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

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CERTIFICATE OF SERVICE

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

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

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

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

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DATED this 27th day of December, 2022.

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

the slide that we're looking at.

One more thing on the faults. Mr. Taggart discussed yesterday the movement of water can be fault driven. He talked about people, you know, finding water in faults and maybe locating wells there. Faults can both constrain water from moving from one place to another. They can also act as conduits. And Vidler and CSI both performed studies following the issuance of 1303 to come up with that best available science as to how these faults might exist within the basin. And the State Engineer largely disregarded this evidence.

There's one more thing I would add in regard to the issue of the individual water budgets. The State Engineer's website has an estimated perennial yield of each of these 232 delineated basins. And this is the type of analysis that should be done had the State Engineer not been in such a hurry to have 1303 boundaries and the 8,000 acre-foot cap adopted.

So in summary, we believe the best evidence was ignored in 1309. The State Engineer relied on 1169 pump test data for the purpose that it wasn't designed for and was not interested in the further evaluation of the geophysical conditions in the basin in order to set a perennial yield as well.

I guess the final point I would make on the 8,000 is just reiterating that there is no substantial evidence. There is no specific evidence that was in the record or presented or

that the State Engineer can cite to in regard to this 8,000 acre-foot number. So he said it based on the upper bound of a range of pumping where groundwater levels have, I think, neared stabilization is the term that he uses, and that simply does not meet the substantial evidence standard.

Thank you.

THE COURT: Thank you.

MR. ROBISON: I've been told that the head can absorb only that which the rear end can endure. Do you need a break or your staff?

THE COURT: I'm okay. Oh, I don't know if everyone else needs a break.

MR. ROBISON: That sounded like a no.

THE COURT: Okay. All right. I'm okay. Part of my staying awake and alert strategy is taking copious notes. So that way and make sure that I'm really concentrating.

MR. ROBISON: Well, I hope it's not that much of a challenge in the next hour.

ARGUMENT FOR COYOTE SPRINGS

MR. ROBISON: Going back, Your Honor, to how we got here, CSI. It's been mentioned several times, primarily by me, that we're not strangers to the litigation with the State Engineer, and all three of those cases, Southern Nevada Water Authority was an intervenor.

With regard to 1303, that was entered after we made a

settlement with the State in which we exchange promises of cooperation. They would in good faith process our applications, and we would in good faith participate in the ongoing workshop analysis of the respective basins involved in this case.

THE COURT: So you're talking about regarding the subdivision map.

MR. ROBISON: Yes.

What happened, we challenge 1303 because it primarily, because it included a complete blackout moratorium. Unlike any other water user in basin 210, any other basin, we were shut down. And I've told you all about the investments and the equities involved in that. Well, 1303, just like the May 16, 2018, letter shut us down. So we challenged 1303 primarily saying that the moratorium is a taking. It's unconstitutional to take -- to shut down a project and depriving a project of water is depriving the owner of its property. And we've talked about the authority that associates priority as a property right.

We're shut down, and so we litigated. And then we get to 1309. We presented our evidence, and we all know that story. 1309, they say, nobody has been ordered to stop pumping. 1309 is just the guidelines, the goalpost, the guardrails. Well, that might be true for them.

We're shut down. Our maps have been denied because

1309 says there's no water. So for every other intervenor or petitioner to say No harm, no foul because nobody has been asked to stop pumping is a bit misleading in terms of the total shutdown that Coyote Springs has experienced as a result of these ongoing administrative proceedings. And it's been shut down because the basins have been consolidated. They've been merged. They've been put into a mega basin, which is not called for in a statute.

We've been here with 22 briefs citing probably 50 cases and more than 50 statutes. And you search through these arguments, and you search through these briefs, and you search for all this material for one scintilla of legislative authority to eradicate basins. We know they can manage basin to basin, particularly where there's a hydrological connection. We know that. It's done throughout the State.

But how does the legislature look at the term basin in these statutes? What did the legislature mean? Has every one of those words in those statutes got an asterisk to it that says this word means whatever the State Engineer wants it to mean? No.

Is there an implicit suggestion by the legislature that the numerous times they've used the word basin that that is supposed to be interpreted as anything the State Engineer says it is based upon whatever it wants to do to manage groundwater from basin to basin?

I want to go back to the statute that you caused me to look at after your question. 37, please.

The State Engineer may make such reasonable rules and regulations as may be necessary for the proper and orderly execution of the powers conferred by law.

We don't dispute any of the powers that Ms. Winston talked about today that are in those statutes. We dispute the distortion of those words, and we believe that what the mega basin does, it violates the powers conferred under the statutes to restrict the investigations, the management, conductive management and the administration to basins.

And it gets pretty important why that happens.

The Court --

38, please, Mark.

When you asked me the question what does this mean with respect to an area, 534.120(1) says,

> Within an area that has been designated by the State Engineer as provided for in this chapter where in the judgment of the State Engineer the groundwater basin is being depleted, the State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.

And I was concerned with your question with regard to

the term area. So we looked, and we said it's got to be explained in the statute. And sure enough it is. And if we take a look then at Slide 39, the NRS 534.110, Subsection 7 and Subsection 8, this explains why the term area is used in .120. And we start with Subsection 7.

Bring that up, please, in the (indiscernible), please. 7A, Mark.

> The State Engineer, A, may designate -- not delineate, as 1309 says. It may designate -- a critical management area any basin in which withdrawals of groundwater consistently exceed perennial yield of the basin.

That's not happened in this case, Your Honor. They haven't confined themselves to the perennial yield of Basin 210, Coyote Springs Valley. They've gone to say, and I think area is used -- the critical management area, which obviously explains and helps to find what is meant by within the area in 120, but I've taken some liberty to emphasize our argument with the next slide, and that's CSI 40. (Indiscernible) the State Engineer may designate -- go down to the statute that you brought my attention to, within an area that has been designated.

So the area in the term designated are tied into the method by which the State Engineer is entitled to designate and investigate, but every single support, every single line in

this is restricted to a basin or within a basin.

And we've heard argument that the State Engineer does this all the time because it will regulate within a basin. Therefore it has a right to conjunctively managed, but that's still restricted to a basin.

And the real simple question comes down to whether or not this Court can say, well, if you take these statutes in their entirety and read them together, is there any explicit or implicit power to obliterate boundary lines of a basin which then jeopardize, if not eliminate prior appropriation and senior priority.

Let's go to 42. We made a list of all the basins -- excuse me I made a list of all the statutes in which the term basin is used. And we looked for any statute that would in any way suggest that these boundaries can't be eliminated. There's nothing, none whatsoever.

So let's talk about what this mega basin really does, Your Honor, and this is more important and probably the most important reason why we're here. If, as in AB51 the legislator was going to be (indiscernible) they can eliminate prior appropriation, they can extinguish senior rights of a user, of a permittee by consolidating basins, the legislature wouldn't have touched that with a fork because we all know that that priority is a property right, and you can't take a property without compensation. We haven't paid anything. I think

that's pretty clear. We haven't been paid anything to shut down our business.

But take a look at Basin 210, and that's on Slide 43. This is the world in which we grew up. 1983 we got our rights. We developed. We were approved. Spent all that money because we were junior to 343 acre-feet that Bedroc had, and that's vested right. We know that. But then the next seniority rights are our 4600. We're second in Basin 210. We're junior only to 343 acre-feet. That's all.

Below us, as Mr. Taggart said, the juniors get wiped out. In the event there's not enough water to service that basin, the juniors get wiped out, and I agree with Mr. Taggart. They do. So we're not going to get wiped out into 10 because we're only junior to 343 acre-feet.

So the next slide, Your Honor, is 44, and I wish it was bigger print, but I've made a copy for the Court to look at, and I got copies for all counsel.

THE COURT: I can look it up here.

MR. ROBISON: I'm sorry. I missed you.

THE COURT: I can look at it right here. So you can just -- tell me what I should be looking at.

MR. ROBISON: Can I mark this next? Because it ties the two together.

THE COURT: Sure.

MR. ROBISON: Your Honor, I'll leave copies of this

with counsel and have it marked as our next, CSI.

UNIDENTIFIED SPEAKER: 56.

MR. ROBISON: 56.

THE COURT: Okay.

(Pause in the proceedings.)

THE COURT: So it can't be marked as 56. She's going to -- she will remark it as whatever it is.

THE CLERK: So I'm sending you guys an e-mail of what I need tonight.

MR. ROBISON: Okay.

THE CLERK: So you can bring it in. Because for every time you spoke, I need whatever you did at that time, and then the next time. I need them all separated out.

MR. ROBISON: All right.

THE CLERK: Because she's having them -- they're putting them in order of how you guys speak.

MR. ROBISON: Okay. Thank you.

THE CLERK: But I will keep it.

MR. ROBISON: The document --

(Pause in the proceedings.)

MR. ROBISON: Well, I'll refer to this document as the groundwater rights by priority in the Lower White River Flow System.

So this has been given to us by the State Engineer, and it is saying to us, well, you thought you had pretty good

senior rights in 210, but guess what, now you're so far down the line that you will get wiped out. You are junior to all of those rights above that blueline, Your Honor.

And you might note that those who have joined with the State Engineer are the intervenors. Look where they are. They have nothing to lose with 1309. They're senior to us. And as Mr. Taggart said, the seniors wipe out the juniors. So going from a position of --

MR. TAGGART: I'm just going to object. I said what I said, Ken, and it will stand for what it was. I said, well we're going to make that decision later how all of that exactly works. I didn't admit my client is going to lose all of their water if that's what you're trying to imply. I said that may happen, but that's for the next phase.

MR. ROBISON: Your Honor, the priority is a very important aspect of this case. So is prior appropriation. What we're trying to show you with these exhibits, Your Honor, is what happens when you combine basins in this fashion. You put us so far down the line in terms of priority that the seniors above us, and you start with Bedroc on the very top, we know they're -- they've been there forever. We've got the Church of Latter-day Saints, they're right below them. They've got -- they have seniority on us, but they don't have anything on us in 210. They've got no water rights in 210 that are senior to ours.

So the mega basin has just destroyed our senior rights, our prior appropriation rights, and that's what happens when you do a mega basin.

THE COURT: Well, so let me ask you this.

MR. ROBISON: Sure.

THE COURT: Mr. Robison, because is it -- I mean, I know that there has been an argument that it would be form over substance. I mean, can't the Nevada State Engineer, if he's looking at how the different basins affect each other then decide, because -- I mean, let's presuppose that there are designated areas, that Kane Springs has been a designated area and all of that kind of stuff. So can't he then decide that because these senior water rights holders are being affected by junior water right holders in the next basin that he could then start a curtailment process --

MR. ROBISON: He could.

THE COURT: -- so that -- and, I mean, in effect it would be kind of a reprioritizing, kind of like this.

MR. ROBISON: Good point, Your Honor, but unfortunately, the curtailment statutes are limited to a basin by basin or within a basin.

THE COURT: Okay.

MR. ROBISON: That's what the legislature said. That's why you can't do curtailment across boundaries. Because the statutory -- the legislature --

THE COURT: But he could take it into account as far as how the other basins affect and then based on that within a basin do curtailment procedures.

MR. ROBISON: Sure. He can give us a notice of curtailment, and we'll go into 210. We'll argue about why we shouldn't get curtailed in 210.

THE COURT: Okay. But that -- it's really more the fact that that procedure was not followed, as is outlined in the statute?

MR. ROBISON: That's correct, Your Honor. I couldn't have said it better. Nor could it be followed under the statutory scheme that's in effect in this case.

THE COURT: Okay.

MR. ROBISON: So, Your Honor, there was not much talk in the arguments that have preceded this one about what happens to senior rights, the prior appropriation doctrine. That was silent in the last couple days of argument. Because once you look at what happens in this situation, we've got real problems with this make a basin creation, which is again first time ever, and they say it's happened in other areas. It hasn't. It's happened within the basin where there's been some conjunctive management issues.

So, Your Honor, we believe that the prior appropriation doctrine should not be jeopardized by the mega basin efforts that have been accomplished in this case. Again,

the suggestion that everybody gets to wait to see what's happening and that we're living in the shadow, everybody but us, we've already been shut down.

This is a curtailment without curtailment procedures because our maps have been denied because no water on 1309. So where do we go? We go to a curtailment that's already happened. I mean, in effect, this has been a curtailment process without a curtailment by the statutory framework. So we're believing that that alone, Your Honor, justifies that 1309 be declared void. It violates statutory definitions of basin, and it has obliterated the prior appropriation doctrine as it pertains to us.

I want to now go to the hardest part of rebuttal argument, and that is to go through your notes to see what they said that you don't agree with.

So it's a bit awkward, but I'm sure you've been there.

THE COURT: I have.

MR. ROBISON: And, of course, the notes are not legible. So bear with me.

THE COURT: Do you need a minute to organize?

MR. ROBISON: Pardon me?

THE COURT: Do you need a minute to organize?

MR. ROBISON: No. I'm good.

THE COURT: You're good. Okay. All right.

MR. ROBISON: It was during the State Engineer's -- Mr. Bolotin's argument where you actually addressed the prior appropriation concern with him. And the answer was curious. Because it was a -- he immediately diverted to the Kane Springs issue in terms of prior appropriation. And I don't think the State Engineer really came back and said all of this mega basin doesn't negate or adversely affect prior appropriation. And they can't.

But this whole identification of the basin with respect to that answer comes out of the Rush Report, as Ms. Winston indicated. And he relies on the water words, and everybody does in this case. They cite to that dictionary. Well, that dictionary is the one that defines the basins as those delineated on the CSS-2 (phonetic), and no other definition exists in this case.

I've already mentioned most of what the State Engineer said about 1309 not denying rights, that's just -- that's not true. It has definitely affected our rights, and it has effectively looked at the situation in terms of the equities. In that case we cite with regard to the equities, the *Happy Creek* case, it is an interesting read.

THE COURT: Which case?

MR. ROBISON: *Happy Creek*.

THE COURT: Oh, *Happy Creek*.

MR. ROBISON: Yep. The Supreme Court, that's the

equity discussion by Justice Pickering, my good friend Paul Taggart successfully argued how equities should be considered in these water management cases so as not allow anybody to forfeit rights. It was a good argument. It was a good opinion, and it applies to this case.

I want to respond to the comments made by the Church. And we agree with the Church in many ways because the argument by Mr. Carlson in this case was basically you've got to do something, Your Honor, in this case with regard to 1309 to protect existing rights, and 1309 protects existing rights.

Well, it protects his existing rights. It doesn't protect our existing rights.

And remember the series of events with respect to the pump test come out in 2012. The rulings come out in 2014. Each one of those rulings pertains to a specific basin. Each one of those rulings pertains to applications made in specific basins. And each one of those rulings in each one of those basins regarding the applications in those basins say this: We are not going to grant additional water to protect existing right so that we can protect existing rights.

