT: Okay.

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

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

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

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

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

THE COURT: Wait, let me --

MR. DOTSON: -- in Number 6 --

THE COURT: Let me just clarify.

MR. DOTSON: Sure. Go ahead.

THE COURT: Really quickly.

MR. DOTSON: Yeah.

THE COURT: So Mr. Robinson.

MR. ROBINSON: Yes, ma'am.

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

MR. ROBINSON: All of the above.

THE COURT: Okay.

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

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

Sometimes people call those --

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

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

THE COURT: Yeah. It is. Sure.

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

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

THE COURT: Let me --

MR. DOTSON: -- as we can.

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

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

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

MR. ROBINSON: Yes.

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

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

THE COURT: Wait, did --

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

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

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

THE COURT: Yes. Sorry, yes.

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

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

MR. DOTSON: Sure.

MR. BOLOTIN: But then there were certain documents

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

THE COURT: Right.

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

THE COURT: It was outside the record.

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

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

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

THE COURT: Oh, yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: And this is slide?

MR. DOTSON: This is not a slide.

THE COURT: Oh.

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

THE COURT: Order itself.

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

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

THE COURT: Terrain?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The 1995 water resources investigation report

estimates the total water budget for all southern Nevada aquifers from the natural recharge to the mountains and subsurface inflow to the study area to be about 160,000 acre-feet annually, and discharges from major discharge areas to be about 77,000 acre-feet annually.

I have this in red because it's particularly important to me. Because if you go down and you look at that footnote, you'll see that the discharge areas are identified as Muddy River Springs, 36,000 acre-feet annually.

Now, you'll recall from my opening that we'll compromise. We'll live with the result of this order. We're not going to appeal the determination that the -- the flow predevelopment was 33,000 or can be used, 33,090 can be used. But you can see that even as of 2002, they were using a much higher number. Which, as you review the other -- the other portions of the record that I referred to, particularly S -- the SNWA report which is found beginning at page 41,930 of the record, there were periods of time where the flow was clearly higher than that. And you can make an argument that the flow was clearly higher than that and I guess that's what the State Engineer was saying here. But we're not -- to be clear on the record, that's not part of our petition for a judicial review.

Importantly, and this is a concept that I think Mr. Lake was discussing earlier when we were talking about recharge and subsurface flow in this next recital: Whereas, it

is believed that all of the recharge and subsurface inflow cannot be captured for use.

In other words, that 160,000 acre-foot number that we saw up above in this whole area of southern Nevada, they were recognizing that, well, we can't get it all. Plants are going to use some and, you know, you just -- it's not -- you can't -- it's not just a -- it's not a budget where it's like my checking account where it can be measured with that precision.

So they had a big public hearing and apparently had it down here. And that's, you know, I guess interesting and perhaps important because of the ability to designate. And I -- I'm going to move away from this now, but the point that I'm making is, going back to my PowerPoint, is that it's not like 1309 in 2017, wow, look at this thing that just happened. That's not what occurred. And I know SNWA had suggested, well, really there's -- there was documents back from the '60s and things like that. Well, these are legal actions that are being taken involving the White River Flow System recognized and named by basin in 2002.

So in January 2014, and I don't know why I did this in my brief because there's this whole series of rulings that come in. For some reason, I picked, like, the second one here. But it had -- they all have similar language. And so this is reiterating what was obviously understood apparently back, at least in '84, that there is a close hydrologic connection

between these various sub-basins. So they're already calling them sub-basins, noting -- noted that -- or actually, that's me. That's my statement, sorry.

Noted that they share virtually all the same source and supply of water. So even if they are only now recognized and the nomenclature of sub-basin is used, back in 2014, it was understood.

And that is supportive in why the State Engineer's action in 1309 should not have been any surprise, with the exception perhaps of Kane Springs because, obviously, it wasn't included in those earlier discussions, though, I can't say what was included or wasn't included in the actual record with and -- and what the science was in the '80s, obviously.

And Vidler showed the carbonate-rock aquifer in that 1169 references it as well, this underlayment. But it also talks about aquifers within the carbonate rock. So there seems to have been, at least as of 1169, an understanding that they aren't all connected.

Order 1303 recognized it as a joint administrative unit. And then they sought input about the geographic boundary. And clearly, based upon the record, it was then that Kane Springs and that -- was added and that this line was moved.

Actually, before I -- well, let's just -- let's just go ahead. Go ahead.

So let's talk about the legal authority to do it. And this is -- I kind of foreshadowed this earlier. Yeah, we've heard a lot about the fact that the word basin is not defined in the statute. That's really interesting. And I remember figuring that out, like, in 2010 because I -- I'd probably been working in this area for about a year before I realized that. And -- and I keep thinking, well, it's got to be someplace, but it's not.

And I think this -- the arguments you've heard this week, Your Honor, kind of explain why. It -- it would have been -- well, creating a legal construct that doesn't necessarily fit within the natural world. And so having it be more flexible makes the law able to be more flexible.

So but in this instance, we know that there is the stated policy. And you've heard a lot about 533.024 and -- and the policy of conjunctive management, and I talked about this in our answering brief. And we discussed how, you know, you -- there -- we cite to some cases that this isn't just a throwaway, though, either. It is guidance. The legislature does provide guidance to the State Engineer here about the public policy of the state. And by the way, when we get to the end, it does make common sense too.

Now, there are some limitations put on that. And the State Engineer, at least in their briefing, certainly cited to this. And this is the protection of, in this instance, the

decreed water rights from my client and others similarly situated.

And there has been no showing that -- that the State Engineer's action isn't authorized by that, and in fact, isn't even necessary for there to have been a statute. If you just had a decree and you have just an enabling act that says, hey, you've got to help manage these decrees -- let's pretend we had a different system, right, which could happen, I suppose. And the State Engineer is not awarding permits and certificates and all that and it's just decreed rights. But the State Engineer is kind of like a water master.

Well, isn't that really what he's doing here? What he's doing is, he is making sure that the water that has been decreed under the prior appropriation document continues to flow and serve. That's what the creation of this area does. Because what he's identifying is, that is the area that impacts these -- this decreed water.

Now, there's a question about what -- how much can be pupped. And on that, you know that we disagree with the State Engineer about the 8,000. We disagree about the number, but we don't disagree that there has to be a cap and there has to be control. And in fact, it is our position that this statute and the decree is what authorizes the State Engineer to take whatever action is necessary to make sure that that water is protected.

In fact, to not do so, he would have to violate that statute. He would have to violate your decree. And frankly, we think that's what's happened with the 8,000. But there is some number of less than that that probably would be perfect and would be fine.

Now, this comes back to my mistaken understanding. 534.030 allows the State Engineer to, quote, designate basins and to make other describing boundaries. Now, you've been focusing on that word, area. I focused on that as well in that statute. Well, in that statute and in 534.020.

And it doesn't say that the area has to be -- it uses the example in the language of within the -- the basin, but it doesn't limit the -- it doesn't say it has to be within a basin.

The State Engineer may -- and now, this is 534.020: The State Engineer may make rules and regulations within an area designated by him wherein his judgment the groundwater basin is being depleted.

Well, he made the determination that all of these basins, save and except Kane Springs, were designated basins. And if you look at 1303 on the second page, it goes through those. I'm just going to click off so I can tell what slide I'm on. I am on Slide 6 now, Your Honor.

What's more is there is substantial evidence in the record to support the creation of the White River Flow System.

We've talked about a lot of that already. And but what is substantial evidence, that which a reasonable mind might accept as adequate to support a conclusion.

Importantly, just because there is contrary evidence doesn't mean there's not substantial evidence. It doesn't mean everything would have to be -- if that were the case, we'd have -- never have a decision in any court, frankly, because you better not get to trial if there really is no question of fact and there's no substantial evidence -- there's no evidence if -- if not substantial, in a contrary position.

So the mere existence of a geologic study proposed by Coyote Springs doesn't mean that the -- that the State Engineer can't make a decision that runs contrary to that geologic study. What the -- what the State Engineer has to do is, it has to -- he has to or they have to look at that evidence, assuming it's valid evidence, and then weigh it in the decision, which that clearly did happen.

In this instance when you look at 1309, the -- the State Engineer goes through the evidence. And it is clear, based upon the conclusion and those words there, that greater weight was placed on the hydrographs and the pumping and his own professional judgment than the determination and the expert testimony regarding, in the example I gave, the geologic testimony that might separate certain areas from others.

He made the determination that the results of the

1169 aquifer test show hydrologic connection between the various sub-basins. And that's a basis, in MVIC's view, and provides substantial evidence that you have to create this area, whether you call it a basin or you call it several basins that are jointly administered and conjunctively administered as well, obviously, is probably form over substance.

It seems to me because he -- you know, again, listening to the evidence -- this wasn't really the way I walked in this -- this week, but listening to the arguments and listening to the -- looking at the law and considering it, if in 1968 all of these basins were created by him, why would it not be within his authority to say, well, these are all sub-basins of one actual basin, which makes more sense scientifically and logically, than to try to just figure out how each of these six or seven basins works if they were separately administered.

The test showed that pumping within one or more of the sub-basins affected water levels in adjacent basins that shared the same supply of water and that the level of water decline encompassed 1,100 square miles.

So there was argument yesterday from Vidler about it's only six inches, right. Six inches over 1,000 -- and some places it's more than six inches, by the way. But even if it were only six inches, over 1,100 miles, that's a lot of water. In --

THE COURT: Let me just -- let me just clarify something.

MR. DOTSON: Yeah. Sure.

THE COURT: So because you just said, made the argument that if the -- if in 1968 the State Engineer created all these basins that, you know, it would still be within his authority to change the areas of these basins. My understanding is that he didn't actually create that basins; is that correct?

MR. DOTSON: That's true. I guess God created the basins --

THE COURT: Oh.

MR. DOTSON: -- and -- or a supreme being, in my view and that --

THE COURT: Well, I mean --

MR. DOTSON: -- and that the --

THE COURT: I don't mean create that way.

MR. DOTSON: I know.

THE COURT: I mean delineate.

MR. DOTSON: He -- he and the federal government, and if you look at the -- maybe this isn't in 1169, but it is -- it's in something I've read recently, that the geologic -- the federal government through, I think, the geologic survey in conjunction with the State Engineer's office, and made a determination of these areas.

And if you look at the map, and it's -- that's in the record and I think there's one in the record that -- that actually has more topography shown. You know, generally speaking, what it seems like they're trying to do is they're trying to pick valleys where it's a closed valley or a close-to-closed valley, but most of them aren't closed valley.

You know, the basin that I'm most familiar with is Lake Tahoe, which rests on the state line, of course, because California moved the state line on us so they could steal 60 percent of my lake. But that is a closed basin, except for where the Truckee River comes out, right. So consequently, it filled up, kind of like what Mr. Taggart was saying. Well, if it just keeps snowing and the water doesn't go anywhere, well then it fills up. Well, that's happened there.

And so the State Engineer didn't create the basins, either you know, metaphysically or by himself, but they did work conjunctively with the federal government to identify them. And doesn't that make sense.

Counsel for -- for Coyote Springs made an interesting argument yesterday about California law, maybe it was two days ago, about we -- there's a rule against segmentation in California because you could make mistakes and things like that. But the truth is human experience tells us that it's always easier to deal with a smaller thing than a bigger thing.