I then find ourselves in the same position as the Church and saying, yes, we too want to protect existing rights. 1309 does not protect existing rights unless you have senior rights over Coyote Springs. 1309 would affect our existing rights only because of the consolidation, only because of the

merger of various basins.

So the 1309 basically defies the reasoning set forth in the various rulings. And two of those rulings were -- rejected CSI's application for groundwater.

So my good friend Mr. Dotson says, well, everybody knew this was coming, that there was limited water. Well, that's not exactly -- not exactly accurate. There was an application for over a hundred thousand acre-feet in 2001. And no one saw it coming. They're in there trying to get more water for themselves. A hundred acre-feet of those some hundred applications, and that's when then they, those applicants, including my client, Las Vegas Valley Water District, Southern Nevada Water Authority made applications thinking that everybody had more water. So this wasn't a train coming down the track with us -- with a deer in the headlight type of proposition. After the rulings that had been no really analysis other than quantity. Pump effect.

But in terms of what 1169 did that resulted in those rulings, there's no discussion about (indiscernible), transmissivity, faults. And Dettinger, who is quoted in 1169 says the analysis of faults is crucial to water management, and that's why we are so disappointed actually that the State Engineer would not give us the credibility with regard to the highway fault, and the 5,000 acre-feet of water that comes out of the sheep range, which is on the west side 210 and then goes

south.

So they still don't explain with respect to the need to make this a mega basin the fact that Coyote Springs can pump water from the -- in 210. That does not go in any way whatsoever to Warm Springs and jeopardize a habitat. That is about 17 to 20,000 acre-feet that bypasses Warm Springs and the dace habitat. That's what the science showed.

So when the Church says protect existing rights, we go we second that. Please protect our existing rights. That was articulated in the rulings that said those applications for more water are denied.

Your Honor, I think 1309 might someday, if it survives this proceeding, lead to some kind of analysis of what the perennial yield is for the mega basin. But once you step there, you've already violated a statute that said that these basins are to be managed based upon the perennial yields of each of the basins. Again, that begs the question, because here again we deal with that dreadful word, basin, one the legislature uses so many times and the courts has.

What does basin mean? What does basin mean? That's what this Court is going to have to tell us in its order on 1309. Does basin mean any combination of basin that the State Engineer thinks is appropriate to combine? Does basin mean those enumerated, delineated basins on CSI 2? What does basin mean? And there's only one definition, and that comes from the

Rush Report, that everybody in this (indiscernible) relies on. And it's those basins on CSS-2, Your Honor.

In order to validate 1309, I think the Court is going to have to find a way to say that basins can be defined as a mega basin despite prior appropriation. And if you get there, Your Honor, I don't know how you reconcile making senior rights junior when you define basin as a mega basin under the statutes that existed and apply to this case.

And that pertains in part to the green light analysis that was discussed by SNWA and the State Engineer.

They said these studies back in 1169 and the rulings will constitute an orange light, a yellow light or perhaps even a red light. That's not -- we saw the rulings. We didn't get more water, but we saw the State Engineer not say in those rulings that you get less water. We're going to protect your existing rights, and, of course, that's when the money started flowing for improvements.

And the Las Vegas Valley Water District and together with us, we created the GID, and the GID was going to provide the water to our units and our improvements. But then they shut us down with no analysis, as I pointed out several times. The light was not red. The rulings for 6255 through 6261 that they turned bright green and said go for your development because we're going to protect your existing rights.

The cases cited, particularly by SNWA, *Cappaert*,

Griffin, Pyramid Lake Indian, Paiute Indian Tribe, if you look at those cases, and we have, they do not resort -- they do not refer to in any way an implicit permission to combine basins.

Yes, they talked about water management, as they should. And so we're clear, Your Honor, we don't have a problem with the State Engineer managing the water that is owned by the public of this State.

THE COURT: Let me ask you. Do you have a problem with him managing it conjunctively?

MR. ROBISON: In our basin, not a bit.

THE COURT: Okay.

MR. ROBISON: You come back, and we'll go, and we'll go to the hearings, and we'll present our evidence, and we'll do a conjunctive management plan for Basin 210. I wish we would have been given that right in the first place. We wouldn't be here.

Your Honor, I've got 25 minutes left, but I've got five minutes left on the clock.

THE COURT: I don't -- well, I should ask my staff first. Will you guys kill me if we stay a little late?

MR. ROBISON: We want to go home, don't we?

THE COURT: I mean, if you want -- I mean, if you want to just --

MR. ROBISON: I'd just as soon break today.

THE COURT: Okay. That's fine.

MR. ROBISON: I'll probably be more precise if you let me break.

THE COURT: No problem.

So why don't we break for the day.

Let me ask if those who are left.

So we've got Apex, Center for Biological Diversity, Muddy Valley, Nevada Cogeneration Associates, Georgia-Pacific, Lincoln and Vidler, just to try and get a sense of how much more time we're looking at, I just want to -- with no pressure. I mean, you all have your four hours. I'm just trying to get a sense of if you think we will end tomorrow, or if we'll be going into Friday. So let me just ask and, you know, like I said, no pressure.

Apex Dry Lake, do you have an estimate of how long you think you will take?

MR. BALDUCCI: Yes, Your Honor, I've been telling everyone today I should be 15 to 30 minutes, which will be 10 to 40.

THE COURT: Okay. All right. And then Center for Biological Diversity?

MR. LAKE: Your Honor, to be safe, mark me down for an hour. I'll probably use less, but.

THE COURT: Okay.

And then Muddy Valley.

MR. DOTSON: Same, Your Honor.

THE COURT: About an hour?
MR. DOTSON: Yeah. I'll probably be less.
THE COURT: All right. Nevada Cogeneration?
MR. FLAHERTY: Your Honor, I think 30 to 60.
THE COURT: Okay. I'll put you down for an hour.
Georgia-Pacific.
MR. FOLETTA: Your Honor, I'd say 30 to 45 minutes.
THE COURT: Okay.
And then Lincoln Vidler?
MS. PETERSON: An hour to an hour and a half.
THE COURT: Okay. So, I mean, it looks like we are looking like we will be finishing tomorrow. So I guess we'll just plan for that. Okay. All right. Thank you.
Are there any other housekeeping matters that we need to take care of today or --
I think Michelle is going to send you e-mails about which exhibits we need from you.
(Pause in the proceedings.)
MR. ROBISON: I wanted to clarify CSI's position in maybe 51 and 60.
MS. WINSTON: 1329, Order 1329.
MR. ROBISON: I just wanted to --
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THE COURT: You know what, start it tomorrow. Start with it tomorrow. So that way we have it on the record.

(Proceedings recessed for the evening at 4:57 p.m.)

-oOo-

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Dana L. Williams
Transcriber

ADDITIONAL TRANSCRIBER: KARISA EKENSEAIR

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DISTRICT COURT
CLARK COUNTY, NEVADA
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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

THURSDAY, FEBRUARY 17, 2022

PETITION FOR JUDICIAL REVIEW - DAY 4

SEE NEXT PAGE FOR APPEARANCES

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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.
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.

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LAS VEGAS, CLARK COUNTY, NEVADA, FEBRUARY 17, 2022, 8:30 A.M.

*** * * * ***

THE COURT: Okay. Good morning, everyone.

There was one housekeeping matter that I realized last night when Mr. Dotson mentioned an amended record on appeal. I remember maybe a month or two ago that there was some issues with getting the amended record on appeal filed in our clerk's office.

UNIDENTIFIED SPEAKER: Yes.

THE COURT: It's not in Odyssey that I can tell, and I don't know if that's something that we needed to make sure is done.

Mr. Bolotin, could you kind of let me know --

MR. DOTSON: Your Honor, can we get appearances first, and then after those, we have some additional housekeeping on top of that too.

THE COURT: Sure.

MR. DOTSON: That we would like on the record.

THE COURT: Okay. Sure.

MR. BOLOTIN: Are we on the record, Your Honor?

THE COURT: Yeah, we are on the record.

MR. DOTSON: Oh, we are. Okay. I just wanted to --

MR. BOLOTIN: James Bolotin --

THE COURT: Oh, you know what, hold on.

My clerk is asking me to do roll call first. So let

me do that, and then we can get that other -- those additional matters on the record.

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

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

THE COURT: Good morning.

Nevada State Engineer?

MR. BOLOTIN: Good morning, Your Honor. James Bolotin from the Attorney General's office here on behalf of the Nevada State Engineer. And I once again have Micheline Fairbank, Deputy Administrator from the Division of Water Resources.

THE COURT: Good morning. Thank you.

Lincoln County Water District.

MR KLOMP: Good morning, Your Honor. Wayne Klomp on behalf of Lincoln County Water District. Also with me in the courtroom is Wade Poulsen, the general manager; and Dylan Frehner, the Lincoln County District Attorney, is appearing via BlueJeans.

THE COURT: Okay. Thank you.

Vidler Water Company?

MS. PETERSON: Good morning, Your Honor. Karen Peterson from Allison MacKenzie law firm, and I have Ms. Palmer here, Mr. Bushner and are here and Mr. Hurth here.

THE COURT: Good morning.

Nevada Cogeneration Associates Number 1 and 2.

MR. FLAHERTY: Good morning, Your Honor. Frank Flaherty on behalf of Nevada Cogen.

THE COURT: Good morning.

Muddy Valley Irrigation Company?

MR. DOTSON: Good morning, Your Honor. Rob Dotson along with Steve King on behalf of Muddy Valley Irrigation Company, and we have the executive director and probably members of the board online.

THE COURT: Okay. Great. Thank you.

Center for Biological Diversity.

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

THE COURT: Great. Thank you.

Let's see. Republic Environmental Technologies and Georgia-Pacific Gypsum.

MR. FOLETTA: Good morning, Your Honor. Lucas Foletta.

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 via BlueJeans is Lisa Cole. She's my client representative and a consultant.

THE COURT: Okay. Good morning. Thank you.

Bedroc Limited and Western Elite. Anyone?

No. Okay.

Moapa Valley Water District.

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

THE COURT: Okay. Good morning, Mr. Morrison.

Coyote Springs Investments.

MR. ROBISON: Good morning, Your Honor. Kent Robison, together with cocounsel Emilia Cargill, Brad Herrema and Hannah Winston by BlueJeans. I should also indicate that our client Albert Seeno, Jr., has been on BlueJeans the entire week, and he's present today as well. And Mark Ivie, our technician.

THE COURT: Okay. Thank you.

Sierra Pacific Power Company and Nevada Power Company.

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

THE COURT: Okay. Good morning.

And then the Church of Jesus Christ of Latter-day Saints?

MR. CARLSON: Good morning, Your Honor. Sev Carlson.

THE COURT: Good morning, Mr. Carlson.

All right. So have I missed anyone?

All right. Hearing no answer.

Now we will go to the housekeeping matter. I just left off where I had asked Mr. Bolotin about-- of the amended record on appeal. Can you enlighten me as far as what happened --

MR. BOLOTIN: Yes, Your Honor.

THE COURT: -- or is happening with that?

MR. BOLOTIN: So we were -- my office -- this is James Bolotin for the record.

We were alerted that some of the exhibits that were in the original one were not the versions of those documents the State Engineer had looked at. There's highlighting and some other things on some of SNWA's exhibits specifically in the record on appeal. So we worked to just -- the Bates stamping stayed the same.

THE COURT: Okay.

MR. BOLOTIN: And we basically filed an amended record on appeal to just swap in clean versions of those. I thought they had been filed. I know that Mr. Ireland in my office and his assistant were working to make that happen. I know there was something filed, but we can make sure to get that. We sent thumb drives and everything to all the parties

with the amended record on appeal, but we're happy to do whatever the Court needs to make sure that it's --

THE COURT: Yeah. I think it's -- what you'll probably need to do is get together with our clerk's office to make sure -- because it's such a voluminous document that I think they have to do it in chunks. And even then they probably -- they probably have to involve IT to do it.

MR. BOLOTIN: And I know the first time we did the really big record on appeal the first time, we did some kind of --

THE COURT: Special something.

MR. BOLOTIN: -- special thing behind the scenes that it was in two really big chunks. And then my understanding in talking to my colleagues and trying to get this done last time, we couldn't do that again. So we had to do something --

THE COURT: Oh, different.

MR. BOLOTIN: -- different, and maybe that's where the issue is.

THE COURT: The issue's at.

MR. BOLOTIN: But we'll make sure that that happens as soon we can.

THE COURT: Okay. Great. Thank you.

And then, Mr. Dotson, there was some other matter that you needed to address?

MR. DOTSON: Well, there's a few things, but I want

to speak on that if I might be heard on that first.

THE COURT: Sure.

MR. DOTSON: Because one of the things that I noticed as I was preparing, and you are correct, I alluded to it because I came to the point in my PowerPoint presentation where I was going to put in 41996. It happens to be one of the pages that Mr. Bolotin is referring to that has an interlineation and highlights --

THE COURT: I see.

MR. DOTSON: -- and it has metadata as well. The problem is the new record, which I at that point was thinking was the new record, is also distorted and blurry. And so if there is a chance to refile -- it's not in color. The new record, it doesn't have -- so that particular report, which is the only part I saw with interlineation, metadata and highlights.

MR. BOLOTIN: Yeah, I think that's it.

MR. DOTSON: Starts at Record on Appeal 41930 and runs to 42029. And in the original, you can see, like these highlighting, these red interlineations are all in the document you've seen.

THE COURT: Okay.

MR. DOTSON: And you can tell that Tom O (phonetic) or somebody like that is who did it, but that's probably whoever holds the license. So, for example, when I do a

highlight, it shows Morgan Bogomil (phonetic), who is my assistant.

THE COURT: Oh, that's the metadata that you're talking about. Okay.

MR. DOTSON: Yeah, so that's Item Number 1.

MR. TAGGART: Well, and I'll just -- Paul Taggart for the record.

We don't know who Tom O is. Everybody has kind of been curious about it, but -- and this came to my attention just last week. These are reports of my client that were -- that are the ones that had to be replaced. So if we need to come up with a clean version, you know, without metadata, but that's in color because I think it's -- you know, a lot of it is graphs and all of that, the color really matters. So we can certainly get you, if need be, a copy that doesn't have that on it.

But, I mean, this is what was in the record before the State Engineer.

THE COURT: Sure.

MR. TAGGART: We don't want to change that.

MR. BOLOTIN: No. And --

MR. TAGGART: So I just want to --

THE COURT: Sure. I wonder if it would be easier on our clerk's office if you filed it as an errata to the record on appeal, you know, basically saying that these are actually

the pages that should be in the original record on appeal.

MR. BOLOTIN: And just -- yeah, I think what happened --

MR. DOTSON: Just that document.

MR. BOLOTIN: -- was we ended up almost refiling the whole thing, and I think that was the big problem, and I think it would be easier if we could just take an ROA range that needs to be part of an errata and file it. That's a much smaller chunk. It'll probably be easier to do.