I also found that argument interesting because that's

exactly what they're asking to do. He warn -- Coyote Springs was warning against segmentation, but yet, they're asking this Court to administrator it by each basin, which as we'll see later just doesn't make logical sense.

Can I switch to this ELMO for a moment? Is there a way to switch the -- I just turned it on. I want to talk about that 6 inches.

THE CLERK: Did someone unplug it?

MR. DOTSON: Well, that -- well, it has power.

THE COURT: Is it --

THE CLERK: I noticed there was some cords, the lights are on.

THE COURT: No. The lights are on.

THE CLERK: But I mean --

THE COURT: Is it plugged down there?

THE CLERK: I think there's other cords to it. I have it on -- on now and it isn't --

MR. DOTSON: Oh, you have it on?

THE CLERK: -- working.

MR. DOTSON: I've got it on.

THE CLERK: We have never used it in here, so --

MR. DOTSON: Well, let's never mind then.

THE COURT: Not yet.

MR. DOTSON: I guess I'm not going to do this. Well, I'll draw and then I'm going to try to -- and I'll hold it up

and then we can put it in as an exhibit if you want, if anybody wants, but --

So you asked Counsel for Center for Biological Diversity a question about water level and -- and this is why I was trying to help him with this because I thought maybe drawing a picture might be helpful.

And so -- so say that this lower line, which is conveniently blue -- we'll make this red instead, the surface. Let's say the red line is the surface of the earth and the blue straight line below it is the water level, the water table in that area. And right here, that water comes out as a spring, right.

THE COURT: And you're pointing to a --

MR. DOTSON: I'm pointing to a little X I put in the --

THE COURT: -- a midpoint where --

MR. DOTSON: Yeah.

THE COURT: Okay.

MR. DOTSON: On the -- on the red line. And then that water, which in my hypothetical here is the Muddy River, right, that water then flows down and joins with other springs and that becomes the Muddy River. And that's why when we talk about the elevation of the spring on the -- it's important.

Now, they use that term, again, because I'm relatively new, in this room at least, to water law, they talk

about the elevation of the head. What they're talking about then, I'll draw a line, is -- and I drew two parallel red lines. Let's say I drill -- somebody drilled a well and the head was where that water table was. That's where you first hit water. That's that elevation. It's that many feet below the surface, whatever. And it has an actual elevation on the earth I guess, as well.

But the point, well, that I would make and I think was trying to be made earlier is, let's say that the water level is actually only six inches above that point where the spring is. Once the water level goes down to -- let's take this -- let's call this number one. Let's say the water level goes down to point two, now there's no way for this water to get up to here. It can't bump up.

And so that's why there's so much discussion in this case, and you'll see in the record when the experts talked -- talk about the height and the change in the water level. That's why it's a concern, especially with regard to a spring. Because, you know, I don't know, maybe the water level is 10 feet above that spring right now. But even if there's 700 feet below, if you lose 20 feet, it doesn't matter. That's the -- that's the concern that I think was trying to be articulated there.

Now, so that's why six inches is still a lot of water. And I think it was, you know, I think it's clear from

the reaction after the 1169 pump test, which wasn't as much. When you read 1169 and you read how many acre-feet were supposed to be pupped for two years and how many feet were --

THE COURT: That's much more --

MR. DOTSON: -- fortunately for my client, that much wasn't pumped and -- and you know, I want to speak for a moment about that.

You know, MVIC has been patient. Water law takes a long time. But the record here, Your Honor, makes it clear that for 30 years off and on my client has been suffering injury. The pump test caused injury. But in my own mind, it's kind of like I have something wrong with my knee and it's actually interfering with my skiing a little bit and I won't -- going to probably have to have it scoped or some surgery done.

Now, God forbid, hopefully it doesn't result in the amputation of my leg, but to my client, MVIC, they -- this is all kind of the surgery to fix and cure their water right so their water right gets back, right. And that pump test, as you can see from all the hydrographs you've seen changed and -- and it caused damage, but it was understandable damage. It was not like -- it wasn't an assault on MVIC. It was in order to figure this out and ultimately protect those rights.

And that's fine and that's the process that the State Engineer was undergoing with 1169. That, I would argue, and I'm suspect the -- I would argue in favor of the State

Engineer. I'm sure the State Engineer would say the same, that's what's happening right now. That's what happened in 1303. That's what's happening in 1309.

They're trying to -- the State Engineer is trying to execute his public trust obligations and not allow people to too much rely on water rights that will eventually have to be curtailed, because eventually my client will run out of patience and we are a prior appropriation state and will say no, no mas, we are done.

The State Engineer took a lot of other evidence that was adverse to joint administration and -- but what's interesting here is although there's some arguments about geology and about interconnection, it's mostly a technical argument that is being made.

And the existence, the mere existence of some factual information that contradicts a vast majority of other information in support of a joint area means that there is substantial evidence to support it. And that his finding is supported by substantial evidence.

Now, we're getting to the state -- the creation of the Lower White River Flow System makes logical sense.

THE COURT: And this is slide?

MR. DOTSON: This is -- let's just see. Because my -- I couldn't even send a printout to get a print -- this is Slide 8, Your Honor.

So there's a few books that exist out there, and one of them is this guy named James Davenport and he's referenced sometimes in the law. And I think he's still alive. And this is a quote from that book: Where groundwater and surface water systems are interconnected, they should not be viewed as separate sources in water management decisions.

Okay. And it's kind of like a treatise, I guess, is what it is. It is a treatise on water law. And it just does make common sense. If we know that there's an interconnection between these water sources, and in particular in a situation such as this, and this is very frequent as you've, I'm sure, identified during the arguments this week, that the surface water were the -- were the easiest -- that was the easiest water to put to beneficial use. So of course those are the oldest rights. And it's going to be true probably everywhere in the state.

And many, if not all, of those systems -- I'm sure not all, but many of those systems are decreed rights, such as this. And so if you don't take into account the effect of groundwater pumping on those decreed rights, you will invariably violate the decree, which is where I started yesterday.

And so to the extent that the creation of a joint area for management, the Lower White River Flow System in this instance, is being done by the State Engineer so that he can

protect those rights. He's following the law and it's making common sense, given the whole purpose of that office.

Now, there was some discussion by Coyote Springs about, well, what I care about is what happens in Basin 210. Here's the problem: The water can flow from one basin to another and it is undeterred. It does not care about the construct of artificial lines on a map. That water molecule doesn't know anything about the 232 basins that we've designed. It does not care.

It's going to flow. And since we know that it flows from these basins to each other and that that is the water that eventually comes out and serves my clients, it would be improper for the State Engineer to not consider that. And therefore, it is proper that the State Engineer did consider it.

Also, as much as everyone would like in this room, and I'm sure we would all like it, the State Engineer, nor the state, nor even you, Your Honor, can cause more water to exist within the Lower White River Flow System. The amount of water that is there is the amount of water that is there. And by simply deciding you segment it into separate basins, six or seven separate basins, and then you try to administrator it within those separate basins, all you're doing is using the legal construct that we've done for convenience and setting yourself up for disaster.

You can't just administer Basin 210 and ignore the other basins around it. Let's just pump all the water we can out of 210 and then we'll, I guess, have all the water from the other basins flowing towards it and no water coming out of the Muddy River. That's why the State Engineer in Order 1169 did what he did, because he realized you couldn't just do that.

Now, and I don't know if this is -- this is the place for it, but one of the attacks that we've heard against the State Engineer relates to the public trust doctrine which, in my opening, I indicate is consistent with support of the decree.

And I think I cited to and I want to just read from *Mineral Country versus Lyon County*, and this is Judge Stiglich speaking in the majority. And this is -- you don't have to go very far into the opinion. This is on the third paragraph: We further hold that the state engineers -- that the state's -- I'm sorry, let me start over.

We further hold that the state statutory water scheme is consistent with the public trust doctrine by requiring the State Engineer to consider the public interest when allocating and administering water rights. That's from the majority.

So just -- I just thought -- I didn't have a really good place to put that in, but that ties into the concept of -- and you know, we're not taking a position with regard to the dace. I think it's clear that when there's water, which helps

my client, apparently that is great for the dace too.

But there's a lot of other issues here too. And the public interest factor doesn't obviously just end when the water right is granted. That's what that language says. It continues while you administer. And that's the importance -- well, one of the importance -- part of the importance of that.

It also means in my opening, and I would suggest this is supportive of the state engineers, that sometimes the State Engineer and the Court has to make those tough decisions because of the public trust doctrine so that we can rely upon these decreed rights. And each of the junior rights that took -- and I don't know how many times you're going to hear this, I'm sorry, took with the understanding they got -- they were granted those rights with the understanding that they were less senior.

And as you saw from the 1169 recitals that I took the time to put in front of you, it was very clear in 2002 the jeopardy that existed as to how certain are these water rights that we've been granting and nobody's been pumping, and how important it was that, unlike some areas where you pump right after you get the water right, that hadn't happened here. And so he had to actually order everybody to pump so that he could figure out what the reaction of the system would be.

Okay. A few other attacks on the State Engineer, that there should be a separate administration of ground and

surface water. Again, I think we've -- I've already talked about that. It just doesn't make logical sense, right. Not only is there an encouragement of conjunctive management, but I don't care where AB 51 got granted or didn't. The bottom line is, he -- there's a decree that was entered in this Court in 1920, and that is his job to defend. And it was said, you know, the -- well, I think I'll have it in here probably about take the -- you know, granteth and taketh away. Maybe that's what he has to do.

But the second argument that is being made is the basin-by-basin management argument. I've already -- I've already said that doesn't really seem to make sense because it will result in segmentation. It will result in the very disaster that was warned of in 1984 and revisited in 2002 and acknowledged and tried to be prevented in Order 1303 and in 1309.

The decree was entered at a time where neither of those legal constructs were memorialized in statute. And the decree does not defer to either concept. You can look throughout the decree, and I've already encouraged you to do so because it's your court that you're enforcing. And they're not limiting those -- the protection of those sources of water to, as I say at the last bullet point, to the county line, to a particular basin. There's no such limitation in the decree; and therefore, there's no such limitation to this Court in

supporting the State Engineer in his efforts to protect the decree. And that is a reason not to overturn that portion of the decree.

The State Engineer was right to protect the tree -- the decree. The State Engineer can giveth and he can taketh away. Indeed, he must. Each of these water rights that was granted after 1920 -- actually, after 1905 because the 1920 decree refers back and identifies that those waters were put to beneficial use in 1905, they all take subsequent.

And NRS 533.0245 is all the farther that the -- that the state -- all the other -- all the instructions that the State Engineer needs to support his decision, if that decision is what is necessary to protect the decree. In fact, to do otherwise would allow his actions to damage the decreed rights.

In other words, if this Court were to say, you know what, you don't have authority to create this joint management area, then what this Court would be doing is it would be telling the State Engineer, listen, I know you've said the only way you could protect these decreed rights is to administer all these rights together, but I'm not going to let you do that.

Well then, how is he going to protect the decreed rights? I guess he'd have to go from basin to basin. Maybe he could do that. I mean, I think in my answering brief I argued that he should do that. He can do that. It's really a -- I think that's where I did the -- that was in the reply, the rose

by any other -- I quoted Shakespeare. But it wouldn't make any difference. He'd have to do it that way.

But the problem is, because the gradient is so flat -- SNWA today showed a map where the blue lines and the flows from different basins and certain paths are recognized because there's a lot of gradient, so there's a lot of flow. But if the flow is just a matter of -- if the gradient variations are a matter of a few feet or a few inches and the slope is so incredibly tiny, then it's not going to take much and it's going to be difficult to rely upon those -- it makes it very difficult on a basin-by-basin basis, you could see, because of the fact that that gradient is not nearly so strong as it is in other parts of the state. That's the importance, at least to me as I understand it, of the comment from the experts that, oh, yeah, this is incredibly flat.

So how can the State Engineer -- this is my fourth bullet point, and for the record --

THE COURT: Which slide?

MR. DOTSON: -- this is on page 10 of 11. How would it possibly make sense for the State Engineer not to adjust his decisions based upon new science?

In 1491, except for Norwegians who had figured out that the world was round, everybody thought the world was flat. Are we still -- well, I mean, some of us are, but most of us aren't walking around still thinking the world is flat and that

that sun is spinning around this earth.

It would make no sense if whoever was Caesar at the time sat down a rule that -- I guess it wouldn't have been Caesar. I'm mixing up my -- if the queen --

THE COURT: History.

MR. DOTSON: -- said no, you -- you cannot use that new technology and you must not sail any farther than this.

No. You're not going to do that. You're going to pay attention to the natural world around it as we understand it now. And what is clear is that our understanding of the natural world is evolving. And in these legal documents, it is one of the things I actually do dig about this area of the law, you can actually see that evolution of technology.

There are things that are -- that the methodologies that were used in the CSI geologic study, that's great. I mean, we're actually looking into the earth, right. And I'm sure we're going to get new and better things in that regard. And that will allow us to figure out, hey, maybe there's a pocket of water in -- in one of these basins that is totally isolated. But that's going to take further study.

The study -- the information we have right now is that the water looks flat from all these wells. And if we don't administer and let the State Engineer administer these, at least jointly if not in one basin, we are going to send ourselves to a disastrous conclusion.

There was a comment -- and this doesn't really necessarily fit about headward waters versus tributaries. And you had this -- a question about that. I don't think with regard to my client, with regard to the State Engineer's decisions here, that it makes any difference.

The point is, the decree says sources of water. Any water that is in the river at the point of diversion for my client is supposed to be my client's water. That's the whole point of that second grant. And I -- you know, I only mention this because of the -- of the question that was -- that was posed. This is my last slide. I think this is Slide 11.

Some have criticized the State Engineer and said, well, wait a second, we'll just -- the State Engineer, if you let him do this, he's just going to start strapping together basins all over the place. And I don't think I've actually heard the slippery slope term be used, but that what's it sounds like to me. It sounds like, okay, somebody's making the slippery slope argument.

But well, number one, there's a lot of areas in law where we do just recognize there's a slippery slope, right. But that doesn't keep us from having to administer the law in those areas. And we have -- we put certain right -- certain limitations on free speech. It doesn't -- just the mere fact that there may be some challenges doesn't mean we don't allow that to happen and we have to allow that to happen here.

In this instance, that determination of administering jointly several basins and making them sub-basins is supported by substantial evidence. And no matter what -- well, I would encourage that this Court's decision state as much. Because I think that's what the State Engineer is saying, saying I have substantial evidence.

And if this Court finds that there was substantial evidence, then that supports that decision. And if in the future there's a determination made that, I don't know what basin it would be, but say -- say the basin that Lake Tahoe is in and the basin that Carson City is in, and as far as I know, there's no hydrologic connection but we're going to administrator them together.

Well, there's probably not going to be substantial evidence for that, right. It just doesn't make sense, even though they are adjacent. So and then there could be a petition for judicial review at that point and you, or whoever the judge is that happens to get that, in that hypothetical I guess it would be probably a judge in Carson City --

THE COURT: Yes. Not here.

MR. DOTSON: -- Judge Wilson can decide, oh, yeah, there's -- there is or there isn't substantial evidence. That's why we have the system we have. And the mere fact that we would have to employ our legal system isn't a reason to not allow an application of the law. That's not a reason to say,

okay, sorry, I guess we're just going to have to let these decreed rights be violated and conflicted with because that's too hard and we can't -- we can't figure that out. That wouldn't make any sense.

So I think I've already made that clear with the opening on my mea culpa, my third point. It was my belief that 534.030 designation had occurred to all of these basins. It hasn't. I think it's pretty clear that it's -- but it's -- but it does apply to most of them, everything but Kane Springs. And therefore, 534.020 applies to six of these basins.

Another little housekeeping item, on 1303 if you go to Footnote 21, there's a typo there. And it says, id -- was it Footnote 21? Oh, not 1309, sorry.

For Footnote 21, it says id, and the Footnote above it is 532.120. But if you look at the language that is cited at Footnote 21, it states: Whereas, within an area that has been designated by the State Engineer as provided for in NRS 534 wherein the judgment of the State Engineer the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules and regulations and orders as are deemed essential for the welfare of the area involved.

That's clearly 534.120. And I think that some people may have argued that he didn't rely upon 534.120. But that language, even though he's citing to 532.120, is clearly almost

a direct quote. So that's further support legally for his decision in 1303.

Now, lastly, I guess, the State Engineer makes a determination that 8,000 acre-feet can be pumped. And as you know, we do not agree with that so I'm not supporting that. We do support that some cap below that should be arrived at. And we say that because if you just read the order and you look at the science that he cites to, it clearly just doesn't make logical sense because it couldn't physically return the flow of the river back to its predevelopment flows if you are just maybe reaching a steady state.

Yesterday, the State Engineer -- and this is just kind of a friendly clarification or amendment, in support of the order said the perineal yield of the area of the Lower White River Flow System was 8,000 acre-feet. And maybe that is correct in water-speak, but so as to avoid the confusion, I think that meant above the decree. So in other words, above the decreed flows.

In my argument on behalf of the State Engineer would be that that must mean it's 8,000 plus 33,900 is the perineal yield of this area, because that's how much the flow is coming out of the Muddy River, there should be coming out of the Muddy River, 33,900. The problem is, that math just doesn't make sense which is why we didn't support him on the 8,000.

But clearly, there is some perineal yield above, or

at least my client thinks, there's some system perineal yield above the flow of the Muddy River. In other words, there is -- you know, maybe it's not the 100,000 acre-feet that somebody at one point in time thought could be pumped from this area, but there is some amount that can be pumped from this area. And this Court, although we urge a reversal of the 8,000 acre-feet, should support the State Engineer's determination that some cap that is consistent with the additional available water over and above the decree can be developed and put to beneficial use from the groundwater of this area.

Court's indulgence while I consult with my co-counsel. All right. So after consulting with -- consulting with Mr. King, he has a -- he has a great breadth and depth of knowledge in water law. And he has pointed out to me that, in fact, the Davenport book and other sources identify that they don't really call them designated or delineated. They talk about the basins having been mapped.

And that actually makes perfect sense, and it makes sense considering the argument we've seen this week and some statements from the -- from -- well, from multiple parties. But sometimes there's adjustments to the boundary lines of the maps for these basins. It's not that somebody's out there with a bulldozer changing the physical world. It's that they're recognizing this artificial construct that we've utilized to ease the administration burden for the State Engineer doesn't

match the physical reality. And so therefore, they've modified it. So they've been mapped.

Thank you, Your Honor.

THE COURT: Okay. Thank you. All right. So should we take maybe a short 10-minute break? Is that --

MR. ROBINSON: Perfect.

THE COURT: All right. Then I think next up is Georgia-Pacific. All right. Am I -- I think that's who it is. Yeah. I have Georgia-Pacific and then Lincoln Vidler.

(Proceedings recessed at 2:17 p.m., until 2:28 p.m.)

THE COURT: Okay. So the timer is ready. So whenever you're ready, Mr. Foletta.

MR. FOLETTA: Okay. Thank you, Your Honor.

ARGUMENT FOR GEORGIA-PACIFIC AND REPUBLIC ENVIRONMENTAL

MR. FOLETTA: Lucas Foletta for Georgia-Pacific and Republic.

I just wanted to make a couple comments -- this is going to be very brief -- in response to the Center for Biological Diversity's petition for judicial review and the brief they filed in support of that.

They make -- and the procedural kind of posture is a little awkward obviously because we all have our own petitions, and we're filing briefs against others, and both the --

THE COURT: I've never had anything like this before.

MR. FOLETTA: Yeah. Both the Center and we are

asking that the, you know, change be made to the order in effect as to the same issue. In fact, the pump limit, but, of course, they want the -- they think the number should be lower, and we think the number should be higher.

So, but they make two basic arguments. One is that the 8,000 acre-foot limit is not based on substantial evidence itself. And the other is that the State Engineer failed to appropriately assess the impact of the declining stream flows on the dace. So they're kind of connected, but as I read their brief, that's how they've articulated their position.

So with respect to the first issue, whether there's substantial evidence to support the 8,000 acre-foot limit. Obviously our position in our case is that there isn't substantial evidence to support the 8,000 acre-foot limit because we think the weight of the evidence is that the limit should be higher.

That said, assuming for the sake of this argument that the issue is really what CBD thinks about the limit, what I would do is just, one, I would incorporate by reference my comments from yesterday about, you know, our views about why there isn't substantial evidence to support even the 8,000 acre-foot number, let alone a lower number. So, you know, we talked about just the fact that there was not a consensus about what the limit should be in the expert testimony, that there was a range of testimony as to what the number should be, from,

you know, like zero to up to 30,000 acre-feet and that the State Engineer had made -- commented on some limitations of the evidence that he had in front of him.

All those critiques are equally applicable to the position that the Center for Biological Diversity is taking. So that's kind of a long way of saying we also don't think that there's substantial evidence that could support the Center's position, right, that the number should be lower.

I would just add sort of one thing for the Court to consider, to put a cap on that, and I didn't talk about this before, but it has to do with Kane Springs. And I don't want my friends with an interest in Kane Springs to get mad at me because we are not advocating for the inclusion of Kane Springs in the Lower White River Flow System.

But if we're assuming that the order is -- if we're assuming that the order is legitimate in all respects other than those that the Center has raised, then what I would say is that one thing that stands out about the order and that -- and this is I think this is a criticism of the Center's position as well is that Kane Springs was added to the LWFS -- LWRFS in 1309. It wasn't in there in 1303.

You recall the hearing was all about what we should do with respect to the Lower White River Flow System, and so -- and people were commenting on the 1303 reports, right. So with respect to Kane Springs, there was a lot of evidence or

analysis of what the impact is of including Kane Springs in the basin. There was some. There was an SNWA report that I think concluded that Kane Springs could contribute about 4,000 acre-feet annually a year to the system as a whole. That analysis is not reflected in either the State Engineer's position or the Center's position, which would suggest that the 8,000 acre-foot number is lower than it should be if you assume that Kane Springs should be in the basin.

And so --

THE COURT: If you're doing the math that they should -- that they would be contributing 4,000, then that would raise the number.

MR. FOLETTA: It would raise the number. I'm not saying it raises it one to one, but the number, it supports the idea that the number is not too low and indeed should be higher. And so I don't -- this isn't reflected in the Center's analysis. And so again I think that analysis suffers from a lack of substantial evidence. And consequently if the State Engineer were to be reversed along those lines, I don't think that would be appropriate.