THE COURT: Yeah. Because, you know, I think I told you from the beginning the way that the record on appeal is now is incredibly difficult to navigate because it makes it really slow and clunky, which is why I gave you all the task of attaching the parts of the record of appeal -- on appeal, which I know is a lot of work on your part.

MR. DOTSON: And it's even worse on the amended.

THE COURT: Oh, I'm sure.

MR. DOTSON: Way worse. I mean, it is very clunky.

THE COURT: Yes. It's very difficult to navigate.

MR. DOTSON: Yeah.

THE COURT: So, Mr. Balducci, please --

MR. BALDUCCI: Yeah. I can confer. I've had great success with the clerk's office in doing very creative things. So I'll confer with them over the lunch break.

THE COURT: Thank you.

MR. BALDUCCI: I have some ideas on what we can do to correct them.

THE COURT: Okay. Great. Thank you. I really appreciate that.

All right. So that -- with that --

MR. DOTSON: Okay. Two more items.

THE COURT: Okay. Two. Okay. Go ahead.

MR. DOTSON: Item Number 2 was, just as a housekeeping matter, that prior petition for judicial review, we've been able to track down, and there is a notice of entry of order of dismissal in that case, and the case number is A-19-789203-J. That is dated. The notice of entry is 9/3/2020. So at least we know that there is not another live case out there, Your Honor.

THE COURT: Okay.

MR. DOTSON: And then lastly, and perhaps most excitingly, apparently my suggestions with the State to reach a resolution have gained some purchase, and I am pleased, and I feel like we have an obligation in candor to the Court to announce that we have reached an agreement in principle for a settlement of the petition for judicial review, which is indeed this proceeding, in my mind, that would resolve my client's petition for judicial review against the State Engineer as well as I believe Southern Nevada Water Authority's.

And I'm happy to describe those elements of that

agreement if you would like for the record.

My board, the Muddy Valley Irrigation Company Board.

THE COURT: So I -- so I understand.

MR. DOTSON: No. I'm not --

THE COURT: No. No. No. I understand this is not as to any of the other clients. This is something that they are just going to put on the record as to their own resolution that they are -- this doesn't change anything as far as the petition for judicial review, this hearing, anything along those lines.

MR. DOTSON: And indeed, my board still needs to take corporate action and vote on it and approve it, and it needs to be put into writing.

THE COURT: So just for the record, you can state what --

MR. DOTSON: What the terms are.

THE COURT: Yeah, what the terms are, and then Mr.--

MR. ROBISON: Your Honor. Your Honor.

THE COURT: Mr. Robison, yes.

MR. ROBISON: The cases have been consolidated. He has to make a motion so we get to view it and comment.

MR. DOTSON: I'm getting to that, but you couldn't wait until I finished.

THE COURT: Okay.

MR. DOTSON: But I also have an obligation and candor

to all of you to describe once we have reached that agreement because I don't --

MR. ROBISON: When the Court approves it in the process, yeah.

MR. DOTSON: Yeah, but this is not --

THE COURT: I'm not -- and I'm not making any decisions about approving anything right now or anything today.

MR. DOTSON: Right. And we would proceed as normal.

THE COURT: Sure.

MR. DOTSON: Today. I intend to conclude my arguments today, assuming we get to it, and so I don't -- but each -- the consolidation, as I understand it, each matter did retain its separate and distinct nature. That's why we had the number of case numbers that we have, but he's correct. We've also intervened in each case.

MR. ROBISON: You've intervened.

MR. DOTSON: -- and it has been consolidated. And I am not taking -- but I have an obligation, I believe, to describe the fact that we have reached this so that you don't hear my arguments today not knowing that we had reached a tentative agreement with the State.

THE COURT: Okay.

MR. DOTSON: It doesn't sound like counsel is interested in hearing that, but --

THE COURT: Let me just have him put it on the

record, and then you can make any comment after he's done that.

MR. ROBISON: Okay. But if they've settled and they're going to argue, what's the -- what's going on? They entered into a settlement, resolve all their claims, and then they want to stand up here at this lectern and argue?

THE COURT: So they -- so what he's saying is they have reached at least an oral settlement, but even if they are at the preliminary stages of reaching this oral settlement, in order for them to even actually settle, it would need to be voted on. So it's just the terms, but it doesn't look like it's actually firmed up yet.

Is that accurate?

MR. DOTSON: It's not even in writing yet.

MR. ROBISON: Your Honor, if you put a settlement on the record, it's binding.

MR. DOTSON: Yes, if they agree.

MR. ROBISON: Binding and executed or put on the record of the court constitutes a binding settlement. We all know that.

MR. DOTSON: Yeah. As soon as I -- but I also have an obligation. You're saying I should have just done this like a Mary Carter and not told the Judge that I have an agreement in principle?

MR. ROBISON: Well, no, I'm not going to talk to counsel. I'm talking to the Court.

THE COURT: Okay.

MR. ROBISON: The rules require that a motion be filed, and the other parties get served because we've intervened.

And then we get to comment on whether or not the settlement is a Mary Carter type settlement and prejudicial to us.

THE COURT: So let me distinguish what I believe Mr. Dotson is putting on the record versus what, you know, what you were talking about as far as the settlement.

I think what Mr. Dotson is saying is he just wants to inform the Court as to the tentative settlement that they've reached. This is not something that I would be inquiring as to the parties is this the agreement, you know, are you settled, that kind of thing to make it officially a settlement that is binding.

MR. DOTSON: Exactly, Your Honor. In fact, if you canvassed me --

THE COURT: So usually when I --

MR. DOTSON: -- I'd say no.

THE COURT: -- when there's a settlement agreement reached, I say are these the terms of the settlement that you reached.

MR. ROBISON: Right.

THE COURT: You know, do you agree with everything

regarding these terms? Yes. Yes. You understand that you're bound by this? Yes. Yes. That is not what I'm going to be doing today.

MR. ROBISON: Well, then why are we putting it on the record?

THE COURT: I think he's just putting it on the record to inform the Court that they have tentatively reached a settlement agreement, but it's not changing these proceedings in any way at this point because they're still going to be arguing. They're still going to be moving forward with the hearing as we're going, but, you know, maybe at a later date, if something happens, then, you know, they can put a motion on and that kind of thing.

MR. DOTSON: We would put it on the record, Your Honor, in the interest of transparency and candor to the Court. If counsel objects to it being on the record and no one else would like to have it on the record -- I'll speak with the other parties, but I guess we don't have to put it on the record right now.

MR. ROBISON: Your Honor, I don't think Mr. Dotson is listening.

MR. DOTSON: Oh, I think I'm listening very carefully.

MR. TAGGART: Your Honor --

MR. ROBISON: It has to be a motion under Rule 41.

We've intervened in this case.

THE COURT: So it needs to be a motion if it's going to be officially approved by the Court.

MR. ROBISON: Correct.

THE COURT: Right. That is not what we are doing today. I'm not approving the settlement. I'm not -- there's nothing along those lines that from a legal standpoint would make it binding on them. I think it's just an informational record that they are making. So there's nothing that's binding on any of these parties as far as this Court is concerned as far as the information that they are going to be putting on.

MR. DOTSON: Right.

MR. TAGGART: Your Honor, Paul Taggart for the Authority and the District.

And we also echo Mr. Dotson's comments, and we've reached an agreement with the State.

I think the point is, is that we do have to file a motion unless nobody objects. We could have announced it here in open court, and no one objected, and then we could put it on the record, but if people are going to object.

THE COURT: Which I think that's pretty safe -- safe assumption?

MR. TAGGART: Then absolutely, absolutely motions would be filed, and we'll debate what the consolidation means with respect to rights of parties to, you know, object or

whether they have veto power or what or how you judge what another party's rights are to object to our settlement.

But I think -- so we all expect that that process will be followed.

THE COURT: Okay.

MR. DOTSON: So maybe the question an inquiry should be to the Court. It is -- you are the Judge in this case. Would you like further detail, or is this transparency adequate.

THE COURT: I think this transparency is adequate.

Mr. Balducci, yes.

MR. BALDUCCI: Yeah. The only -- I'll come to the podium.

THE COURT: Sure.

MR. BALDUCCI: The only concern I would have, and I echo Mr.-- actually, everyone's comments here, if we're dealing with a truly false party that is adversarial solely for this case that has a side deal with the engineer, we need to know about that. We need to comment on that. I don't know what's going to come of it. I'm interested to hear the terms, how it may or may not affect my client. Is it something I need to comment on today? I don't know. But I think for the sake of transparency and for evaluating whether the irrigation company and the Water District are still actual parties with a controversy in this case or a false party that are basically

bootstrapping the engineer, we need -- and I say that in the most kindest way possible.

THE COURT: No, I understand.

MR. BALDUCCI: That's what the case law says. And when we talk about Mary Carter, it goes way back to some case in, like, 1998 where a defendant settled out, didn't tell anybody and basically provided testimony in support of the plaintiff. We need to know about that. And I agree for the sake of candor and to make sure there's a level playing field -- I think your --

Is it a public company, the --

MR. DOTSON: Yeah. Yeah.

MR. BALDUCCI: So it would be something that's --

MR. DOTSON: Well, it's not public public. They're just whatever -- there's more than -- it's still closely held, but it's like 300 shareholders or something like that.

MR. BALDUCCI: Okay. That's fair. I think we should know about what the terms are.

THE COURT: All right.

And, Ms. Peterson, is there something else --

MR. DOTSON: 250.

THE COURT: -- you would like to add?

MS. PETERSON: I did. This is Karen Peterson from Allison MacKenzie.

And again, these parties are helping other parties

with their arguments. It's obviously very clear what's been going on in this courtroom, and so if they're going to settle, but still help other parties with regard to their cases, that's not right.

THE COURT: So -- okay. So let me just -- let me just -- so and I haven't read the Mary Carter case. Just, you know, in full transparency. I assume that in the Mary Carter case that there was an actual full and final settlement that was done between the parties. Is that correct, that they had actually settled?

MR. DOTSON: There was actually an agreement, and they didn't disclose the fact that there was an agreement.

THE COURT: Okay.

MR. DOTSON: But what you can do is appropriately have, like, say reach a high low in a civil case, which is what I'm more used to.

THE COURT: Right.

MR. DOTSON: And but you -- at least my practice has been that you inform the Court once that agreement has been reached, but you still need the determination from the jury as to where -- well, where it falls.

Here we haven't actually got an agreement, but we came -- we have an agreement in principle as of this morning. And so I felt like we need to disclose it to everybody for all the reasons that have been listed.

THE COURT: Okay.

MR. ROBISON: Your Honor, Mary Carol -- Mary Carol. She's my secretary.

The Carter case, Your Honor, was a settlement that was made between one defendant and the plaintiff to the prejudice of the other defendants because this defendant as part of the settlement agreed to testify in a certain manner that hurt the codefendants. That's a Mary Carter settlement.

And the reaction is that those are void. Those are invalid, and our legislature responded, as did our Supreme Court by invoking rules that the full terms of the settlement has to be submitted to the Court by a motion. And all of the other parties have the opportunity to respond to the motion.

Well, what's happening here, Your Honor, as Ms. Peterson pointed out, we've got a collaboration between these parties, and now they want to say we don't have a dog in the fight, but we want to argue against the other parties, like the Vidler and Lincoln County and CSI. That is getting very close to Mary Carter type settlement.

THE COURT: So --

MR. DOTSON: We're past that though, Your Honor, respectfully. We're, at this point, the arguments that are left are my arguments against the State.

MR. ROBISON: Well, then there's no arguments.

MR. DOTSON: Well, there is until there's a deal, and

the point is there isn't a deal. So unless we want to just recess and all come back after it's memorialized, which I wouldn't suggest is the best judicial efficiency.

THE COURT: I agree.

MR. DOTSON: I think that's where we're at.

MR. ROBISON: Well, there's no prejudice for us going forward right now. Let me argue. Let them argue against the State. Let everybody do their reply argument, and he can make his motion and put it on the record. Nobody is accusing them of not being transparent. It's just the timing and effect.

THE COURT: So why don't, for the -- well, kind of the mushy record at this point, but why don't we do it this way if that makes it procedurally better. We go through with the arguments. At the end, if you would like to put on the terms, unless the other parties wish to know the terms now as far as if they think it would affect their argument.

MR. ROBISON: We don't need the terms because he's going to argue anyway as though there's not a settlement.

THE COURT: Okay.

MR. ROBISON: So let's just go forward, Your Honor.

THE COURT: All right.

MR. BOLOTIN: I just had one point, Your Honor.

THE COURT: Yes.

MR. BOLOTIN: I don't think -- and this is James Bolotin for the record.

I don't think there would be a false party situation because they're still intervenors in the case anyway. So there's still parties to the case, no matter what.

MR. ROBISON: Well, not in reply, not in rebuttal.

MR. BOLOTIN: No, I don't -- I -- I'm not disagreeing with that.

MR. ROBISON: Okay.

MR. BOLOTIN: I'm just saying -- yeah. They would still be --

MR. TAGGART: Yeah. I share the point. I mean, to the extent my client is a respondent supporting the State Engineer, if we settle the case that we have with them where we were a petitioner, we're still responding. We can still participate in the proceedings as a supporting party that is in defense of the State Engineer's decision on the areas that we agree. So we're not done with the case, and we're not collaborating improperly with anyone if we're the defending the decision of the State Engineer.

THE COURT: Okay. Mr. Lake.

MR. LAKE: Your Honor, I just want to echo Mr. Balducci's comment. It would be helpful for me to know the terms in order to determine if they are affecting my client's position.

THE COURT: Okay.

MR. LAKE: That's all.

MR. BALDUCCI: Just for the record, Your Honor, so I can provide you with the cases you may need if you want to take some time.

THE COURT: Okay. I'll look them up, and I'll read them.

MR. BALDUCCI: *Lum versus Stinnett* --

THE COURT: Wait. Wait. Wait. Wait. Hold on.

All right. I have Westlaw in my chambers. Okay. If you could...

MR. BALDUCCI: Yeah. *Lum versus Stinnett*, 87 Nevada 402. That's a 1971 case that first laid out the groundwork. And to be clear, the Nevada Supreme Court has never expressly adopted the Mary Carter rule, but it has referred to it in various cases and acknowledged those settlements are void.

The next case is *NAD, Inc. versus Eighth Judicial District Court*, cite 115 Nevada 71.

Don't ask me why I have all these cases saved in my Dropbox.

THE COURT: I'm thankful.

MR. BALDUCCI: And an unpublished decision Norden (phonetic) Company versus Fergustrohm (phonetic) (2001) Westlaw 1628302. I can tell you at the time that I looked these up it must have been in 2017. That was the entire universe of Nevada cases I found myself, personally.