The other thing I wanted to address is the second issue, which is the State Engineer's assessment as the Center characterizes it, of the impact of declining stream flows on the dace. You know, we have talked about in our briefing -- I think we talked about a little bit the other day sort of the

position that the Fish and Wildlife Service had took in the hearing, and Ms. Peterson talked to you about that and showed you I think a transcript where there was a back and forth and some questions about whether they felt that there was a take occurring or not.

What our position is with respect to the Center's argument is that there really again isn't substantial evidence to support the notion that -- that the declining -- that there are declining stream flows and that that is the cause of one of the concerns about the dace. In other words, there are other things going on that undermine the assertion that it's all about kind of stream flows and that we should be looking closer at that, right.

So, for example, we had the memorandum of agreement that you've heard about multiple times. I'm not going to show it to you, but there's a page of the memorandum of agreement. It's at the record at 531.4041 I believe, and it's pretty interesting because it shows you how the parties to that agreement had come up with a rubric to kind of work through the dace issue. And so as the stream flows decline from 3.2 down to I think 2.7 CFS, the pumping also declines. That was the basic agreement. So stream flows are declining. Pumping declines as that happened, and that's the basic framework.

The interesting part about it is 3.2 was the starting point, not the endpoint, right. So you started at 3.2. And I

think the first requirement is that the parties confer with the Fish and Wildlife Service at that point when it gets to 3.2. As you go down to 2.7, it goes from 3.2 to 3.0 to 2.9 to 2.8 to 2.7. Then pumping declines and some other things happen. But the point is the agreement doesn't reflect the notion that 3.2 is the bare minimum -- 3.2 CFS is the bare minimum. Yet that is the number that I think the Center seizes on a bit and the order itself is focused around.

So I would agree I think -- somebody earlier talked about this because there was a question about kind of the scope of the agreement, to whom it applies and where it applies and so forth.

The point of the agreement from our perspective is that it undermines the assertion, the evidentiary sort of basis for the claim that 3.2 is the right number and that we've got to maintain that number. Because even the Fish and Wildlife Service entered into an agreement that said that's not the floor, right.

The CBD also I think overlooks the impact of invasive species on the tilapia -- not the tilapia, on the dace. And we talked about this in our brief, and this is another factor that's --

THE COURT: Is that the tilapia?

MR. FOLETTA: The tilapia is the invasive species.

So we talked about this in our briefing, but in

response to their position, the idea is that this is a nonflow related factor that is impacting the viability of the dace in connection, which there's evidence to support the notion that, again, things other than flow levels need to be addressed to ensure the integrity of the species.

And so the opinion that the center references you to in their briefing identifies conservation actions that don't relate to spring flows. That's the point here, including, quote, "The eradication of nonnative fish, such as tilapia, from the historic range of the Moapa dace." So this is the record at 47159.

At the hearing, the Fish and Wildlife Service introduced a white paper that showed that -- that talked about kind of the history of the dace in this area, and it said that, quote -- or excuse me, tilapia, quote, "invaded the Muddy River Springs area in 1995 and dramatically reduced the population of the dace." That's the record at 48721.

It further went on to say, quote,

> Current knowledge of this system suggest that the negative interaction between tilapia and Moapa dace was so severe that the recovery of the species depended upon the removal of tilapia from the system, a major recovery action only recently completed in full.

That's the same page in the record.

So the point there is not only that there are other things affecting the dace, but that the mitigation efforts that have taken place to date to try to secure the viability of the dace are, according to this white paper, recently completed and that, you know, it takes time, the passage of time to understand the effects of the other things that have been done other than maintaining stream flows, let's say pursuant to the MOA, to understand what is happening with the dace, what needs to be done down the road, and consequently it undermines this kind of -- this conclusion that we should be looking closer and closer at stream flows to the exclusion of some of these other things.

With that, Your Honor, I do not have any further comments on the Center's (indiscernible). Thank you.

THE COURT: Thank you.

(Pause in the proceedings.)

THE COURT: The floor is yours.

ARGUMENT FOR LINCOLN COUNTY AND VIDLER WATER

MS. PETERSON: Thank you, Your Honor. Karen Peterson from Allison MacKenzie law firm representing Vidler Water Company, and I also have Mr. Klomp here with me at the counsel table. He's going to -- we have a really short PowerPoint on this section, and I just wanted to explain that we did file an answering brief in response to --

THE COURT: You had an intervening brief, right.

MS. PETERSON: -- the Center for Biodiversity's. So I'm going to address some of the arguments that they made on Monday. I'm responding to arguments they made on Monday, but they made arguments today that were kind of covered the same things. So I am responding to Monday.

THE COURT: Okay.

MS. PETERSON: I just wanted you to know that.

So one of the things in the argument on Monday, the Center for Biological Diversity indicated and it kind of inferred that there might be an incidental take statement that Lincoln and Vidler might have. And so we just wanted to point out, and it is in the record, that we do have an incidental take statement that allows, if we meet certain criteria and there's take before that criteria -- take before the criteria, that we are allowed the incidental take, and it's set fourth --

First of all, Slide 1 shows the request that Lincoln and Vidler made for formal and informal consultation for the Kane Springs Valley project. And that is in the record there 49906. And actually the U.S. Fish and Wildlife put in our complete biological opinion, which included the incidental take statement, into the record in 1309.

So if you could go to Slide 2.

And there, we're on page 37 of the exhibit, the U.S. Fish and Wildlife exhibit. And again the record on appeal citations are noted there, and the top paragraph indicates that

the, you know, after the U.S. Fish and Wildlife has done its review that our project is not likely to jeopardize the continued existence of the dace. The project could contribute to groundwater level declines and spring flow reductions; however, implementation of the projects conservation actions will minimize these impacts.

And then going -- and again, we didn't put -- I mean, it's -- I don't know how many pages, 50 or something like that. So obviously we didn't put anything in.

But then going down to the next paragraph, there was discussion about Section 9, and our biological opinion does reference Section 9 right there. And then the second part on the slide that we've highlighted indicates under the terms of Section 7 before and 762 of the act,

> Taking that is incidental to and not intended as part of the agency action, and that's what I was just referring to, is not considered a prohibited taking provided that such action -- such taking, sorry, is in compliance with the terms and conditions of this incidental take statement.

And then if you could turn to the next slide, slide Number 3. Again, that's another section and the next page about the Moapa dace. And then it's interesting that it notes our biological opinion and our incidental take statement

acknowledges that the amount of groundwater pumping under our project is substantially smaller than the amount of pumping that could potentially occur under the Order 1169 pumping.

And then again, it does allow that a small unquantifiable amount of take in the form of habitat loss would occur if the spring flows reach 3.0 CFS at the Warm Springs gage. And if they decrease below 3.0, the amount of the incidental take for this project would be exceeded for the Moapa dace.

So our stipulation that we have with the State Engineer that was filed with U.S. Fish and Wildlife to our applications, that has a trigger point of 3.2, but actually the incidental take statement allows a little bit lower.

And then do we have one more slide? Yeah.

And then this is the final determinations with regard to the effect of the take. So we just wanted to point that out to Your Honor.

And then we have put the citations to the record there.

So the other thing that we cited in our brief, and I again wanted to reiterate here is the *Mineral County versus Lyon County* case, and you've heard a lot about it today and/or Monday, but -- and the public interest that's being analyzed, and there seems to be an argument that public interest is supposed to be analyzed continually by the State Engineer, like

while we're holding our groundwater permits, and that's not at all what is supposed to occur with regard to the public interest determination that the State Engineer is supposed to make. It's supposed to be made at the beginning in the application process.

And, of course, then when the State Engineer grants any applications, those become vested property rights. They become adjudicated property rights, and that's under the Fillipini (phonetic) case and all that line of cases. And so there's not some kind of continuing obligation by the State Engineer to continually look at the public interest. That's exactly what *Mineral County* said is not supposed to happen because there's supposed to be certainty with regard to water rights.

And again, we've cited in our briefs with regard to the *Mineral County* case the Nevada Legislature has enacted a comprehensive statutory scheme outlined in NRS Chapters 532, 533 and 534 that regulate the procedures by which water rights may be acquired, changed or lost.

And the Nevada Supreme Court goes on to say in *Mineral County versus Lyon County* the statutory scheme in Nevada therefore expressly prohibits reallocating adjudicated water rights that have not been abandoned, forfeited or otherwise lost pursuant to an express statutory provision.

And finally Nevada's comprehensive statutes are

already consistent with the public trust doctrine because the statutes both require that water allocations be based on public interest and that the allocation satisfy all of the elements to safeguard public trust property.

There's no authority for the State Engineer to create -- based on that, we don't think there's any authority for the State Engineer to create any new procedures for the public trust which are not authorized by the statutes.

And the other thing I also wanted to note about the biological opinion, turning back to that, is that it is an approval that's in place that again provides some certainty to water right holders. We know where we stand. We know what the rules are with regard to the Moapa dace and what the U.S. Fish and Wildlife has allowed us to pump with our mitigation procedures in place so that we are not impacting the Moapa dace.

And again, that provides some certainty to water right holders. We know what's going to happen, not like something here where the State Engineer says, oh, no, the State may be liable for a take, and therefore, Lincoln and Vidler, you're not going to be able to use your water rights anymore because I'm going to throw you -- I'm going to throw Kane Springs into the Lower White River Flow System.

The other brief that we filed, and answering brief that we filed had to do with Southern Nevada Water Authority

and Moapa Valley irrigation company -- Muddy Valley Irrigation Company. I'm sorry.

And we -- as we put in our brief, we disagreed with the calculations of the predevelopment flows. We disagreed with the calculations of the irrigated acreage that SNWA holds. We disagreed with their quantifications of their water rights that they hold or their ICS credits that they're claiming.

We also argued that the State Engineer did not modify the Muddy River Decree under Order 1309 and did not modify SNWA's water rights or didn't modify Muddy Valley Irrigation Company's water rights, and there's been arguments made to the Court about this Court being, you know, the decree court. And that makes me a little nervous because while the Eighth Judicial District Court is the decree court now, this is a petition for judicial review of Order 1309. And if there's any interpretations of the decree or any kind of enforcement of the decree, that needs to be done in the proceeding where all of the water right holders in the decree have notice and are entitled to participate.

And so again, I get a little concerned that we're going to go outside the realm of, you know, a petition for judicial review by the Court somehow -- I interpret the relief that they're asking is that the Court interpret the decree in this proceeding, and I'm not sure that that's appropriate.

The State Engineer, what the State Engineer did in

Order 1309 is indicated that all the water right holders under the decree are getting their water. That's what he was talking about in the paragraphs that they have appealed. And the State Engineer under the decree is the watermaster for that decree. And the decree -- it's in the record under the Muddy River Decree, and it's at the record on appeal at 33.793, which indicates that there's going to be a watermaster for this decree, and the State Engineer is going to approve that watermaster. And actually, as it stands today, the State Engineer is the watermaster of the decree.

THE COURT: So that's like an actual term of art, watermaster?

MS. PETERSON: Yeah. Yeah.

THE COURT: Okay.

MS. PETERSON: And so what the watermaster does, and again, this is in the decree, and it's at page 33793, that the watermaster under the decree supervises, controls and regulates the distribution of the water.

And again, the watermaster doesn't necessarily have to be the State Engineer, but in this case for this decree, the watermaster is the State Engineer. So the watermaster knows that the water is being delivered, and everybody is getting their water because his office is supervising, controlling and regulating the distribution of the waters of the decree.

And so I guess -- and I think you picked up on it,

that it is an order and a judgment and a decree of the Court. And again, that's in the Muddy River Decree. It's in the record at 33771. And the Muddy River Decree also, you know, it orders, adjudged and decrees. It uses those words. It's a judgment of the Court. And that's at 33786.

So again, if there's any modification or interpretation or enforcement, I mean, that needs to be done by the decree court I'm going to call it, and again, everybody has to have notice of that under the decree.

And with regard to this enforcement of the decree, in *U.S. versus Orr Ditch Company*, it's 600 F.3d 1152. It's a 2010 case, and it's a federal case because it involved a federal decree, but it was a case in which the surface water right holder was contending that groundwater rights that had been granted by the State Engineer under state law interfered with the federal decree. And the federal decree court said that the decree court did have jurisdiction to consider those claims.

And so I just want to point out that if there's any enforcement that needs to be done of the decree, that's brought in the decree court. It's not brought in front of the State Engineer because we're talking about enforcing a judgment that's been entered by a court of law. So that would be the place to go if there's any enforcement that needs to be done under the decree.

And the other thing I wanted to point out is that if

there's claims of impairment under the decree, you know, the Muddy Valley Irrigation Company needs to go to court -- or SNWA, they need to go to court. And it's not like you just stop pumping in the -- what they're contending 1100 square miles of potential water decline. I mean, what you have to do is -- because you're impacting somebody's property rights. I mean, you have to prove that their pumping impacts your water rights. That's what you do. So that would be what would have to be done in the District Court, not any way in this proceeding.

So and then the other thing I wanted to point out, and there was a slide in the Center opening, is that the slide that indicated that SNWA's report that after the 1169 pump tests, but that there where no water level declines or no discernible impacts from pumping north of that Kane Springs wash fault.

And I also wanted to let you know that Muddy Valley Irrigation Company adopted all of the studies of the Southern Nevada Water Authority in the proceedings below in 1309. And so if they adopted all the studies and joined in on all of the studies that the SNWA submitted, that they would also concur in those opinions that there is no discernible impact from pumping, you know, north of that -- north and west, whatever was on that slide of Kane Springs wash fault.

So and I know we heard just recently that they're not

saying there can't be any pumping, but I heard on Monday that any pumping in the Lower White River Flow System affects the Springs. That's what I heard on Monday. So.

And I also heard on Monday from Muddy Valley Irrigation Company that one of the objects of this proceeding was to return the Muddy River flows to predevelopment flows, and I just want to point out that when you look in Order 1303 as to what the scope of this proceeding was, it was not to return Muddy River flows to predevelopment flows. That's not one of the questions that the State Engineer asked everybody to address in 1303. Remember, those were the five questions. One was the boundaries, how much water can be pumped, can you move water between the carbonate and the alluvium. So there was -- I mean, this proceeding is not about returning Muddy River flows to predevelopment flows, and --

THE COURT: When you're talking about this proceeding, this proceeding in this Court or the proceeding that was -- that --

MS. PETERSON: 1309.

THE COURT: 1309. Okay.

MS. PETERSON: That -- I mean, the five --

THE COURT: Whatever precipitated 1309, that proceeding?

MS. PETERSON: The four specific matters that we were supposed to address in 1309 -- well, from Interim Order 1303,

1303 hearing, which resulted in Order 1309 where the geographic boundary of the Lower White River Flow System, aquifer recovery subsequent to the Order 1169 aquifer tests, long-term annual quantity and location of groundwater that may be pumped in the Lower White River Flow System and the effect of movement of water rights between the alluvial and carbonate wells within the Lower White River Flow System.

And I don't see in there that we're supposed to return the Muddy River flows to predevelopment flows.

And again, as I've indicated in our briefs, we disagree with what the level of those flows are.

And I'm very concerned -- this is my last point -- that Mr. Dotson asked you, as his request for relief to affirm that predevelopment flows were equal to 33,900 acre-feet annually, and he was taking that from Order 1309. And he asked you to affirm that the river flow has flowed 13 -- 30,600 acre-feet since 2015. I think the average river flow was 30,600 acre-feet since 2015. And I have two problems with that.

Number one is, he's asking you to affirm parts of Order 1309 that they're appealing. Those are the specific paragraphs. They're pages 60 and 61 of Order 1309. They're found at the record on appeal at pages 61 and 62, and those are the exact paragraphs that they're appealing. And yet they want you to affirm those factual matters.

He's asking you to affirm those factual matters in this proceeding. And the reason he wants you to do that is so that if there is a Phase 2 in this proceeding and we have to determine what conflicts are, there's already going to be a finding by this Court that the predevelopment flows of the Muddy River were 33,900 acre-feet and that the flows since 2015 are 30,600. So they're already going to have their conflict determination made because they keep on contending that they've lost 3,300 acre-feet -- 3,300 acre-feet since 2015. And that's going to be the law of the case, and that's going to go into Phase 2, and that is not appropriate, and that is scary. So you, please, cannot do that.

THE COURT: I can hear the desperation in your voice.

MS. PETERSON: It's -- it's not right.

So that's all I have. Thank you.

THE COURT: Okay. Thank you.

Mr. Klomp.

MR. KLOMP: I join in Ms. Peterson's --

THE COURT: Oh, are you -- is that everything?

MR. KLOMP: Yeah. We were sort of together.

THE COURT: Okay. That's fine.

So then now we are going to -- there were five.

MR. KLOMP: One quick matter, Your Honor.

THE COURT: Yes.

MR. KLOMP: There's a thumb drive right here, and I

don't know that somebody.

UNIDENTIFIED SPEAKER: I think that's Mr. Taggart's.

THE COURT: Okay. Mr. Taggart, do you want to take a minute before you start?

(Pause in the proceedings.)

MR. TAGGART: No, I can go now.

(Pause in the proceedings.)

MR. TAGGART: Okay. We're good.

THE COURT: So you'll have a copy of this for us?

MR. TAGGART: Oh, I was going to cover that. No, this is just a document from the record on appeal. I was just going to show this as a demonstrative.

THE COURT: All right.

MR. TAGGART: And I will cite to it as just from the record on appeal.

THE COURT: That's fine.

MR. TAGGART: All right. So I will not have a third -- or I don't know how many it would be.

THE COURT: PowerPoint or --

MR. TAGGART: A PowerPoint for this reply.

THE COURT: Okay. Thank you.

MR. TAGGART: So that 17 minutes means I talked for three hours and 45 minutes already?

THE COURT: Yes. Impressive that you haven't lost your voice.

(Pause in the proceedings.)

ARGUMENT FOR SNWA AND LVVWD

MR. TAGGART: So if it pleases the Court, again, Paul Taggart on behalf of the Water District and the authority.

A couple housekeeping matters. One, there was a discussion earlier, we've talked at length about the original map that had the -- the original map that mapped the basins, and we talked about it being in 1968. I'm alerted by my associate that that map and that report is not in the record. We cited to a 1968 USGS report when we talked about that map. So I just want to be clear, we cited to 9348 through 9422 of the ROA, and that's actually a 1968 USGS report about something, not the map. So we don't have a map of the original -- the original locations of the basins, but what we have is the 1971 map that I showed this morning, which is part of Waterford, Nevada. So that's just a housekeeping thing.

The other thing is that I thought we cited to (indiscernible)'s rulings. I've told you that this morning that we did in our briefs, but I'm told we didn't. So I apologize for that.

The -- I'll be brief since I only have a few minutes anyway. A couple of things. I'm here now to reply to arguments made against our arguments regarding the conflicts determination by the State Engineer. And I'll just remind the Court that there was clear statements made at the prehearing

conference about what would and would not be ruled upon, and we think this fell within that, and I think Your Honor recalls that when I read that transcript into the record.

So a couple things have been said. One, no one has filed any complaint about the water. We have. So that's an inaccurate statement. A number of inaccurate statements have been made about our position here.

One, we did file a notice of alleged violation. It's up on the screen, and it's in the record at pages 48131 and 48132. We attached to this document the same analysis that we talked about earlier, the depletion analysis that our experts completed about the amount of ICS credits that were not generated because of captured water. We included all that information and filed that with the State Engineer. And there is a file stamp on there that's dated July 3rd, 2019.

And so I agree that conflicts requires an evidentiary hearing. We didn't get to have that, but I also struggle to understand how were supposed to wait for that. If we file something with the State Engineer and he doesn't consider it, how long are we supposed wait?

When we filed this with the Court, this petition for judicial review, and again, completely disagree with my colleague about this, we invoked the jurisdiction of the decree court, and it should be scary because water has been taken from decreed right owners, and there's nothing in this action of

invoking the power of the decree court that requires notice to all decree owners. This is an enforcement action under the decree. And there's been --

THE COURT: Well, let me ask then, is an enforcement action proper in a PJR?

MR. TAGGART: Yes. When that case that we've been citing to, *Orr Ditch*, when it was filed, the -- you know, that's what they were asking, that the application be denied so that they wouldn't have an impact to their water. We've asked that the Court simply interpret the decree, and that is not modifying the decree. You know, I've been through having to name all the owners in a decree, and you do that when you amend a decree, not when you ask for a decree to be enforced, not when you ask for a decree to be interpreted by the decree court.

The parties to the alleged action have to be part of the case. All of those were part of this -- I believe all of those have been noticed, and all of those are here.

So our PJR specifically states that, you know, the subject matter of this appeal involves decreed waters of the Muddy River Decree, and so in our view we've done that.

We're not asking, again, as you know, we're not asking you to adjudicate the conflicts question. We'd rather not have that happen here. We'd rather you strike the language in the order and have that done properly in an evidentiary

hearing.

So the issue of whether it's proper here or not is probably academic. The key is that we should have that evidentiary hearing initially.

Just because the State Engineer is a water commissioner or a watermaster for this Court doesn't mean we're getting our water. And that's the whole point of some of the arguments that we've made.

So I think that the easiest thing for the Court is to understand the scope issue, to -- and the fact that so much of what the State Engineer relied upon in his analysis on conflicts is not available in the record for folks to see and understand how it was done. So for those reasons, it's fundamentally unfair to allow that conflict finding to stand. And for that reason, we ask that you reverse that, but uphold the remainder of 1303, and we've -- and that's the extent of our argument.

And I am done.

THE COURT: Okay.

MR. TAGGART: I will provide you with the PowerPoints tomorrow morning.

THE COURT: Okay.

MR. TAGGART: And provide those to all of the parties in the case as well. Thank you.

THE COURT: Thank you.

THE CLERK: Is it just the PowerPoints (inaudible)?

MR. TAGGART: Yeah, it'll just be the ones that I spoke about already. All right.

THE CLERK: Okay. Because you've given me some.

MR. TAGGART: And are we doing that as --

Yes.

THE CLERK: I just don't want to --

MR. TAGGART: I think I've given you two of three.

THE CLERK: Okay. So it's just this last one that you --

MR. TAGGART: But are we doing it all as one exhibit and adding to it or --

THE CLERK: No. I'm putting them in the order as you guys go. So when they get it on appeal they can (inaudible).