And just a final comment in terms of what these terms

are. I'm curious to know what they are because I'd like to know does the irrigation company have standing to raise certain arguments in response? That's one of the biggest areas that I'm most curious about.

THE COURT: Okay. So let me do this. I'm going to e-mail myself my link to Westlaw so I can look it up in here, and then I'll be right back.

(Pause in the proceedings.)

(Off the record at 8:53 a.m., until 8:57 a.m.)

MR. ROBISON: ... people that are on the enlightened side of this case.

THE COURT: Yes.

MR. ROBISON: And we will welcome that that be put on the record.

THE COURT: Okay. All right. So then --

MS. PETERSON: Well, maybe we --

THE COURT: Yes, Ms. Peterson.

MS. PETERSON: Under your terms, Your Honor, that it's just to inform the Court, it's not that the Court is --

THE COURT: Just to, yeah. Yes.

MS. PETERSON: -- yeah.

THE COURT: Yes. This is just to inform the Court. There is no motion. This is not a formal determination. I'm not going to be asking the parties if that's the terms of the agreement and that they are bound by it. It's just

informational only to place on the record.

All right. So then go ahead.

MR. DOTSON: All right. Thank you, Your Honor. And I appreciate that. And I'll -- yes.

In the interest of transparency, I'm going to articulate what I understand to be the agreement, and then I'll welcome the State and SNWA if they believe I misstated or want to add to the terms.

So the Nevada State Engineer would stipulate to essentially strike the two paragraphs in Order 1309 that were the focus of the petition for judicial review for MVIC. I believe those are found on pages 60 and 61 of the document. Actually, it's -- yes, it's pages 60 and 61, 61 and 62 of the record. So it's the second first paragraph on page 60, and then the last paragraph on that page rolls over to the next page.

And this, of course, not surprisingly, includes the language capture or potential capture of the waters of the decreed system does not constitute a conflict with decreed right holders if the flow of the source is sufficient to serve decreed rights.

And basically it also includes the mathematical analysis of the consumptive use calculation that we believe was improper. So that would be Element Number 1.

Element Number 2 would be that the -- there would be

an agreement and the State Engineer would stipulate to a biannual, so every two years, or biannual assessment of the pumping of and water levels and flow levels of the river to determine if further reduction below the 8,000 acre-feet annual cap that is articulated in 1309 would be appropriate.

And for that assessment, Muddy Valley Irrigation Company and Southern Nevada Water Authority would have the right to provide input and review the data upon which that status check, is really what we're talking about is a status check type situation, occurs. And that first status check would occur within a year.

Is that -- well every two years, but when is the first one?

MR. BOLOTIN: I believe, Your Honor -- this is James Bolotin for the record.

MR. DOTSON: I don't think we talked about that.

MR. BOLOTIN: No. I think it was April 2024.

MR. DOTSON: Okay. April 2024 is agreeable.

As you can see, we have not exactly finalized this.

And the third element would be that there would be in future hearings either related to this or separate, but likely related to the continuation of the 1309 process, the State Engineer would be acting within your authority as a special master of this court, the decree court, and would continue with the original plan of completing a conflicts analysis, and that

conflicts analysis would seek to determine and adjust pumping, determining what pumping may be interfering with flow of the Muddy River and to what extent that occurs. With the concept at least of hopefully returning the decreed flows to the river and to the water users who have decreed rights on the river.

Obviously SNWA and Muddy Valley Irrigation Company would be invited to participate in that proceeding as well.

Importantly, there will be no stipulation, and so to the extent that my statements here authorized by my client to stipulate to the flow, predevelopment flow at 33,900, that would be withdrawn, and my client would be free to argue that that flow was in excess of that.

This should allay the fears that have been described by some parties because that would also allow the State Engineer to determine freely, without being tied to that number, what the flow -- predevelopment flow is as well and what is being impacted by pumping versus other sources.

What else is -- am I forgetting?

MR. TAGGART: Your Honor, Paul Taggart for the District and the Authority.

MR. ROBISON: Your Honor, may I interrupt?

MR. TAGGART: And --

MR. ROBISON: This is argument. This is asking the Court to approve 8,000?

THE COURT: I'm not -- I'm not.

MR. TAGGART: No.

THE COURT: I'm not doing that.

MR. ROBISON: They say we want you involved in future proceedings to enforce and interpret our settlement regarding the 8,000 and continued monitoring with the flows in the river. That's what this case is about, and now they're trying to influence this Honorable Court --

THE COURT: Well, that's -- okay. So --

MR. ROBISON: -- by saying it's a settlement.

THE COURT: That is -- that's not what I heard. So what I heard is that they are tentatively reaching this settlement, one which would be that that conflict language and the mathematical analysis of the consumptive use would be stricken, that biannually they would do an assessment of the water levels and the flow levels of the rivers, and to determine if further reduction below the 8,000 cap would be appropriate, which Muddy Valley and Southern Nevada would be able to provide input and that in the future hearings regarding talking about the continuation of 1309 as far as the conflicts analysis that Muddy Valley and Southern Nevada would be able to participate, but they are also stipulating that they would be -- there would be no stipulation as to the 33,000 acre-feet --

MR. DOTSON: 33,900, yeah.

THE COURT: -- that are regarding the original

predevelopment --

MR. DOTSON: Predevelopment flow.

THE COURT: -- predevelopment flow. So the Nevada State Engineer would not be tied to that number as far as determining the predevelopment flow. That's what I've heard. So I haven't heard anything about me making any decisions on that.

MR. DOTSON: The only thing was we would ask that you --

MR. TAGGART: Your Honor, so Paul Taggart for the record.

THE COURT: Okay.

MR. TAGGART: Your Honor, we agree, but I just want to clarify that based upon some comments that were made yesterday and based upon some positions that we've taken, we believe the decree court is the proper place to have the conflicts determination made.

THE COURT: So you're saying you are agreeing that he would be acting as a special master --

MR. TAGGART: Well -- well --

THE COURT: I mean, that's not something that I'm making a decision on today.

MR. TAGGART: No, you're not.

What we're contemplating is that we would file a petition with the decree court asking the decree court to

direct the State Engineer as the decree court special master to do a conflicts analysis.

THE COURT: So that would be all part of a motion that is done --

MR. TAGGART: Exactly. Exactly.

THE COURT: -- and everything --

MR. TAGGART: Exactly. There would be a process where we -- I mean, Ms. Peterson made some comments yesterday about notice to all decree owners and whether the decree is being interpreted or whether it's being modified. So we believe that it's the decree court's job to enforce water rights if they're being impacted under the decree.

So what we're contemplating is having that process initiated in the decree court and then having the State Engineer authorize a special master directed to make recommendations back to the Court on conflicts.

THE COURT: Okay.

MR. TAGGART: That's it.

THE COURT: Okay. And this is obviously with the assumption if this Court affirms the order -- I mean, affirms the, yeah, the order, Order 1309. If I do not affirm the order, if I reverse it and remand or if I strike it, then that all kind of goes out the window I assume.

MR. TAGGART: Yeah, we talked about that, but we can't quite play it forward clearly on where that would be in

that role.

THE COURT: Sure.

MR. TAGGART: But, yeah, that's definitely an unknown on what would happen without 1309.

THE COURT: Okay. So is there -- does anyone else want to place anything on the record with their -- Mr.--

MR. BOLOTIN: Your Honor, this is James Bolotin for the State Engineer.

I just wanted to clarify that obviously this would be a settlement with MVIC and SNWA so they want to protect their interests and be involved, but any affected party would have a chance to be involved to the extent conflicts were shown to be related to one of the other parties' water uses, and I want to clarify something Mr. Dotson said. I believe that you would have to strike those two paragraphs. Your Honor, would have to strike those two pair paragraphs. It wouldn't be something the State Engineer can do because the jurisdiction is no longer with the State Engineer. It's with the Court.

THE COURT: Well, and that would be done upon a motion where you're requesting the Court --

MR. BOLOTIN: Yes.

THE COURT: -- and everyone else would have an ability to comment on it and that kind of thing.

MR. BOLOTIN: That's correct.

THE COURT: And I could reject it if I wanted to.

MR. BOLOTIN: Correct, Your Honor.

THE COURT: All right. So is there any -- are there any other issues that other parties would like to place on the record regarding this information?

Yes, Mr. Herrema.

MR. HERREMA: Herrema. Your Honor, I've just been told that the folks on BlueJeans can't hear Mr. Bolotin very well. So we'd just ask him to step closer to a mic if he's going to speak.

THE COURT: Sure.

MR. ROBISON: Or not say anything.

THE COURT: Mr. Bolotin, did you want to just repeat what you said closer to a mic --

MR. BOLOTIN: Yeah, sure.

THE COURT: -- so that the other folks can hear that.

MR. BOLOTIN: Yes, Your Honor. James Bolotin for the State Engineer.

I just wanted to clarify that any affected party would be able to be involved in that process, but obviously this is the proposed settlement with SNWA and MVIC, which is why they want to ensure that they specifically would be able to be involved in that process.

And that because Order 1309 is now in the jurisdiction of the Court due to the petitions for judicial review, I just wanted to clarify something Mr. Dotson said, and

that is the State Engineer can't unilaterally strike those paragraphs that he cited. It would have to be done by the Court pursuant to a motion approving the settlement.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

And I know that there were other parties that had stood up, and it looks like I think you wanted to make some commentary.

MR. BALDUCCI: Yes, Your Honor. Christian Balducci on behalf of Apex and Dry Lake.

When people come to find me at court, they usually look on the third floor in front of the business courts or med-mal sweeps.

I'd request just a brief period of time to consult with my client to ascertain how, if at all this may or may not affect the rights.

THE COURT: Okay. And, yes.

MR. ROBISON: Oh, I'd just like to proceed with argument.

THE COURT: Oh, okay. All right.

Mr. Balducci, do you need that time now, or are you okay if we do it like during the break before you argue?

MR. BALDUCCI: I could probably place a call while they're --

THE COURT: They're arguing. Okay.

MR. BALDUCCI: -- Mr. Robison is arguing. I think that's fine.

THE COURT: Okay. Great. All right. So then are we --

MR. LAKE: Your Honor.

THE COURT: Oh, yes, Mr. Lake.

MR. LAKE: I'd like to request the same thing.

THE COURT: That you would like to have a little bit of time to consult with your client?

MR. LAKE: Yes.

THE COURT: That's fine.

All right. So let's see. Looking at the -- so I think just so that everyone is clear on the order, we've got Coyote Springs. Next is Apex. After that is the Center for Biological Diversity. So I don't know if -- I mean, what I could do is after he finishes, Mr. Robison finishes, I could take a quick five-minute break.

MR. LAKE: That works. I would like to observe Mr. Robison's argument. So just as long as it's before my argument it would be okay.

THE COURT: Okay. No problem. All right.

All right. So now we are ready.

Or is there anything else?

(No audible response.)

THE COURT: No. Okay. All right. Now we are ready.

Are you ready, Mr. Robison?

MR. ROBISON: Yes, Your Honor, I am.

THE COURT: Okay. Great.

CONTINUED ARGUMENT FOR COYOTE SPRINGS

MR. ROBISON: Your Honor, I just want to, so we're clear, I understand what happened today under the theme of transparency, but what we heard we're pretty sure that we're filing oppositions with respect to the approval of that settlement.

THE COURT: Oh, I do not doubt.

MR. ROBISON: Okay. And I'd like to proceed without prejudice.

THE COURT: Absolutely.

MR. ROBISON: And clear my mind that I'm not talking to some special master who is regulating the water flow in the Muddy River as I argue my case. So I'm just going to put that out of my head although and my blood pressure will come down a little bit and I'll argue.

May it please Your Honor. Good morning.

THE COURT: Good morning.

MR. ROBISON: I'd like to show the Court, again CSI 43 please. And going to the prayer appropriation situation. The Court asked me yesterday whether or not CSI would be willing and a good faith participant in a conjunctive management and the answer is, definitively, definitely,

absolutely, yes, we are and we would. We have to.

So we're in 210, and if I can show you the inventory, the list of the priorities on 44 and 45. Here I've put them together, Your Honor, but as you go down to the blue line, what I want you to see, Your Honor, is what happens to this 8,000 foot limitation restriction.

So, Mark, could you show us where we are in 8,000.

If all the seniors were given rights over us as junior rights on this particular exhibit, we'd be left with 500 acre feet. And what would happen to the rest and underneath if, as it's stated, the juniors are wiped out, that's what's left in the mega basin right there.

The intervenors, Bedroc, which Bedroc's best position of anybody because they've got the best of rights, oldest, and they're first in time of everybody. But and that black area represents what once was first in time in 210 and now last in time or nonexistent in the mega basin. So, Your Honor --

THE COURT: What slide?

MR. ROBISON: I'm sorry?

THE COURT: What slide is this?

MR. ROBISON: That's 44 and 45. 45 has the blue area that indicates the holdings of CSI. But, more importantly, if you go to the top --

I don't know if you can enlarge that, Mark.

-- but the way you read across this document it

doesn't talk about acre feet, it talks about duty.

So, Your Honor, the first column identifies the basin in which water rights were provided, were given, permits were issued. And then the second -- third column over from -- going left to right is the priority dates. So you can see, Your Honor, who was first in time according to the State Engineer on this chart, and it carefully delineates who's first in line and therefore first in right.

And then, Your Honor, you go two more columns over where it says annual duty.

THE COURT: Uh-huh.

MR. ROBISON: Annual duty is the AFA, the acre feet annually. And so that's going to show you what we've been permitted. And just so we're clear, Your Honor, on that blue area, on 45, give me back the blue area.

THE COURT: So let me ask because there's an annual duty and a cumulative duty?

MR. ROBISON: Yes. What -- look at that cumulative. All that does is add up. So you take the next line below, you add it and it's a cumulative.

THE COURT: Oh, I see.

MR. ROBISON: But that's where you get to 8,000, Your Honor.

THE COURT: So it is the cumulative duty for everyone or just for that right holder?

MR. ROBISON: For everyone. So if you look --

THE COURT: So it'll just keep adding up all the way down? Okay. I see.

MR. ROBISON: Yeah, if you look at the bottom it's like -- what is it, 15,000 or 25,000 acre-feet.

THE COURT: I see it. Okay.

MR. ROBISON: That is the cumulative duty. But if you look, just go back up and you find 8,000 which in my example here on --

THE COURT: I see. So that's where you're saying that you would be limited to the 500 acre-feet --

MR. ROBISON: That's all that would be left.

THE COURT: -- annually because everything else had added up before you.

MR. ROBISON: If the seniors wipe us up we're left with 500 --

THE COURT: Okay.

MR. ROBISON: -- acre-feet.

THE COURT: And then what is the one all the way to the right? What is the --

MR. ROBISON: The cumulative percentage?

THE COURT: No, pumpage. Pumpage. What is --

MR. ROBISON: Yeah.

THE COURT: -- explain to me what the pumpage indicates.