THE COURT: Okay. So you have a number already for when I gave it to you?

THE CLERK: I do. So yours will be 14.

MR. TAGGART: Okay. Thank you.

Thank you, Your Honor.

(Pause in the proceedings.)

THE CLERK: All right. So this you're not giving?

MR. TAGGART: No, not this.

THE COURT: No, this is just on the record on appeal. So it's a --

UNIDENTIFIED SPEAKER: She kind of needs them for

her --

THE COURT: Oh, you need it. Well, if you want to go through --

MR. TAGGART: Well, I can provide you with this.

THE COURT: Okay.

MR. TAGGART: It's easy. It's only two pages. I'll get a copy made.

THE CLERK: So you gave one -- you gave me two yesterday. No, I think I only got --

MR. TAGGART: Right. On Monday I would have started and given you one regarding conflicts.

THE CLERK: Right. Let me find my (inaudible). So right now I have -- I have one for Monday.

MR. TAGGART: Yes.

THE CLERK: And then one that you gave last night.

MR. TAGGART: Yes.

UNIDENTIFIED SPEAKER: Your Honor, are we in recess?

THE COURT: We're -- I guess we're sort of in -- informally. Do you guys want to take a formal recess?

UNIDENTIFIED SPEAKER: Yeah.

THE COURT: Okay. Why don't we recess for five minutes and come back at --

UNIDENTIFIED SPEAKER: I just wasn't sure.

(Proceedings recessed at 3:10 p.m., until 3:20 p.m.)

THE COURT: Okay. Whenever you're ready.

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

or interest in the term area in the statute. And if you go to the second page of 1303, it's very clear how the State Engineer wants to implement the word area.

Now, there are not seven basins at stake here that's being swept into the big bathtub called the mega basins. There are five, and then there are two of the basins that are designated as areas because they are not completely designated basins, only an area within the basin is part of this case. And that's Black Mountain, and that's I think the Warm Springs, and that's why throughout 1303, 1309 and the various petitions that the word area is used, and we'll get into that in a little bit more detail in the statute.

So the Black Mountain Area hydrographic basin is discussed in 1303. Garnet Valley hydrographic basin is discussed in 1303. The California Wash hydrographic basin was designated pursuant to 534.030. Hidden Valley hydrographic basin was designated. So the Muddy River Springs area was partially, partially designated.

So what we have, Your Honor, on 1303 is partial designations of areas within a basin, and then the other basins which are identified as designated except, of course, Kane Springs is not identified as a designated basin, nor can it be because it is not.

1309 on the other hand, Your Honor, does the same thing. It identifies the Black Mountain area hydrographic

basin, area being the operative word. It's an area within a basin, and that's how the State Engineer has used the term.

But more importantly, the order says this: The various basins, a northwest portion of the Black Mountain area as described in this order is hereby delineated. Not designated, delineated. So my partner Ms. Winston is going to get into that in a little bit more detail. But what we've lost sight of over the last -- what's it been, three weeks?

THE COURT: It feels like it, although we've been moving along quite quickly. So --

MR. ROBISON: We've lost sight of this simple word the engineer and the legislature and the courts have used for years, and that's the word basin.

The overlay for our closing argument in rebuttal goes back to the Pyramid Lake Indian tribe versus Ricci case. First,

> It is undisputed that Nevada's groundwater resources have long been managed on a perennial yield basis for the entire hydrographic basin. Such system is specifically contemplated by the Nevada groundwater code, which provides the State Engineer to take various acts on a basin wide basis.

They cite for that proposition 534.034, but that's been argued much differently than as defined and described in

this decision by the State Engineer himself.

Method of designation for groundwater basin, see 534.035. Establishment of groundwater boards in an individual basin, see 534.050. Permits required before a well may be dried -- drilled in a designated groundwater basin.

It is in fact this authority that the State Engineer has identified 235 groundwater basins, and there they are, and the word used in this absolutely clear language by the State Engineer is that the authority of the engineer to identify these basins. And as we have said, there has been so much reliance on the definition given to the word basin by the State Engineer himself over decades of all users, courts and legislature.

Finally, the State Engineer says this:

> It is patently reasonable for the State Engineer to manage these basins in a manner consistent with statutory authority. This approach is also reasonable for the reason that managing a basin on the base of its perennial yield requires and ensures that the basin will remain in balance.

We always have to come back to this proposition in this case, Your Honor, that there was a fault, (indiscernible) fault. Over here is the legal issue, statutory authority to eradicate basins and make them a basin, which we're calling the

mega basin. Statutory authority, it stops. If there is no statutory authority and the State Engineer has exceeded the legislative authority, we don't get to the other side of the fault, which is the science. And I'm now going to yield the floor to Ms. Winston and be back with you in a little bit, Your Honor.

THE COURT: Okay. Thank you.

ARGUMENT FOR COYOTE SPRINGS

MS. WINSTON: Thank you, Your Honor. Hannah Winston on behalf of CSI.

I'm going to address three issues in this argument. The first is the use of the terms designate or designation versus delineation. The second issue is whether the creation of the mega basin or combining multiple basins into one, whether that is a legal question or a factual one. The third issue I'm going to address is this idea of conjunctive management versus joint administration or joint management.

I'm going to walk through the statutes on designating basins, so I really welcome the Court, encourage the Court to ask any questions as we go through them.

Designation is a term or designate is a term that is used throughout NRS Chapter 534. The word delineate is not used in NRS Chapter 34 or NRS Chapter 33. That is a State Engineer word.

THE COURT: Do you mean 534?

MS. WINSTON: Either one. 534 --

THE COURT: I only heard you say 34 and 33. So, but you mean 533 and 534?

MS. WINSTON: Correct. Yes.

THE COURT: Okay.

MS. WINSTON: Sorry about that, Your Honor.

So the first statute I'd like to pull up is NRS 534.011, and these are just from the statutes. It's not necessarily an exhibit.

NRS 534.011 is important. It's part of the definitions for the chapter, and it provides that an area of active management means an area in which the State Engineer is -- I'm going to sum it up so I'm not just reading it to you because you can read -- it's an area where a basin needs particularly close attention. And Subsection 2 is important because it says that that area has also received a designation under NRS 534.030.

So now, Mark, if we could go to that statute, NRS 534.030.

NRS 534.030 provides the process for designating a basin. And as we just saw in NRS 534.011, designating a basin means we're designating it for additional or particular management. So it's an area of active management. That's what we mean when we say we're designating a basin.

So there's two ways to initiate the process to

designate a basin for more management. Either under Subsection 1, the petitioners or water right holders in a basin can actually petition the State Engineer and say we need you to come in and please designate.

In the absence of a petition, we look at Subsection 2. The State Engineer can actually initiate this proceeding himself. And, of course, we've seen this before. There's multiple basins. And what you can see on the -- I believe this is CSI's Exhibit 2.

MR. ROBISON: I believe so.

MS. WINSTON: The basins that are shown in gray are ones that have gone through this process and been designated.

Important to this case is that Kane Springs Valley has not gone through that process. And to figure out what the process is, we look at 534.030. So if the State Engineer thinks that a basin needs to have this additional management, it needs to be designated, then the State Engineer can hold a hearing. And important to this case is Subsection (2)(a) and (2)(b). You'll see in (2)(a) that the State Engineer shall hold a public hearing within the basin. Okay. So when we're designating a basin, we're not designating seven basins at one time. We're designating a basin in that or a portion therein. And that basin -- or the hearing has to be held within the basin. It makes sense.

THE COURT: Let me ask you a question. So under the

statutory framework that we have, is it your position that you do not dispute the fact that the State Engineer can manage the basins with an eye towards how those -- how the water flows within those basins, but if the dispute is him changing those six basins and delineating it into one basin?

MS. WINSTON: That's correct.

And what's important about your question, Your Honor, is that that's -- that's really the issue here. How do you manage seven basins together if the science shows that they're related or there's a hydraulic connection between basins? Is the answer to erase the boundary lines between them that have been established since 1968? No. We have tools to manage them. So we start with 534.030. This statute works in conjunction with NRS 534.120 and .110. So 534.030 provides the process to designate, and NRS 534.110 and 534.120 provides the State Engineer with the tools to implement that management.

So I want to pull up NRS 534.110, please. And I'd like to go to Subsection 6, which I think is important to the Court's question as well. Because if the State Engineer is managing basins by the basin, sees that there is a hydraulic connection, what can he do? Well, if the State Engineer determines after following the proper steps that an investigation is warranted, curtailment is warranted, then the State Engineer can implement curtailment, but only in a basin, right, not amongst several basins together.

And the curtailment has to be restricted to conform to priority rights, not amongst seven basins, but in the basin because curtailment only happens by the basin.

THE COURT: So let me ask. So if the State Engineer is looking at how each of the basins are interconnected and how drawing in certain basins affect other basins, is it your contention then that the Nevada State Engineer cannot consider the senior surface water rights of other parties in other basins and how that is affected by junior groundwater right holders in connecting these things?

MS. WINSTON: No. I believe that the State Engineer does have to consider groundwater and surface flow rights.

THE COURT: Even if it's different, but potentially basins that affect each other?

MS. WINSTON: Right. So this -- it's actually the third issue I was going to address, but I'll just jump right in.

THE COURT: Okay.

MS. WINSTON: There's been a lot of discussion about conjunctive management versus joint administration or joint management.

THE COURT: And I guess for me there's a difference between when you're talking -- when you're defining joint management, if you're talking about joining together several basins as one versus jointly managing, you know, six or seven

separate basins.

MS. WINSTON: Correct. So the word joint management or joint administration, those terms, those are not in NRS Chapter 533 or 534. Those are State Engineer terms, okay. So to the State Engineer, apparently since 1309, joint management or joint administration means literally combining seven basins, erasing their boundaries and viewing that as one hydrographic basin. That is how the State Engineer views joint management.

My position is the State Engineer can do -- consider the effect of pumping between multiple basins without combining the basins into one. He can still implement the tools that are available to him without erasing those boundaries because it has, as we briefed, and as Mr. Robison is going to address, that has very severe consequences.

If the State Engineer is just managing seven basins and this interconnectedness between the basins, then he can still curtail by the basin if he maintains the boundaries between the established basins. He can still curtail and respect and give priority to priority rights in each basin while being mindful of the impact of the connection of water between the basins.

Where I think that this conjunctive management issue has gotten a bit confused is conjunctive management; that word is in the statute, right. It's in the declaration of

legislative policy. And let's bring that up. That's at NRS 533.024.

UNIDENTIFIED SPEAKER: I didn't down load 533. I downloaded 532.

MS. WINSTON: Oh, okay. Then we remember what it is says. We read it so many times.

THE COURT: Okay.

MS. WINSTON: So in that one it says it's the policy of the State of Nevada to conjunctively manage water regardless of the source. Source means groundwater or surface flows. And there was some argument today that some petitioners have taken a position that this is the first time that the State Engineer has ever conjunctively managed groundwater and surface flows. That is not CSI's position. Of course the State Engineer has to disc consider decreed rights. That is prior appropriation. That's reflected in the statutory scheme. The issue of first impression is combining basins to make them one. That is the issue of first impression.

So the State Engineer can assess the effective groundwater pumping on surface flows. The State Engineer can look at the interconnectedness of basins and manage each basin by the basin. That's how the statutes are written. That is how it's been done historically. But the State Engineer cannot combine those basins into one. That is where CSI takes issue.

I'd like to pull up NRS 534.120. So I mentioned

earlier that 534.030 provides the process to designate a basin. NRS 534.120 provides the tools: How do you manage a basin that has been designated? And this is the provision of the statute that you brought up to Mr. Robison in his opening argument.

So I think now we have a better understanding. Within an area that has been designated by the State Engineer as provided for in this chapter, so that means as an area of active management. There's also critical management areas that can be defined. And as SNWA articulated earlier, only Diamond Valley has that actual critical management area designation.

If we look through the rest of the statute, there are different tools available. So in Subsection -- you don't have to zoom in -- but in Subsection 2, the State Engineer can require periodical statements of water elevations. The State Engineer can determine whether there are preferred uses for the water. The State Engineer can issue temporary permits. The State Engineer could temporarily stop pumping in certain areas. So there's different things that the State Engineer can do in those designated basins that are part of his tools in his toolbox when a basin has been designated.

Part of the problem with the State Engineer or some other petitioners in trying to justify 1309 as having occurred under these statutes for designating basins is that Kane Springs has never gone through the designation process. So the State Engineer cannot use these tools in Kane Springs Valley.

And I mentioned earlier 1169 was issued under NRS 533.368, which is to conduct an investigation to see if there's additional water for appropriation, not to assess the boundaries, not to decide that these basins should be combined and treated as one. That's not the purpose of 1169. Because 1309 comes from the pump test and everything that occurred after, 1309 cannot all of a sudden stem or be rooted in 534.120, .110 or .030. That's just not where we are, and it's just sort of a after-the-fact justification to try and make 1309 lawful.

Now I want to talk about the State Engineer's use of the word delineate.

So in Order 1309, the State Engineer says that he is delineating the Lower White River Flow System as that one hydrographic basin.

As I mentioned earlier, the word delineate is not in the statutes. That is the State Engineer's word. And when you talk about delineating, that's really creating, right. He's creating. He's determining that this is one basin.

After all of the argument that we've heard over the past couple of days, we still have not identified one statute that allows the State Engineer to determine, establish, redefine the basins. There's been a lot of discussion about the map that shows the 232 hydrographic basins. And that map, as we briefed, came from the Rush Report from 1968. The USGS

in conjunction with the State Engineer developed that map and established those 232 hydrographic basins.

If the State Engineer had authority to change those established basins, it would have to be in a statute, and the State Engineer has not identified any statute that would give him that authority.

There's also been a lot of discussion about what a basin is. The State Engineer in his answering brief almost feigns confusion as to what CSI means when they refer to the term basin. Obviously this is disingenuous given how water has been managed, how the basins has been referred to over the years.

The State Engineer has argued that nothing in Nevada's water law constrains the State Engineer's view of what a basin is. But what the State Engineer thinks a basin is is truly irrelevant. The legislature uses the word basin throughout the statutory scheme. And this is where I find it so striking that we have no statutory interpretation from the State Engineer to explain what a basin is or why the State Engineer alone somehow has authority to define what a basin is whenever he wants and on whatever terms he decides.

The State Engineer does not argue that the word is ambiguous. So we just start with the plain language. That is how statutory interpretation works. A basin is just a geologic feature. It's akin to a valley. It's a geologic feature

that's also a mountain. So mountain ranges get identified, and they get named, just like Nevada's basins do.

And what's interesting is the State Engineer's Water Words Dictionary actually defines Nevada basins. And it does so by referencing the basins that were established by the USGS in conjunction with the State Engineer. Those are the 232 hydrographic basins.

Rather than actually go through any type of statutory interpretation or statutory analysis, the State Engineer just dismisses of it and says the legislature left it up to the State Engineer to determine what a basin is. That is not how statutory interpretation works. The State Engineer can only act where authorized to do so. There is no statute that says the State Engineer gets to decide what a basin is or what that term means.

The State Engineer is also dismissive of the fact that Coyote Springs looks at the fact that the legislature uses the term basin in a singular versus plural. That is a tool of statutory interpretation. We assume, the presumption is if the legislature says a basin, any basin, a particular basin or a portion thereof or a portion therein, that means one basin. The presumption is if the legislature wanted to reference multiple basins, then the legislature would have done so. And the State Engineer hasn't provided any authority or any explanation as to how you could possibly read the term a basin

as multiple basins. That would violate tools of statutory construction. That would violate the plain language of the statute.

The next issue that I want to address is the State Engineer's attempt to characterize the combining of multiple basins into one as a factual issue versus a legal issue.

So we know why the State Engineer wants it to be factual: Because more deference is given to factual findings.

The problem is the basins have been established since 1968. As I referenced earlier, if there was an intention by the legislature to give the State Engineer the ability to change those basins, then it would have said so. It has not done that.

The second issue is that where the State Engineer is authorized to conduct factual investigations, which is now what he wants to characterize as 1309 constituting, that combining these basins into one hydrographic basin is a factual finding. If that were true, the legislature would still have to authorize that. So throughout the statutory scheme, we'll see where the State Engineer is authorized to conduct factual investigations.

We start with 1169. We saw it earlier. Under NRS 533.368, the State Engineer is authorized to conduct a study or investigation to see if additional water is available for appropriation. So that's a factual finding that is

expressly authorized by statute.

Another example, NRS 534.110, Subsection 6, that statute authorizes the State Engineer to conduct a study to determine if it's necessary to initiate curtailment proceedings.

So if, even if the determination of combining multiple basins into one, even if we could call that a factual determination, there still has to be statutory authorization to allow that to happen. And here there's no statute that says the State Engineer can conduct an investigation to change the basin boundaries or to combine multiple basins into one.

The last issue I told you I was going to address is this joint administration versus conjunctive management, and the one thing I wanted to show the Court.

And Mark, if you'll pull up NRS 532.167.

Under this statute, the legislature requires the State Engineer to develop a water budget for every basin in Nevada.

And we've talked a lot about water budgets, that that is a tool that the State Engineer can use to assess water in each basin. The State Engineer can assess whether those basins have a hydraulic connection, how they impact each other. And then the State Engineer can enter his rules and regulations where appropriate if he finds that there's a depletion of water.

And with that, I will pass it on to Mr. Herrema. I probably said that wrong. I call him Brad.

ARGUMENT FOR COYOTE SPRINGS

MR. HERREMA: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. HERREMA: Brad Herrema on behalf of CSI. I'm going to just hit a few highlights on the substantial evidence issues. I know you've heard a lot over the last almost three days here, not quite three weeks, but so I'll try to be brief. I appreciate the attention I know you've paid and the time you put into the briefing as well.

Just kind of harkening back to what I talked about on Monday, it's clear, and I think it's become clear to you that 1309 has put the Lower White River Flow System basins into a state of uncertainty.

Mr. Taggart said, you know, it makes sense that the State Engineer would do this fact-finding process before policy setting. But it's not -- it's still not clear to me why the State Engineer felt that it needed to issue an order like 1309 when it was finding facts unless, of course, the State Engineer wanted to have those validated either through the statute of limitations running or a process like this.

One other thing I heard from both Mr. Taggart this morning and Mr. Dotson this afternoon, they both seized on this word segmentation that I used when I was talking on Monday to

sort of explain to the Court how I'm trying to wrap my head around what's happening here.

And they both have I think sort of challenged my argument in saying well, you're inconsistent because you've said that on the one hand that the State Engineer shouldn't segment this, but on the other hand you're saying what the State Engineer should do is look at this basin by basin and not combine these six, seven basins into one single basin. And that confuses the concept of what segmentation is.

The segmentation issue in California CEQA law, California Environmental Quality Act law, is breaking something up processwise into smaller pieces so that you don't ever have to look at the whole of it when the impacts of the whole might be -- might not be able to see the forest if you're only looking at the individual trees. And that's what the concern is here with breaking things up into 1309 as a single order with supposedly just fact-finding and then deferring a process, which we don't know what it will be. We don't know when it will be.

Mr. Bolotin said in his argument, you know, if things don't get figured out, then the State Engineer will have to start some process. And so we have this black cloud looming over all of our heads now because we don't know what the State Engineer is planning to do next, but he's sure trying really hard to make sure that these factual findings are approved.

THE COURT: So when you were referring to the segmentation, you're talking about dividing the fact-finding process from the determination of the conflicts of the different water right holders; is that correct?

MR. HERREMA: I'm talking about separating this ruling, this order on the fact-finding from whatever the process will be. We don't know. Some people have characterized it as the beginning of a curtailment process. Others have said, you know, maybe because of this black cloud over us people will have to work it out, and something, you know, a miracle will happen. I don't know what it will be, but that's the segmentation I'm talking about.

And the reason I brought it up on Monday and why I think it's part of the substantial evidence review is because we don't know what all of this is going to be used for. We can't tell if it's suitable for that purpose. And so how can the State Engineer claim that there's substantial evidence for findings that will support what, we don't know. That's the context of the segmentation argument.

I don't need to repeat the substantial evidence standards. They've been repeated many times over the past couple of days. I would just hit a couple real quickly.

> Even where the issues involve technical or complex scientific issues, the State Engineer's orders must be sufficiently explained and

supported to allow for judicial review.

That's *Eureka County*.

> And even under deferential substantial evidence review, Courts must not merely rubber stamp agency action. They must determine that the agency articulated a rational connection between the facts presented and its decision.

And so it's not enough for the State Engineer just to say this is what he's decided.

And then we talked a little bit the other day. I think it's been cleared up. The State Engineer himself views that the legislature has mandated that he use the best available science.

A couple more things in regard to the -- both the determination of a hydraulic connection and the State Engineer's reliance on the 1169 pump test and then I'll touch on the 8,000.

In regard to the reliance of the State Engineer on the 1169 pump test, Mr. Taggart stated that some folks have characterized the pump test as perhaps not well thought out. That certainly was not what my argument was. I think Ms. Winston has done an excellent job today of explaining what the genesis of that pump test was, what the statutory authorization that the State Engineer thought he was operating under was for that pump test. And I think that informs the

manner in which that pump test was constructed.

So if the pump test had been designed for other purposes, such as potential curtailment of existing rights as opposed to an investigation of what water might be available for additional appropriation, it may have been designed differently.

If the parties understood what the criteria were that the State Engineer was going to use for determining whether there was a close connection that justified merging these six, seven basins into a single basin, they also might have designed the pump test differently.

And just in regard to those criteria, I'm not going to walk through them. Mr. Taggart said CSI knew before it submitted its report and testimony to the State Engineer what those criteria were. That's absolutely not true. There's nowhere that -- that it's shown that the State Engineer had disclosed what those criteria were before 1309.

In regard to what the pump tests can and can't be used for, Mr. Bolotin brought yesterday his demonstrative exhibit here with -- we've got multiple. They did their multiplying.

THE COURT: I can't see that one.

MR. HERREMA: He brought his demonstrative here with a handful of hydrographs shown. I'd like to just clarify. This has eight well hydrographs on it, two spring flow

hydrographs. There were a total of 79 wells in alluvial or carbonate aquifers that were monitored as part of that 1169 pump test. And they had well data collected either continuously, monthly, quarterly. There were also a total of 10 surface water gauging sites included in the monitoring that worked so.