MR. ROBISON: I wish I could; I don't know.

THE COURT: Oh, okay.

MR. ROBISON: But I do know 8,000 is a big part of this case and I know where 8,000 is on this chart, and that's what I'm trying to illustrate here, Your Honor.

THE COURT: Okay.

MR. ROBISON: But let's take a look at the next slide, Exhibit 14, CSI 14. That's what's been appropriated for the various basins that are at issue in this case. 16,000 acre-feet has been appropriated for Coyote Springs Valley. That's where we live. That's where we are. That's where we're building our development. And as I told you yesterday, all but about 5,000 acre feet of that is junior to us and Bedroc.

So the flows of the water, as I indicated, flows to the east, Warm Springs, flows to the south. South doesn't affect habitat, doesn't affect the decree rights.

So let's talk then about conjunctive management, Your Honor. If we look at NRS 533.024, this is the policy decision that you've been shown and read a million times in this hearing, and I'm just telling you, we're in.

The legislative policy, and we have no dispute with it, is that the policy of this state is that we are encouraged as a sustaining juror to manage conjunctively what water is available. Now, the water availability in Basin 10 has completely different criteria and characteristics as the

availability of the water for the mega basin.

So what we do is say we have to conjunctively manage if we get the opportunity to eliminate 1309 and sit down and work with the State Engineer on Basin 210, which gives us some pretty good leverage, I think, to talk to the engineer and this Court about what happens if 1309's invalid.

We're putting up two, please -- or 33, excuse me.

Can you enlarge that, Mark? Thank you.

Your Honor, on the top, I wrote out on Kane Springs because this was a slide I use to explain what had happened with 1609 and the ruins --

THE COURT: Which slide is this again?

MR. ROBISON: This is 33, Your Honor, CSI 33. Kane Springs was out on the 16 -- 1169 analysis, the pump test wasn't pumped. And then the other basins, Lower Moapa Valley, it was in, but then when we came out in 1309 it reversed Lower Moapa Valley even though there's transmissivity and even though there's hydrological connections, State Engineer took that one out and put Kane Springs in.

Now, we have five -- we have a thousand acre feet that we've purchased and have options for out of Kane Springs, and that's why Kane Springs is a pretty crucial and important issue to us. But look -- let's take a look at this. What the tests and what the testimony has shown, Your Honor, is that the effect on the aquifers and the Warm Springs. It kind of has

concentric circles of influence. Right out of the bat we know that the pumping in the Warm Springs area, Moapa Valley Water District, dramatically affect water levels. And they're junior to us.

But if you go on to another concentric circles, there is clear evidence that there's less and less of an impact necessarily on Warm Springs, the habitant and the decreed water. So when you sit down with the State Engineer and say 1309 went by the wayside, but we've got to come back anyway. We are going to be back in front of the State Engineer no matter what happens at this level with this Honorable Court, we are. And we go conjunctively manage Basin 210 with us.

We have two primary objectives; protect endangered species. We don't have a choice. We've heard endangered species act. We've heard what the concern is and none of us have a choice about that. So our pumps on the eastern side of 210 are more influential to Warm Springs than are the pumps that we -- the wells that we've pumped on the west side. And the west side, and according to our theories, where there's more water. We'd have to prove this at a conjunctive management type process, and we're prepared to do that.

So if we conjunctively manage it, reduce or eliminate our wells on the east side of 210 and we focus our project on the wells on the east side and pump there, which is water that goes from north to south, bypasses Warm Springs, comes off the

Sheep Range; we have a plan that says we'll get our 4140 --

THE COURT: And so -- wait, hold on. I thought you said that your pumps on the eastern side are more influential on the Muddy Valley floor --

MR. ROBISON: Have more of an effect.

THE COURT: What was that?

MR. ROBISON: Have more of an effect.

THE COURT: More of an effect.

MR. ROBISON: I guess influential but --

THE COURT: Yeah, more of an effect than the western side.

MR. ROBISON: -- they're the ones we'd have to -- I'm sorry, Your Honor, I interrupted you.

THE COURT: So you're saying that they're more -- yeah, more of an effect than the western side --

MR. ROBISON: Right.

THE COURT: -- but then I thought I heard you say that you would be pumping more from the eastern side?

MR. ROBISON: That -- if I said that, I definitely misspoke.

THE COURT: Okay. Maybe I misheard.

MR. ROBISON: I think I misspoke.

THE COURT: Okay.

MR. ROBISON: No, the idea on a conjunctive management with others, we know that we're connected, but we

know also that we could conjunctively manage 210 in such a way as to mitigate as we have in the past with the 460 acre-feet that we've dedicated to the dace, and we could mitigate if we do a conjunctive mega plant in 210.

And then no one's concerned about the definition of basin, designate, delineate; we're doing what the State policy asked us to do to mitigate. Reducing the pumpage or eliminating the pumpage on the east side, focusing the management plan on the west side and proceeding accordingly.

We don't get wiped out under that kind of analysis. And that is why this basin by basin analysis is so important and is the spirit and intent of the legislation so that you can make these adjustments in a basin by basin basis even though there's hydrological connection and transmissivity, but it can be managed in the basin if this 1309 has gone away.

What happens on the other basins is the same thing. We know there are effects if there's excessive pumping, if they pumped all 1600 acre-feet that would not be a good day for the endangered species. But that is a basin by basin management proposition.

Would we get a haircut, as they say, would we get curtailed under that conjunctive management plan? Perhaps, perhaps, but it would be a process which has been in place for decades in this country -- excuse me, in this State.

So, Your Honor, 1309 is a restriction to being able

to allow the people in their respective basins to manage together with the State Engineer for the protection of all rights; senior rights, us, the dace and the decreed water.

The challenge in this case is really an interpretation issue as Ms. Winston argued yesterday, but I want to reemphasize we cited several cases in our brief about whether or not the State Engineer's entitled to any deference on purely questions of law. Most important of which is the Town of Eureka, and in that case we're told that the review of the legal issues by a Court on a petition for judicial review procedure is *de novo* and that questions of law are to be decided by the Court, and according to the town of Eureka case that we've cited, the State Engineer is not entitled to a deference with respect to the questions of law in this case.

And the big, the big elephant in the room, Your Honor, is whether or not the statutory configuration of all these statutes referring to basins and areas within basins is to prevent or be construed in such a way the State Engineer did not have the legal authority to invoke 1309. I've made that point many times.

So, Your Honor, let's just take a look at where we are. I had this pretty well set in my mind until this morning. One, 1309 is void. The State Engineer did not have the authority to create a mega basin, which incidentally they say is a mega mess now and would not be a mega mess if 1309 were

honored.

Well, Basin 210 would not be a mega mess if it were monitored and that we've had monitoring wells and a conjunctive management plan in Basin 210. So we eliminate that.

But if 1309 is declared to be void because of authority issues, due process, prior appropriation issues that we brought to this Court, we go back. We have to go back to the State Engineer. And we have to negotiate whatever comes out of that effect of it being void. We've got to. In fact, I think, all of us would have to, but hopefully it's going to be on basin by basin basis with the same objective and the same criteria in mind that led to 1309; that allegedly protects things, it doesn't protect existing priorities. It does not protect existing priorities. So we're going back if this order is void.

What if it's partially void? I think that is nearly moot because of the collaboration between the Southern Nevada Water Authority, the Muddy Water Irrigation District and the State Engineer. That, apparently, has been put on the record subject to approval of various public boards. If it's approved, we'll have to see what it looks like. So we can't address it, but what they took position is this; SNWA and the Irrigation District says it's partially void, and we want just a little bit of it on the decree issue to be remanded and cleaned up. But that means we're going back. We're going

back.

And finally, what happens if 1309 is declared entirely valid? We're going back. Everybody said if this thing's valid, we got to go back. We're going to see whether or not there's a formal, finally, curtailment procedure put in place. We're going to go back to see whether or not the parties can agree to conjunctively manage the entire seven basins together as one basin.

The point is, Your Honor, we're going back. Under any result in this case, we're going back to the State Engineer and trying to work for the benefit of the existing rights, for the benefit of constructive management, the dace and decreed water. But we're going back to protect existing priorities.

THE COURT: Let me ask a procedural question because, you know, I know with everyone's conflicting positions, no matter what I do, this is going to get appealed. So what is your position of what would happen procedurally that way depending on --

MR. ROBISON: On an appeal?

THE COURT: -- well, yeah, at what point is it something that is ripe for appeal versus if it gets remanded? What would be the next procedural steps in your view regarding procedure?

MR. ROBISON: It's going -- I'm sorry I keep interrupting you. I apologize, Your Honor.

THE COURT: No, no, that's fine.

MR. ROBISON: It's going to depend on how you -- what conclusions of law you include in your final judgment. And if there's partial resolution, and also it depends on what is set forth in the specific notices of appeal or notice of appeal. The procedure is if only a partial part of your order is appealed, I don't know whether there'll be motions to stay in this Court if denied motion to stay in the Supreme Court given the influence that one part of your decision may have on the other parties or other parts of your decision. So I wish I could be more specific and more clear.

THE COURT: You know what, that gives me a little bit more clarity.

MR. ROBISON: Yeah. It -- and I don't know if the mandatory mediation process with the Supreme Court would apply to this case. The moment we file a notice of appeal, boom, we're sent to mediation.

THE COURT: That's true.

MR. ROBISON: Be interested to know whether we would be referred to mediation then we're calling in a special master and maybe you won't come in and try to settle this thing.

THE COURT: Okay. I just wanted to at least be aware of the practical aspects of what happens afterward.

MR. ROBISON: Well, and I appreciate your point. I can tell you what the --

MR. BOLOTIN: Your Honor -- you can pause Mr. Robison's time. I'm not trying to take his time.

THE COURT: Okay.

MR. BOLOTIN: I just wanted to clarify some of the procedural questions, if that's okay. I didn't know if it was part of Mr. Robison's argument.

MR. ROBISON: Your Honor --

THE COURT: Oh, could we have you get closer to the mic? But -- or maybe what we could do is we could have -- I mean, this is not something that's like burning in my brain right this minute.

MR. ROBISON: Yeah.

MR. BOLOTIN: Okay. I apologize.

THE COURT: So maybe we could do that, we could do that right after Mr. Robison is done.

MR. ROBISON: I'm more than willing to give one minute of my time to Mr. Bolotin to clear up --

THE COURT: That's okay. We'll --

MR. ROBISON: -- anything I said. But I would like to finish.

THE COURT: Sure.

MR. BOLOTIN: Yeah, no problem, Mr. Robison.

MR. ROBISON: I was at a point where the Court asked me what will happen in the event of different resolutions of this -- these petitions. Not quite sure, but I do know what

will happen. I know that CSI and Mr. Seeno will be stuck. They will be paralyzed. They will not have a project. They will have payroll. They will have taxes. They will have fees to pay, but that project will be stuck, and it will be crippling, and if you give any deference to the equitable arguments in the Pickering decision that should alone require and justify officiation of 1309. That's what I know is going to happen if you validate 1309, Your Honor.

Finally, and I would be remiss and I'm not attempting to curry favor, but I think I speak on behalf of everybody in this courtroom. Thank you for taking on this massive assignment. I'm glad --

THE COURT: I was kind of voluntold.

MR. ROBISON: I'm glad I'm not there. I'd much rather be at this lectern. But, Your Honor, with the volume of material that we've dumped on you and the issues involved, you've done an incredible job, and thank you very much for entertaining our case.

THE COURT: Thank you. Thank you. I appreciate it.

All right. So with that, do we want to take the break so that --

Oh, Mr. Bolotin, sorry, let me just -- no time or anything like that. So, Mr. Bolotin, what is your view then as far as the procedural aspects?

MR. BOLOTIN: Yes. James Bolotin for the record for

the State Engineer.

I just wanted to talk a little bit about the history because we've had some -- the State Engineer has had some of these big cases that go up --

THE COURT: Okay.

MR. BOLOTIN: -- and down and up and down. And the key thing is if Your Honor remands the case it's not going to be --

THE COURT: A full panel.

MR. BOLOTIN: Yeah, it's not going to be able to go --

THE COURT: Okay. I see.

MR. BOLOTIN: -- to the Supreme Court at that point and there's been cases -- I think Mr. Taggart can help with the names of the cases because we were both involved in them, but they were --

THE COURT: Okay. I assume that if I affirm, it's appealable, if I strike, it's appealable, but then I wasn't sure what would happen as far as, like, it was sort of partial.

MR. ROBISON: It's always writable.

MR. BOLOTIN: Yeah, and there --

THE COURT: Oh, that's true.

MR. ROBISON: Okay. So this is, this is --

MR. BOLOTIN: No, but there was a case, Your Honor, that the State, I think, SNWA tried to appeal and then it said

it was a remand so it's not appealable and then there's parties that tried to file writs and the Supreme Court still --

THE COURT: Didn't hear it.

MS. BROWN: -- said no, go back and have it at the State Engineers.

THE COURT: All right. Mr. Taggart.

MR. TAGGART: Yeah, I think Ms. Peterson's probably (indiscernible) she knows as much about this as I do.

THE COURT: Right.

MR. TAGGART: But it really depends on the nature of the order and even if you completely -- well, if you gave remand instructions, then almost definitely that's not appealable, and we filed writs in a case like that and the writs were denied because there was a legal remedy.

THE COURT: I see.

MR. TAGGART: And the legal remedy was going back down to the State Engineer, exercising the remand instructions, going back up to the Court again --

THE COURT: And then going back up. Okay.

MR. TAGGART: -- and then going to the Supreme Court. So that was the legal remedy, and they found that our writs were improper and they denied them.

The harder question is even if you -- even if you uphold 1309, whether that's appealable, you know, I would say there's a good argument it is --

THE COURT: Uh-huh.

MR. TAGGART: -- but there may be an argument that --

THE COURT: But it's still not finished because there's a conflict.

MR. TAGGART: -- it's just factual and now we have to go back -- now the State Engineer has its factual decisions. I mean, I don't want to concede, I guess, you know, then the State Engineer would have to take those factual determinations and do the next phase, but I just don't want to concede anything on the record. But anyway --

THE COURT: No, no, I understand. And I understand this through Robison's -- I mean, if it was affirmed, it would be probably an appeal on whether or not the State Engineer has a legal authority --

MR. TAGGART: Uh-huh.

THE COURT: -- which I think would probably be something that was --

MR. ROBISON: Not to mention, appropriation.

THE COURT: Yeah.

MR. TAGGART: Yeah, most likely that type of issue, I think, would be appealable.

THE COURT: Okay. And then let -- you know, while we're talking about it. So I've never had a case where there were multiple petitioners with multiple petitions. In the order, do I need to be specific as to what parts of the

petitions are granted or denied or -- I mean, if I do one -- so, you know, I had you all prepare proposed findings of facts and conclusions of law so I didn't have to start from scratch.