I know this is a demonstrative exhibit, but when you look at it, please keep in context that there are 70 other well hydrographs and eight spring flow hydrographs that are not shown on the bigger.

I did want to show you just a couple other hydrographs.

Mark, if you could bring those up.

These hydrographs here, these are Coyote Springs Valley, CSVM wells 3, 4 and 5. We'll walk through them.

I don't think they're marked on the bottom with the --

THE COURT: This is slide?

UNIDENTIFIED SPEAKER: 53.

THE COURT: 53.

MR. HERREMA: I don't think they're marked on the bottom of the ROA cites. The ROA cites are 35653 through 35655. They're part of the expert report that Coyote Springs submitted to the State Engineer back in July of 2019. So the first is CSVM-3. This is a well that's at the north end of the

Coyote Springs Valley.

THE COURT: This is the one that's what, 2 miles away from the Kane Springs Valley well?

MR. HERREMA: It's further north. I'm not sure exactly where it is.

The next one I have is CSVM-4 --

THE COURT: Oh. Maybe that's the one that's --

MR. HERREMA: -- and this is actually shown on Mr. Bolotin's chart here. You can see it's just south -- southwest of the KMW 1.

And this is the well that the -- or the hydrograph that the State Engineer uses for establishing a close connection.

The next one I'd like to show you though is CSVM-5. And this is a hydrograph that's not on the State Engineer's demonstrative exhibit here. This is a well that is west of -- it's in the western portion of the Coyote Springs Valley. And it's something -- west of something that Mr. Robison has described as the highway fault. It's a fault that was identified by CSI's consultant after the State Engineer issued 1303 and said, you know, we're going to have this evidentiary hearing process.

Then CSI engaged a company called Zonge, Z-o-n-g-e, and they did the CSAMT process that Mr. Morrison talked about real briefly yesterday. And so this well is west of the

highway fault that was identified.

So one of the concerns that I talked about on Monday was the fact that this test took place 25 and a half months. It's a very short amount of time, and it has to be viewed in the context it took place. And I mentioned on Monday that it took place at the end of a long dry period.

Mark, could you bring up the precipitation record.

I had intended to have this on Monday, and I apologize that I didn't have it.

Here you can see the -- on the bottom here the precipitation record got a --

THE COURT: And what slide is this?

UNIDENTIFIED SPEAKER: This would be 54.

MR. HERREMA: You can see the ROA cite on the left-hand side there.

Now, this -- there's a dark blue line, and what it shows during -- it's called cumulative departure from the mean. And so that's a term of art. It's taken me a long time to kind of wrap my head around what it means, but if you take a median amount of precipitation during a -- over a long stretch of time and you start at that particular point in time, and then you see cumulatively how are we doing? Are we trending along the line, along the mean where we think the average would be? If we're above the mean, then that line would be higher. If we're below, then that line would be lower. You plot that each year

as a trend though. It's cumulative.

And so what you see here with this blue line dipping down, that's a dry period where we had this pump test taking place. And for all the reasons I talked about previously, you have to view those pump test results and the data that they provided in that context.

In regard to the inclusion of Kane Springs, I think Coyote Springs has made its position quite clear.

Now, there was a discussion with Ms. Peterson yesterday. She brought out a ruler and showed the 6 inches and sort of how much that actually means in terms of these different water levels.

Mr. Lake talked today about an analogy of having a couple buckets next to each other or one bucket maybe with some type of structure in the middle that -- or in it that separated different parts from each other, and it caused differences in what we call hydraulic head. And what you've been asking throughout the hearing, you know, what are you talking about when you're talking about elevations. We're talking about something called hydraulic head. And frequently it's recorded as the water level as opposed to -- or as compared to meet sea level.

So we can talk about the altitude of different cities like Las Vegas, Los Angeles, Denver. We can also talk about the -- what the hydraulic head in these wells is, and that's a

number above a baseline. And so you can compare wells if you use that common baseline. So we know that the water level in the wells, regardless of what's happening in terms of the ground surface, we know that the water level in these wells, it's different by about 60 feet. And the State Engineer has said, well, regardless of that you've got a similar response to the pump test. And so they must be connected.

And as Mr. Lake was talking about, you could have these connected buckets where if one drops because of the differences in the connection the other might drop. But the converse is not necessarily true, and particularly given the way that the pump test was set up. No one disputes that there was no pumping from the Kane Spring Valley during the 1169 pump tests. So you might be able to claim that there's an impact on what's happening in Kane Spring because of the pumping lower down in Coyote Spring Valley during the 1169 pump test, but there's no way to claim that there's -- there's no way to know what the impacts of Kane Spring pumping might be because that wasn't part of the test.

And, in fact, Ms. Peterson did show a plot of two hydrographs yesterday that showed when they did test the pumping in the Kane Spring Valley well there wasn't a response in the Coyote Spring Valley well.

Now, one other thing on the Kane Spring exclusion issue. Yesterday Mr. Morrison brought up or mentioned very

briefly a critique of the Zonge work as lacking credibility was I think the word that he used. I don't think that's a fair way to characterize his concerns with their work. His briefing, his answering brief, there was a criticism of the way that they laid out specific testing lines for this geophysical testing that they were doing, but I don't know that that goes to the credibility of the witness. I think that was not really a fair characterization.

And also I would just point out that the Water District, Moapa Valley Water District acknowledges that faults can act as low permeability structures at the bottom of Kane Springs Valley, but they say perhaps it doesn't hydraulically isolate one basin from the other.

The fault found by that Zonge study at the base of Kane Springs, in CSI's opinion, it acts similarly to the low permeability layer between the Pahranagat Valley and Kane Springs. It does create a steep water level gradient that hydraulically separates Kane Springs and Coyote Springs. And the same reason that the State Engineer excluded Pahranagat and Delmar basins from the Lower White River Flow System would require or mandate the exclusion of Kane Spring Valley from the Lower White River Flow System as well.

I think someone -- maybe more than one person that said well, this is a remarkably flat basin. And if you look at 60 feet of difference in water level elevation over 22 miles,

you know, that's not much of a slope at all, but that's like saying it's remarkably flat from the sixth floor of your apartment building to a park 22 miles away as long as you don't mind that first step walking off the apartment building.

Finally, I'd like to reiterate that 1309 doesn't explain why Ruling 5712 conclusions are -- I'm sorry, why the -- yes, the Ruling 5712 conclusions are overruled. The 1169 pump tests don't refute the facts that were in 5712, and the State Engineer's decision to exclude Kane Springs Valley from the Lower White River Flow Systems is arbitrary, as it dismisses the difference in hydraulic head that he previously found to be conclusive evidence in 5712 that Kane Spring Valley should be excluded from the 1169 pump test.

In regard to the 8,000 acre-foot cap, it's been made clear that this number was come up with primarily, and I think the State Engineer's brief is very clear that this 8,000 acre-foot number is based on a desire to protect senior Muddy River rights.

And the question I think it begs is if it's necessary to protect those rights, why set this cap that they've sort of backed into with this effects analysis as opposed to doing what the State Engineer previously talked about doing following and creating a groundwater model, which is what he said in 1169 he was going to do? And considering his responsibility, as Ms. Winston talked about, to create a water budget or establish

a water budget for each of these individual basins, why do you need to go -- to back into this number based on affects when he's got other options.

Now, Mr. Taggart showed his clients -- I didn't see the title of it. I don't know if it was a notice of violation or a request for action. And whatever the demonstrative was that he showed in regard to his client's request that the State Engineer take action on the depletion in the Muddy River flows.

THE COURT: It was a notice of alleged violation.

MR. HERREMA: Okay. The notice of alleged violation. Thank you.

Now, I would just note the date on that, July 3, 2019. I think that's the same date that expert reports were due to the State Engineer in the 1303 hearing process. So this is -- this is something that wasn't done outside of that, this current process. It was I think occasioned by the work that they were doing for the 1303 hearing expert reports, but if you have that available, and the water authority has availed itself of that.

Mr. Taggart talked earlier about different types of curtailment. He said there's conflict curtailment mechanisms that the State Engineer can undertake. The water authority has availed itself of it.

So why set this 8,000 acre-foot affects-based cap now, create the black cloud that we're all under with no idea

what's going to happen next, particularly when the State Engineer hasn't defined how the 8,000 is available within the subbasins or how it will limit pumping to the 8,000 acre-feet?

In regard to the availability of the 8,000, I think too many people during the proceeding have sort of talked about the system as if it's one big bathtub without any heterogeneities in it. So using this concept, this rough justice concept of impacts at only one particular location to set this cap, it doesn't take into consideration the variability and what's happening in the Lower White River Flow System.

It doesn't consider the fact that not every well has -- pumping from neither each individual well has the same impacts on the flow system, and there may be flow paths where water goes -- discharges from completely different parts of the basin.

Mr. Dotson brought up 1169 earlier. He showed Footnote 12, which is on page 4 of 1169. I'd invite the Court to take a look at that, and you'll see what the State Engineer said there about all of the different points of discharge from the Lower White River Flow System basins. There's many more than just Muddy River Springs.

And so this 8,000 acre-foot cap doesn't take into account that there may be the ability to pump water that would not otherwise be discharging from that Muddy River Springs

area.

In fact, during the pump test, there was 14 and a half thousand acre feet of pumping of which 5300 occurred in Coyote Spring Valley. There was only a resultant 300 acre-foot to 450 acre-foot impact on spring flow. And so that suggests that there must be other things going on in terms of the effects of that pumping and where that water is coming from.

Mr. Taggart showed a chart. I think it was this morning, with all of the basins, the 232 basins, and then a bunch of arrows in between them. And those arrows were showing the way water flowed in between different basins. And so when there's communication between the basin, one might contribute to another, and that was what those arrows showed.

Now, these types of movements also occur within the individual basins, and not just basin to basin, but within the individual basins you have water coming in, water going out, water moving in different directions.

Mark, could you bring up the chart.

(Pause in the proceedings.)

This is what Coyote Springs attempted to do in --

THE COURT: What page is this or what slide is this?

UNIDENTIFIED SPEAKER: This will be 55.

MR. HERREMA: Is there an ROA cite on the bottom there, Mark?

UNIDENTIFIED SPEAKER: Yes.

MR. HERREMA: Now, this is from CSI's expert report.

THE COURT: It says ROA 41017?

MR. HERREMA: Yes. Thank you.

And this is a type of analysis, and Ms. Winston touched on it a little bit in her argument as well, but this is the type of analysis that the State Engineer should -- this is just Coyote Spring Valley, but this is the type of analysis that can be done not only in Coyote Spring Valley as part of the water budget that the State Engineer is required to develop, but it also can be done to talk about the relationships between the different basins.

And this is the way to develop that number that is -- if they feel that they need to come up with a combined perennial yield for all these basins, this is the way to do it, not this backed out impacts analysis of 8,000 that they've come up with.

What that doesn't take into account is the flow paths that might exist, the faulting structures that I talked about in terms of the work that Zonge did. There's a -- I think it's deuterium is the way it's pronounced. It's an isotope that is -- that you can look at to understand how water moves around within the basins. If you look at the prior page in CSI's expert report, which I don't have the slide of unfortunately, but it's the immediately previous ROA cite. You'll see the water budget that CSI did that supports these arrows here on