MR. ROBISON: Remember our stipulation to consolidate, Your Honor?

THE COURT: Yes.

MR. ROBISON: Each and every one of us said that each of our petitions were retained as separate and distinct legal and factual characteristics.

THE COURT: Okay.

MR. ROBISON: So I respectfully suggest that there's going to have to be, if there is a set of findings, broken out petitioner, petitioner.

THE COURT: By petition.

MR. ROBISON: There could be joint findings --

THE COURT: Okay.

MR. ROBISON: -- and separate findings per petition.

THE COURT: Okay.

MR. TAGGART: And I -- typically, we don't see a Court go through the petition and address each claim in the petition.

THE COURT: No, what I -- I mean --

MR. TAGGART: They, you know, they address the case as it is; right?

THE COURT: Right. So, I guess, my question is would

I, you know, I -- as far as structuring the order, I would have the, you know, findings of fact, conclusions of law and then at the end I would be looking at, you know, petitioner Coyote Springs' petition is granted as to this, denied as to this based on the, you know, findings above. Is that, I mean, is it -- would that -- I just want to make sure that I'm doing it clean.

MR. ROBISON: That's fair, and I think then whoever gets the short stick on that's going to have to worry about, you know, 54B certification and all those type of more complicated issues. So let's wait until we see it.

THE COURT: Okay.

MR. TAGGART: Well, I -- just not to overly complicate it. We -- since they're consolidated --

THE COURT: Yes.

MR. TAGGART: -- if the caption has all the case numbers on it.

THE COURT: Yes.

MR. TAGGART: And then in the order you go through, you know, at the beginning, maybe, each petition, you know, so-and-so filed petition, so-and-so filed --

THE COURT: Right, right, right. The procedural history --

MR. TAGGART: -- then I think the --

THE COURT: -- and then it was consolidated.

MR. TAGGART: And I think the meat of it could be --
THE COURT: Together.
MR. TAGGART: -- the same for everyone --
THE COURT: Uh-huh.
MR. TAGGART: -- but then at the end you may need to go petition by petition --
THE COURT: Right and that's kind of --
MR. TAGGART: -- and grant or deny. And then it's, in a sense, eight separate orders and it's all in one. Sounds kind of familiar. But --
MR. ROBISON: Let's not go there.
MR. TAGGART: Okay. But you do have to rule independently --
THE COURT: Right.
MR. TAGGART: -- on each petition because they still retain their independence.
MR. ROBISON: Now, I don't want to drop a bomb and then ask but when this -- if this goes Supreme Court, there --
THE COURT: Let's just be honest. When this goes to the Supreme Court. And we all know in this room.
MR. ROBISON: Well, I don't know -- they'll probably appeal, you're right. But, Your Honor, I have to disclose this, we're up in the Supreme Court right now in a petition for judicial review and it's de novo. So they're not looking necessarily at you. They're looking at the State Engineer with

fresh eyes.

THE COURT: Oh, I see. Okay. All right. Good to know. All right.

MR. TAGGART: Yeah.

THE COURT: All right. Well, thank you for that clarification. I appreciate it because it will help me when I'm putting together the order.

So why don't we take a five-minute break so that you all can talk to your clients. And then we'll be back at a quarter to.

(Proceedings recessed 9:38 a.m., until 9:47 a.m.)

THE COURT: All right. So we'll be back on the record.

Okay. The floor is yours.

ARGUMENT FOR APEX HOLDING AND DRY LAKE

MR. BALDUCCI: Thank you. Thank you, Your Honor. Christian Balducci appearing on behalf of Apex and Dry Lake.

And before you, as you've seen each and every day with growing numbers of lawyers in the courtroom and client representative, there are a lot of parties in this case and there's certainly are a lot of issues for phony issues, for that matter, for the Court to sort through, and while you do know this, I think it's important to emphasize that at the end of the day this case really isn't any different than any other petition for judicial review that you've had appear before you

up to this date and after.

The main issue with respect to this administrative agency and the engineer is did he have the authority, at least from my client's perspective that we've raised since I don't want to be too repetitive, the main issue we have is did the engineer have the authority to take these seven different basins or really five individual basins and then apportions of two other basins and by delineation turn them into one.

After listening to all the arguments that have gone on throughout this case, I've kind of (indiscernible) down to what I see this case as and how I characterize it. This case is about the engineer deleting by delineation. The question is did he -- and what I mean by that is deleting the boundaries of separately identified basins on the map there of 233 different maps to combine and conjoin them into one, mixing up the priority rights of all the various rights holders.

THE COURT: And this is slide what?

MR. BALDUCCI: This -- so Slide 1 was just the title --

THE COURT: Okay.

MR. BALDUCCI: -- and this is what happens when I use a PowerPoint for the first time of the last day hopefully, hopefully last day. This is Slide 2, page 2. I will have this -- I have a lot of time so I can talk about slides. I will have this filed, and I will do my best to circulate it to

all the parties. And I didn't bring it with me earlier today because the version I would have brought would have been different than the one I'm showing you right now.

THE COURT: Okay.

MR. BALDUCCI: So when I -- I tried to come up with some kind of analogy as to what this did. And where I'm from, out of the northeast, we have more than just one large unified school district. We have lots of school districts. And, for example, my graduating high school class, at least in Pennsylvania, was just under 2,000 people, but there were lots of different school districts. I went to Parkland. There was Whitehall. There was Allen. There was (indiscernible). And when I was trying to be on the varsity hockey team which many would say was a bad idea, I knew who I was competing against. I knew who I could playing with.

What happened in this case is the engineer took all the different school districts and so me and my hockey tryouts that -- against 30 other people, I figured, okay, 20 on the team, I only got to beat 10. Took all the school districts, by delineation, deleted their lines, threw us all in a pile and now I'm trying out against 150 different, maybe 200, and the rules now are saying well, we're going to determine who's on the team by who's most senior. So that means the tenth year senior is going to get on the team even though he's probably 35, has a beard, at this point has a bum knee and, you know,

I'm 17 years old and in much better shape than he is. But well, because he's a tenth year senior in high school, he gets to play on the team and I don't. And those are rules I didn't know about when I applied to be on the team and tried out for the team.

That's what happened. That's what the engineer did. But there's no statute saying he can do that. Just like there'd be no statute saying that's what would happen in Pennsylvania for me.

So let's start with one thing I think everyone in this case agrees on. Pulling up Slide 3. Everyone here agrees that all the water in Nevada it belongs to the public. And I think that needs to be the start of the analysis.

Rule Number 1, water belongs to the public and the legislature, not the engineer, represents the public, the people of Nevada. The engineer's authority to do anything is rooted only in that which is designated by the legislature. And if he wants more tools for his toolbox, he has to go to the legislature.

And I understand and I've heard the arguments it's not that hard. No, sorry, it is very hard. 8051 was a disaster. It's not just so simple to walk across the street from the engineer's office in Carson City to the legislature. It's a tough process. Well, there's a reason it's tough. Because it's impacting the rights of the people of Nevada and

the rights holder of each of these basins. It's intended to be tough. It's not an easy thing. But at the end of the day, something not being easy is not a reason to avoid the proper legal channels.

Again, these arguments, I want to thank Your Honor when we first had these arguments that I thought to myself two weeks of oral arguments about water. My goodness, there's not enough solitaire I could play to capture my time. But I found what was being said to be illuminating because sometimes the things that come out in the briefs come out far differently when said in person.

And, in particular, as I've highlighted, on February 15th at this point I don't know how far into February we are, could be nine weeks for all I know, but on the 15th at roughly 1:56 p.m. I heard counsel for the engineer say something that caused me to rethink about how the engineer looks at his authority. What was basically said I tried to do apostrophes but I couldn't write down that quickly, not because Mr. Bolotin didn't say it slowly enough; it's just because my hand was cramping from all the solitaire.

Basically, what he was saying was the policy statements are referring to the 533024 statute. This policy statement from the legislature provides the engineer the lens to look at his authority when he's using his powers. Okay. So let's take a step back. It's basically like the glasses he

puts on before he reads the statutes. So he can figure out what they can and cannot say in his opinion which brings me to really my next slide and why I do have a lot of criticisms of the engineer and the way he's approached this. Because what I think is he didn't just approach this as one global process, he broke this down with these lenses and engaged in a three-step process.

And so we have The Hulk. This is who the engineer thinks he is when he puts on the NRS 533.024 what I would call them rose-color lenses. He becomes something different. He is able to take a broad legislative statement of intent that in his opinion says, I have the power to go and accomplish this intent and now when I look at these different statutes to determine what my authority is I can now look at them even broader than what they are.

And so that's why I do call it a three-step process. Number 1, the engineer has to put on his lenses. The legislative intent, which in my opinion in particular in this case with respect to Order 1309 is very rose colored, probably the rosiest there is when it comes to reviewing the statutes and what they mean.

If he puts these glasses on and he sees that a particular statute might fall within his field of vision, to him, he can then take it and look at it even broader than what it would mean when looked at alone. So that's Step 2.

And then here with 1309 he took a third step after putting on his glasses, reviewing the different statutes, the mosaic of power which I'm going to get to next. And then do something no statute says he can do. So let's look at the mosaic of power, and I think it's important that we focus on what the lawyers are saying which we're going to do first.

THE COURT: And this is slide?

MR. BALDUCCI: This is Slide Number 6.

THE COURT: Okay.

MR. BALDUCCI: It's important to look at this mosaic of power that the lawyers have come up with, but next we're going to look at what the engineer says his power was. So let's look at what his lawyer said. And, in fact, not just his lawyers but also the lawyers he's now settled with and told this Court about today; okay?

So let's start with the mosaic of powers that the Water District talked about. Mr. Taggart talked about it. I think Mr. Taggart did an excellent job cobbling together various statutes to try to come up with it, and I think as he explained these are different swatches, and when you look at the swatch alone, it may not mean a lot but when you put them all together, you can see the entire tapestry.

And that's why I have picture here of this cat and the stoplight and the A and the 2; okay? This is the tapestry that not even a parent would be proud of. If you tie them all

together, it doesn't say what they want it to say. They have to try to cobble these things together and say, okay, let's read all these together. Let's merge them into one. Let's just -- let's not just look at one chapter, let's span three different chapters. And then apply the legislative intent to mean we can do even more than what it says.

That's not how it works. And that's why I started with this case really isn't any different than any other petition for judicial review for an administrative agency you've ever had before you or will ever have before you.

There's one question to decide here. Is there a statute or administrative code that says, dear engineer, you can, as I like to call it, deletion by delineation. There's nothing. He can designate basins. In fact, my client's basins, Garnet and Black Mountain, those are designated. But he can't delete my boundaries. He can't -- I need to know what sandbox I'm in.

I mean -- and here's deal. I just want to be clear because this came up a few times. I agree that the engineer can manage on a basin by basin level and the way that they have been forever. Certainly longer than I've been around. But he can't throw us into the unified school district. He can't do that. There's no statute that says he can do it.

So let me just cover some of these. I don't want to be too repetitive, but I probably will be for which I

apologize.

On the top, the five bullet points are some of the statutes that Mr. Taggart, the Water District, had cited and below was what the engineer's lawyers said. So I'll just hone in on that for a moment. NRS 532, 534.120, real naked; okay? 1309 doesn't look like a rule. It's not a rule to delete my lines. 532.167, duty to perform estimate around water investigation. Okay. Cool. That's great. You can go pump water, investigate and see what it does with the flows. That's fine. I don't have a problem with that. Doesn't say you can delete my lines. Doesn't say you can throw me in a big pool.

532, 534.110 doesn't say he can do what he did.

53403 -- I think I switched those around. One is how you designate basins which he did for Black Mountain and Garnet. Can't delete my lines though. And then 533.024, I guess I switched them, manage conjunctively, which again is a point I'm not going to repeat. I think CSI's attorneys did an excellent job yesterday distinguishing between joint and conjunctive. So I'll defer to them on those authorities and arguments.

THE COURT: Let me just ask you a question.

MR. BALDUCCI: Yes.

THE COURT: So I know that you say that, you know, it says manage conjunctively, not jointly. What is your position as far as whether or not the State Engineer can take into

consideration the connectivity between the basins and then within the basins, you know, it -- what -- a decision in one basin may affect a decision in another basin. What is your position on that? Do you think he has the power to do that?

MR. BALDUCCI: As long as I'm only dealing with those in my basin, that's okay. I just want to know who I'm playing pool with.

THE COURT: Okay. But some of the connectivity issues from the basin next door may affect what happens in your basin. Do you find that he has the power to do that?

MR. BALDUCCI: Through the curtailment process.

THE COURT: Okay.

MR. BALDUCCI: So up there is what the engineer's attorney said, and what's more to the point, look at what the engineer said himself in his own order, 1309.

THE COURT: And this is Slide 7?

MR. BALDUCCI: This is slide -- yes, this is Slide 7. The engineer we see he starts out with the legislative intent, and this is where, I believe this is when he's putting his glasses on to read these statutes broader than can or should be read.

He then goes on to the one thing we agree with, 534.020, the water belongs to the public. I agree. No problem with that.

Slide 8, 532.120, rule making. Okay. Sounds good.

534.110, his investigation. All right. Although he does go on to tell us, and if there is a finding as set forth in the proceeding whereas he may restrict withdrawals to confirm priority rights. I really hope he's saying he's going to put me through the curtailment process. I hope that's what he's saying. I'm not sure, not sure anyone's really sure.

And he goes to 534.030, designating basins. Okay. That's great. It's in a footnote. Not sure what that means.

And then he repeats 534.110.

This is the authority the engineer said he had when he entered 1309 before any lawyers, that I'm aware of, got involved in this courtroom. This is what we need to evaluate when ascertaining did the engineer have the authority to do what he did as opposed to relying on ad hoc, postlawsuit stuff that lawyers, that are very creative and very intelligent, came in and made up. The engineer either had the authority or he didn't.

I want to move on to the next slide, Slide 9. This is something, I guess, another thing that the engineer and I actually agree on. 1309 is the order that tells us what these boundaries are and what happens. And I want to deal with this very briefly. I don't think it's worth a lot of lip service. The concept that we should have appealed 1303, 1169, 999. I don't know.

Let's focus on 1303. It's an interim order, by its

very term, it's interim. It's not final. It's subject to change, rescission, which is actually what happened here, withdrawal and modification. Anybody seeking relief on that is basically looking for an advisory opinion, which we all know are not appealable. And even then look around this courtroom and how many lawyers there are from all across the state.

If there was a basis to move to dismiss any of these petitions on lack of timeliness, you can absolutely, 100 percent guarantee that would have happened. The fact that no one did that tells us the one unspeakable truth we all acknowledge that appealing from 1309 was the proper way to raise each and every one of the issues that are presently before you. And I just wanted to blow it up on the screen. I know you've seen it a million times, and I've said it at least probably 11 from Order 1309, SEORA 66. This is where he says, I'm delineating you all as one single basin. This is why everybody appealed 1309.

THE COURT: This is slide?

MR. BALDUCCI: This is Slide 10.

THE COURT: Okay.

MR. BALDUCCI: And I'll be moving to Slide 11. This is also part of Order 1309, and I raise this because I heard some in passing, some a little more forceful that hold on, Judge. Hold on. Hold on. Prior appropriation isn't here yet, and we don't know the priority. We don't know whether we're

going to do it by day. Maybe we'll mix up the basins. Maybe we'll do something else.

That's for another day, Judge, don't you decide. Okay. That's bologna. That really is. It's just a way to try to get you to not make a decision on this core issue that we believe the engineer made a massive mistake on. Because in 1309 what he's saying, he's telling all of us, hey, all applications for movement of existing ground water rights, yeah, you got to process them here. How are you going to process them? How are you going to figure that out? What are you going to do? This isn't something for down the road. This is here. This is today. This is before you.

Going on to Slide 12, and I pulled this from Order 1303. It's rescinded. It's no good. I get that. But I think it tells us what the engineer was thinking and where he may be going, okay.

He tells us in Order 1303 -- again, rescinded, no good -- that the water rights in this White River Flow System will be administered based on their respective date of priorities in relation to other rights within the other regional groundwater unit.

What does that tell us? He's already said back in 1303, years ago, hey, yeah, you're going to go (indiscernible) prior appropriation, but in this massive basin, right, deleted the lines by delineation.

What does that mean? That means a lot for me. In Black Mountain, Dry Lake is right holder one, two and three. You compare me to all the others, I'm way down the list. He need only take a look at the chart that Mr. Robison circulated yesterday that was in the record SEORA 8511, 8512 to see -- I don't even think Dry Lake shows up on the first page. We're way down on the bottom.

Order 1309 effectively curtails my client's rights. It is very damaging to my clients.

If you have any questions for me, I'm happy to answer them.

But I'll leave with the thing I've said 13 times. My view, this is deletion by delineation which is not authorized by any statute. The order is void, and this Court should enter an order saying 1309 is void.

Thank you.

THE COURT: Okay. I think, Mr. Lake, you're up next. So, yes.

And you don't have a PowerPoint?

MR. LAKE: I don't.

THE COURT: I mean no pressure. I just wanted to make sure just for my clerk's sake.

MR. LAKE: If you would like a PowerPoint, I can put my slides from Monday back up.

THE COURT: No, that's okay.

MR. LAKE: But I'd rather simply state our case and not worry about what slide I'm on.

THE COURT: Absolutely. The old-fashioned way.

MR. LAKE: Yeah.

THE COURT: Okay.

ARGUMENT FOR CENTER FOR BIOLOGICAL DIVERSITY

MR. LAKE: I'm going to try to be brief here. I think we share a lot of commonalities with some of the arguments -- well, arguments that were made yesterday, and, you know, there's one particular interest here that the Center uniquely represents, and that's the Moapa dace. So I'm going to focus on that.

I'm going to start with Order 1303. That's essentially why we're all here. The State Engineer entered Order 1303, decided to have this is fact finding proceeding, which precipitated the hearing, although he had some reports, all the evidence and Order 1309.

What the State Engineer said in Order 1303 about why we were doing this in the first place I think is worth noting, and that's on record on appeal, page 70. The State Engineer said,

> This interim order aims to protect existing senior rights and the public interest in endangered species and to limit development actions that are dependent on a supply of water

that may or may not be available in the future. So protecting existing senior rights in the public's interest in the Moapa dace.

And we think Order 1309 takes some positive and necessary steps toward achieving both of these purposes, up to and including joint administration of the various basins, however you characterize that. From what I've heard, it sounds like basin by basin or joint administration is largely a form over function, a distinction without a difference.

You know, I think it's telling that we haven't really heard a clear answer to the question of, well, can the State Engineer curtail in Coyote Springs Valley to protect surface water rights in the Muddy River Springs area? And our position is that whether you consider that a joint management decision or a basin by basin decision, the answer to that question has to be, yes, ultimately because of the interests at stake in the Muddy River Springs area and the Muddy River Decree, which I'm sure Mr. Dotson is going to talk about. I sure hope he will in a few minutes and the Moapa dace.

So for the sake of brevity, I'm just going to jump into the 8,000 acre-foot cap as it relates to the Moapa dace in the Muddy River Springs.

We talked a lot about the standard of review. Basically what the standard of review says is an administrative agency, when it makes a decision, it has to provide a rational

explanation for that action. It has to draw a connection between the facts found and the choices made. And while Order 1309 takes some very positive steps toward recognizing the problem and addressing the problem, ultimately it fails to do that thing. It's internally inconsistent. It says it's going to do a thing. It says it's going to protect senior rights and the public's interest in the Moapa dace.

Ultimately, it declines to do what by its own terms it says is necessary to do those things. This doesn't call all of the order into question, and I'm going to address remedies at the end of my presentation, but it does raise some issues that do need to be addressed by this Court.

So why -- why is 8,000 too high? Well, let's go through the facts. The Lower White River Flow System is unique, and we've heard a lot about this. I don't think this can be emphasized enough. There's concern, and I think this applies equally to our argument about limiting pumping as it does to the State Engineer's authority because, you know, if 8,000 is too high, we're looking at a tighter restriction than is already in place.

But, you know, to assuage the fears that this is setting some kind of statewide precedent, I think it's helpful to look at the factual basis behind the State Engineer's decision and talk about this very unique nature of the Lower White River Flow System.

First, you have generally low recharge. It's also variable over time. So and then this hasn't really been addressed in detail in these proceedings in court, but what was found below is that most of the time, most years, there is no recharge to the system. Most precipitation doesn't make it into the aquifer. It's only in years where we have above average precipitation and really, you know, extraordinary years, like 2005, where you can look at these hydrographs that we've been looking at all week and -- excuse me.

THE COURT: My bad.

MR. LAKE: Okay. You can look at these hydrographs and actually see the levels rise.

So recharge is low and recharge is variable. You have the remarkably flat and transmissive aquifer that's feeding the Muddy River Springs and providing habitat to the Moapa dace.

There's been some discussion about heterogeny in the system and maybe the system is heterogenous. So if you -- if you pump in one place, it's not going to effect the dace, but that doesn't really reflect the evidence. There was a distinction drawn in the hearing between having geologic features that affect the transmissivity to 1 degree or another, having water flowing in 1 degree or another and the connectivity. And the connectivity is what's important. And nothing that's been presented here refutes the conclusion that

this system is interconnected. The system my -- so Coyote Springs tries to characterize a separate flow path.

Now, first of all, one expert agreed with that conclusion at the hearing. It was Coyote Springs' expert, and we've heard a lot about how this Court isn't supposed to be reweighing the evidence.

THE COURT: So I see Mr. Herrema.

MR. HERREMA: Herrema, yes.

THE CLERK: Yeah.

MR. HERREMA: Your Honor, this is the time for the Center to be addressing its response to the opposition by the State Engineer to its challenge, not to be taking on CSI's positions.

MR. LAKE: Your Honor, two points. This is the Center's time to rebut arguments that have been made by the other petitioners. Also, to the extent that we argue based on impacts from pumping to the Moapa dace, that the limit should be lower, which is the basis for our petition, we should be able to address evidence that's contrary to that position.

MR. HERREMA: This is their reply to the --

THE COURT: To the State Engineer.

MR. HERREMA: Correct.

THE COURT: So I would ask you to limit your comments to the State Engineer, what you disagree with. As far as if the -- let me think about this.

If the findings of the State Engineer are -- or actually, if what was presented in the State Engineer's answering brief touched on what you are talking about, then I think it's fair game, but I'm not sure that it did.

MR. LAKE: Okay.

MR. HERREMA: Thank you, Your Honor.

MR. LAKE: I'm just going to continue with the discussion of the aquifer, setting aside what the issue with Coyote Springs' presentation.

THE COURT: So you were actually talking about the fact that the connectivity is the most important part.

MR. LAKE: The connectivity is the most important part. The State Engineer did recognize that. And I guess this goes back to the order being internally inconsistent because all these things were recognized. I'm just reciting them to establish essentially the foundation of what we're going to talk about in a second.

So connected, transmissive. And at the end of the system, you have a fully decreed water source. So all the water rights in that system are, you know -- every bit of water in the Muddy River has been appropriated by decree.

And finally you have this endangered, very site specific, very endemic species in the Moapa dace. And it's important to consider I think the difference between -- the differences and the similarities between the Muddy River Decree

and the Moapa dace here in terms of the interest.

You know, naturally protecting the natural spring flow of the Muddy River also protects the dace. So there is to some degree a coincidence of those interests; however, as I clarified on Monday, the Moapa dace is dependent on these high elevation spring flows that are far more vulnerable to pumping impacts than the flow of the Muddy River as a whole.

And I think that calls for a consideration specifically of how pumping is going to impact the spring flows, not the overall river flow, but the individual spring flows from the Muddy River Springs.

The State Engineer also acknowledged in Order 1309 the need to maintain at least 3.2 CFS. I'd like to talk about this for a second as well. You know, there's a concept in ESA case law called historic range where you look at the where a species has historically existed compared to where it exists now.

And it's one factor in determining whether a species -- and this is highly litigated. So if you go to the case law it's going to be all over the place, but the basic concept is you can look at the historic range compared to the current range and look at what impacts, you know, the degree of impacts occurring to the species. And here with the Moapa dace, you see that historic Warm Springs west flows are around 4.0 CFS.

THE COURT: So I need you to translate that for me.

MR. LAKE: Okay. This is the flow of the stream at the Warm Springs west gage, and this is the gage that collects the flow from all of the higher elevation springs.

THE COURT: So you're just saying then that historically at the west gage area, the flow was at 4.2 CFS, and that is part of the habitat conditions that help it propagate?

MR. LAKE: Yes. And at the time the dace was abundant in the system, those are the kind of flows that were occurring. That's the baseline.

3.2, you know, while 3.2 is important to, you know, given current conditions, and we would argue that it's absolutely, you know, a necessary floor to maintain here, it is not the baseline. 3.2 is already a 20 percent loss in spring flow. And I discussed on Monday that the relationship, the direct relationship between spring flows and habitat loss. So with all of those reductions in spring flows you're also seeing an equivalent habitat loss.

Now, there is consensus among experts at the hearing, at least those that address the dace, not all experts talked about the dace, but those that did recognize that 3.2 absolutely needs to be maintained. And this was -- this was somewhat of a revision of what was understood before. Again, the pumping test gave us new information about how this system

behaves.

One of those pieces of information was that when you pump from this aquifer, it doesn't recover. It doesn't come back up. You're not going -- simply stopping pumping or reducing pumping isn't going to lead to a restoration of prepumping spring flows. And this is different than a lot of other aquifers in the State. In, you know, your typical alluvial basin aquifer, what I'm talking about, like a precipitation fed aquifer in a basin, I mean, you give it time to recharge, and the levels come back up.

In this system, we're seeing a different kind of behavior. And that's significant because it means that if you drop below that 3.2, you know, that could very well be a permanent loss to the species. We don't really know how to recover that.

You know, we've had some arguments in relation to a decree about predevelopment flows. Mr. Dotson said, you know, nothing in 1309 tells us how we're going to recover to predevelopment flows, and that's true.

And on the other side, CSI says there's no need to recover predevelopment flows. But the consensus there is that we're not -- once it's removed, it's not coming back.

So that is the basis for maintaining 3.2 as set out in Order 1309, not the MOA, which came before the pump test, which came before we had this information, and not any of the

analyses -- any other of the analyses that were done before the pump test. The pump test really changed the playing field here with regard to spring flows and the impacts of pumping.

Another thing that's not in dispute is the continuing decline in spring flows, and this is acknowledged by the State Engineer both in Order 1309 and in the State Engineer's briefing on appeal. Just to be specific, at Record on Appeal 58, in Order 1309, the State Engineer says,

> Water levels may be approaching a steady state, but the trend is of insufficient duration to make this determination.

In briefing, the State Engineer also says,

> Data from some Lower White River Flow Systems (indiscernible) cut against the conclusion that the system is at equilibrium.

A downward trend in these wells is acknowledged.

And finally, the State Engineer concludes:

> A continuing monitoring of groundwater is necessary to determine whether further reductions in maximum pumping are required.

And this is where Order 1309 becomes internally inconsistent. Because the State Engineer has established what's necessary to protect the dace and what's necessary to -- we have to maintain spring flows 3.2.

But then the State Engineer fails to do anything in

Order 1309 to maintain the spring flows at 3.2. The State Engineer says essentially we will maintain spring flows by monitoring and adjusting. That is not substantial evidence.

And I'm going to discuss the *Eureka County* decision again -- the citation is 131 Nevada 846 -- because I think that case is very informative about the situation that we have here. Mr. Taggart pointed out that there are some factual differences in that case yesterday. We acknowledge those, and there is no -- this isn't the same situation. The State Engineer isn't saying we're going to come up with a mitigation plan that does not yet exist.

But what the State Engineer is saying though, and this is why Eureka County is informative, is the State Engineer is saying, we don't have the information in front of us right now. We'll get it later.

Well, Eureka County said the State Engineer can't do that. The State Engineer's decision, and I'm quoting now, "must be made upon presently known substantial evidence rather than information to be determined in the future." Now, presently known substantial evidence is that spring flows are declining. And the spring flows aren't recovering once they've gone below a certain level.

You know, the Court asked me on Monday, you know, where do we draw the line? And I think that's an important question. We agree that a line has to be drawn. We think a

cap is a good step forward. It's better -- it's certainly better than no cap at all.

But the bottom line is that the State Engineer never makes a finding that this cap is going to maintain 3.2. The State Engineer never even says that the system is in a steady state. The State Engineer acknowledges that there is not evidence to support the conclusion.

Now I don't think it's appropriate for me to stand here in an appellate proceeding and tell the Court the appropriate number is. At the hearing, the Center's expert recommended the carbonate pumping -- no carbonate pumping should occur if we're going to fully protect senior rights and flows from the Muddy River Springs area.

Now, as myself and Mr. Dotson and Mr. Taggart have stated, Order 1309 doesn't fully protect those senior rights and those spring flows, but, you know, that's what we told the State Engineer below, no carbonate pumping and no more than 4,000 acre-feet of alluvial pumping.

I don't think the difference between carbonate and alluvial is particularly relevant to the current discussion, but for the record, that was our position below.

But that's also I think kind of beside the point because it wasn't necessary for the State Engineer to come to a specific conclusion on steady state or equilibrium. The State Engineer just needed to draw a rational conclusion from the

evidence in front of him.

THE COURT: So needing -- drawing a rational connection between the 8,000 and the 3.2?

MR. LAKE: Exactly. And the State Engineer found that 3.2 was necessary. So how do we maintain 3.2?

And so and how do we protect senior rights too? So, you know, it's our position that that could be made. That decision could be made based on any number of any amount of factual information in the record. But it can't be made on the basis that the system is approaching equilibrium because there's not evidence that the system is going to equalize. I mean, it could. It could not. The point is we don't know. There is no presently known substantial evidence.

The Court might also wonder, you know, why be so precautionary. Is there really -- is there really a requirement that the State Engineer, you know, honor these limits so strictly? And our answer is yes.

First, the pumping test revealed new information about the nature of the aquifer, which I already discussed, you know, and before the pumping test, we thought, everybody thought well, you know, this is not necessarily a permanent impact. Flows could recover. But what the pumping test told us is that, oh, it called that into question. It said, no, the levels aren't recovering. It looks like we have some degree of permanent loss to storage as a result of the pumping test.

So, you know, that changes the calculation. That means that the State Engineer does have to consider the fact that if we drop below that 3.2, it might not get back up above that 3.2 again. We're certainly not getting back to 4.0, where it was initially.

And, you know, the State Engineer's duties in this regard, again, are, you know, various. But due to the public ownership of water, the State Engineer is acting in the capacity of a trustee, a trustee, who according to the express language of the Nevada Supreme Court in the *Mineral County* decision has to maintain the trust for future generations.

Now, allowing a permanent depletion of this water source to the detriment of communities, businesses and of this endangered species is not maintaining the trust for the benefit of future generations. And that's why the State Engineer has to be precautionary here.

If we are actually too in a long-term drought, as some parties have argued here, you know, the Center hasn't taken a position on this. We have observed that there were some above average precipitation years following the pump tests that probably buffered the amount of decline to make it look -- to make it be less than it normally would be.

But if we are indeed in a long-term drought and there's a long-term drying trend, this only argues for more caution. It means that, you know, the State Engineer was

correct in 1309 to say that he can't control climate. He can only control pumping. And if climate is going to have an adverse impact here, that only means that we need to control pumping even more to protect these substantial interests in the Muddy River Springs area.

And that is, in light of Mr. Herrema's objection, I think that's the extent of my presentation.

THE COURT: Okay. Thank you, Mr. Lake.

All right. Next step we've got Muddy Valley.

MR. DOTSON: Court's indulgence. It might take a moment. I don't know.

(Pause in the proceedings.)

MR. TAGGART: Your Honor, while he's doing that can I give you the -- or give the clerk the documents from yesterday?

THE COURT: Go right ahead.

(Pause in the proceedings.)

ARGUMENT FOR MUDDY VALLEY IRRIGATION COMPANY

MR. DOTSON: Good morning, Your Honor. There is no way that I would use the hour and 55 minutes allotted. I would like to start, and I'll probably conclude with joining my colleague and thanking you, and Mr. King has asked me to thank you as well.

It's been clearly obvious to all of us in the room that you have read the briefs, that you've grappled with this issue, and we really appreciate your informative questions and

your time.

This is the time for my rebuttal argument. That, as I understand the ground rules, and, you know, I will be to respond to the defense from the State and also to respond to the statements of some others that have spoken --

Well, that's not working.

THE COURT: That spoke in the intervenor part.

MR. DOTSON: That spoke in the intervenor in a position contrary to ours to what we have advocated.

It's totally locked up.

(Pause in the proceedings.)

MR. DOTSON: All right. Sorry about that. I think when I switched --

THE COURT: And this is slide?

MR. DOTSON: This will be Slide 2.

And, in fact, Your Honor, I think what we -- what was telling about the State Engineer's presentation was the absence of a direct response.

Now, there are briefs, and those are certainly part of the record, but we're here for oral argument. And at least with regard to oral argument, candidly, and we're going to talk about some of these things, the response from other parties was stronger in contradiction to the positions that we have asserted and advanced on behalf of Muddy Valley Irrigation Company than that of the State Engineer's.

But definitely certain parties it would seem, seek to limit MVIC's decreed rights. The irrigation company is not going to allow that to happen, at least that is their goal. That is my job.

And to be clear, this proceeding, as I understand it, is a petition for judicial review. When I referred to this proceeding, that was my intent. It wasn't 1303 or the 1309 hearing. I understand that conceptually this isn't a continuation of that same legal conduct or this same string of decisions, but this proceeding is insular and discrete insofar as there's a record that has been identified. There are issues that have been raised in however many petitions for judicial review -- seven I think, something like that -- and the intervening briefs as well. And that's what's at issue, as I understand it, in this proceeding.

In this proceeding, in our petition for judicial review filed by MVIC, it did invoke the decree. It's all over our petition for judicial review. So and I think it's clear when you look at the record that -- and it should be important that the decree was important in the consideration of the issues that are up on review. So I don't think it's -- and I'm not saying anybody is claiming a surprise on this, but it isn't a surprise.

Now, this was not an original action in the decree court. I would agree with that, but our arguments, as I hope

have been clear, and apparently maybe they haven't been, are grounded in the decree, and our arguments have remained constant and have remained the same.

Now, as I conceded, I think, both in the briefs and in oral argument here this week, the ruling that came out from the State Engineer was enlightening for my client that maybe he couldn't -- he -- it could not rely upon the State Engineer to the extent that it had. But that's a long ways from a position -- excuse me, Counsel -- suggested by Vidler yesterday, which happens to be a shareholder, that if we are seeking to benefit from the decree, we need to file an original action.

The whole purpose of the statute that, well, what we would argue, the primary purpose of the statute that directs the State Engineer to do nothing, that injures the decree or injures a decree or a Court order -- and we'll get to that in specifics -- is to prevent and avoid every party who has decreed rights having to enter an action whenever they think those rights may be in jeopardy. They shouldn't have to have a District Court action in the decree court to enforce the decree when they think there may be a problem in the future.

THE COURT: So let me ask the question. Because when you're talking about decreed rights, you're talking about really the conflict of rights; correct?

MR. DOTSON: I am talking about any water right that

has been adjudicated by a District Court in an actual decree or order.

THE COURT: Oh. So I know that that's the basis --

MR. DOTSON: So I'm speaking generally.

THE COURT: So but what I'm talking about is when you are saying that you are invoking the decree for this Court to make decisions on, that is part of the conflicts analysis; is it not?

MR. DOTSON: It is insofar as it seems clear to us from the record below that the State Engineer made the determination that there was an impact and therefore a conflict with the decreed rights, that not all of the decreed rights were being delivered, and therefore there must be a determination as to what pumping, assuming it was pumping that was causing the conflict, and he found that as well, is actually causing that conflict and what we can do about it.

THE COURT: So this is really only to the limited issue of the conflicts analysis that's within the decree that you are saying is -- that was outside the scope of this proceeding; correct? So when you're talking about -- when you're talking about asking the Court to make a decision about the rights about the decree that you have, that is based on the limited scope of the portion of 1309 that the Nevada State Engineer made -- did a conflicts analysis saying, you know, it's not affecting the Muddy Decree River rights or whatever

along those lines; is that correct?

MR. DOTSON: Right. Exactly. Exactly. What we're saying is that the -- well, actually, let's go -- I think actually what I'm going to say next is going to be helpful, and we are now at Slide 2, 3, 4, 5. I guess I should have written the numbers on this.

So to be clear --

THE COURT: What slide is this?

MR. DOTSON: This I believe is Slide 5.

THE COURT: Okay.

MR. DOTSON: So he's wrote 5. This is 5.

MVIC contends that, and I think this kind of goes to the issue you're raising, that the Nevada State Engineer cannot modify the decree. In fact, nobody can modify the decree. We don't think you can modify the decree. That period to do so has passed.

And we're not suggesting that 1309 does that. It acts to do that. It's not literally modifying the decree. He cannot modify the decree. And, in fact, I think Nevada state law now and public trust doctrine being in -- and being consistent with that has identified in *Mineral County versus Lyon County*, that Stiglich opinion, that, and this is a portion that Vidler's counsel cited to, has identified that those are consistent. I cited to it in my opening as well. That even considering the public trust doctrine, even considering that

the water is owned by the public, and the public has an interest in it, the public's interest is served by the certainty in the understanding of prior appropriation. These concepts and the statutes that are built upon them are in harmony.

And so the reason why we filed our petition for judicial review is because we read 1309 as running contrary to those established rights from the decree, which it cannot do.

And so we sought this petition review, which happens to also be with the decree court, which is why I say I invoked the decree. What I'm saying -- I'm not saying that I filed a new action here based on the decree. That has not occurred. And, in fact, my contention is it shouldn't have to, but maybe it does. But it is -- it has been raised. So I feel like I had to deal with that.

Now we're at Slide 6 consistent with the argument we just said.

MVIC is not asking for a modification to the decree; however, it was notable that when Vidler filed this action, their petition for judicial review -- they originally filed in Lincoln County. The Court I know is aware of this.

THE COURT: I think I actually just read the opinion again last night. So I'm fully aware of --

MR. DOTSON: Okay. So you know -- well, that's what I was going to ask you to do.

THE COURT: No. I already read it last night.

MR. DOTSON: Thank you.

Moving to Slide 7. MVIC's position differs from SNWA, and MVIC did not adopt the SNWA positions below. I want to refer you to exactly where in the record we have our report.

So the report and the portions -- the report starts at record on appeal 39714. It's very short. And ends at 39717, and I would suggest the brevity of this is indicative of my client's belief that really its involvement in this hearing was optional. It shouldn't have been necessary at all to be there, but there are at least three spots on the record on appeal 39,716 and 717 where MVIC concurs with the discussion points at certain sections of the Southern Nevada Water Authority report that I've referred to a number of times in this case, and it's not coincidental that that has occurred.

But I think has been clear, and I would be lying if I didn't say that as Mr. Taggart borrowed my computer to prepare and present his report when he was speaking in support of the 8,000 cap, I thought about clicking it off just for fun. Because we don't agree with that.

And there's -- MVIC is much more protective of its rights than that particular shareholder, and obviously more protected perhaps than -- well, this is a note from my colleague and cocounsel Steve King. It's very interesting that in this room, just to be again clear and transparent, there are

five shareholders of my client: The LDS Church, Vidler, Coyote Springs Investment, SNWA and Moapa Valley Water District.

So what are those rights that each of those shareholders we just described have a certain percentage interest in. They are to the Muddy Valley Decree, and to those decreed waters. And I have in the past referred to the Decree and really mostly the holdings, but I want to also direct the Court that it's interesting maybe to read at the beginning of the Decree the stipulation that is contained therein because it is in that stipulation that the parties who are actually litigating this case in the Muddy Valley Irrigation Company is the plaintiff in that case are recognizing even in the stipulation this prior appropriation concept, the fact that the water was put to beneficial use in all instances of these people and entities before 1905.

Oh, I thought there was an alarm.

THE COURT: Oh, no, no. It's just the --

MR. DOTSON: And -- sorry. I lost my train of thought.

THE COURT: You were saying that the water was put to a beneficial use before 1905.

MR. DOTSON: And it also recognizes the rights and the usage of the Muddy Valley Irrigation Company, as I've described here and this -- this two-tier type circumstance, these two specific type of grants.

Now, in the stipulation not all the water had been included, because the order, as you recall, includes certain certificates. At least this is my understanding.

I will tell you that I have -- I found it -- this case is so historical, right, and I find it interesting that I stand in the shoes, and I stand on the shoulders really of this guy named A.S. Henderson, who represented the Irrigation District and who no doubt negotiated that stipulation. And candidly I'm trying just not to screw anything up that he did because what he did was he preserved and he placed in a decree in an order rights that have already stood for over a hundred years and hopefully will stand for hundreds of years in the future. And that is the concept of prior appropriation, Your Honor.

The fact that -- and it is consistent with the public trust because it is important for planning, for future generations, whether it's an individual. Now, there's a guy in here who has part of this water named Knox. One of the lawyers in the case for the -- though he hasn't spoken -- for the power company is a guy named Knox. I was ready to get some joke about Mr. Knox's water. But I don't know who owns that water now. But the point is that it allows for certainty and that every one knows how much water it is and that it can be used for beneficial use.

And it was recognized then subsequent to that in

statutes. This decree predates the water law that you've been discussing, predates the statutes that we ask you to look to and we think are in harmony with this, but it's important that Nevada's -- that it is appreciated, and I think everybody agrees that Nevada's water law is based upon common law and statutory law that hopefully is in harmony.

In this instance, it grants to MVIC specific diversion rates for specific periods of times, the winter and summer that we talked about in the opening and again the time to revisit it has long past.

Now, I don't think that statute that gave the three years existed. Obviously it didn't exist at the time the decree was entered, but even if it was just a -- well, I think counselor for Vidler said it well yesterday. It's a Court order. It's a final order. And you can only -- we want finality in our courts as well.

So again, it's a seamless web, which is what the law is supposed to be. And it plays upon each other.

So moving quickly through this, because I know I've stated it ad nauseam. This is the specific allotment of cubic peak feet per second, 36.2588. This is what we seek to have the State Engineer return. This is the remand instructions that we have asked, which is that you strike that portion of the decree which is found on page 60 and 61 and remand with instructions that the State Engineer is to calculate an amount

of pumping that can occur without conflicting, which is exactly where that question that you rose -- you raised I think came from, without conflicting with those decreed rights, whether by location and amount, and we'll at least eventually return the river to its predevelopment decreed flows, whatever that may be.

As a -- we read and so we would ask that you would strike and then remand with instructions, strike those portions of Order 1309.

As we read the order, the State Engineer made very clear and supported factual findings about the 36,900 acre-feet annually of flow in the river predevelopment and the fact that, which is just stating a fact from the measurements, that the flow, at least since 2015, at the time of the hearing obviously had averaged 30,600; thus leaving a deficit of 3,300 acre-feet annually.

But then the State Engineer fails to apply, and this is the inconsistency where we align very closely with the Center for Biological Diversity and not as much so with SNWA where we don't think the math can possibly therefore work out that you can conclude that there's a deficit in decreed water rights and yet allow a level of pumping that you acknowledge may or may not even have reached steady state yet. We need to do better than steady state to return the decreed flows.

And those are the flows that my client has the right

to under the decree, the specific allotment and whatever the flow of the river was. And this is where the geography of where my client takes on the river is important because we're at the end. We get what's left, and there's this catchall phrase that I know others dispute the significance of it, but from my client's position, it is its understanding that any water that reaches it at that point it is to put to beneficial use. I will tell you that they even think it's their obligation to do so. I don't think the decree sits quite that hard, but that's what they think.

I'm not waiving privilege beyond that point, by the way, for the record.

So what we seek is that this Court's remand provide instruction that the State Engineer take action to protect the decreed water rights at 33,900 acre-feet. And those are not just our rights. Those are everybody's rights on this river, not just Muddy Valley Irrigation Company.

Now --

THE COURT: And this is slide?

MR. DOTSON: This is -- thank you, Your Honor.

THE COURT: We've been going through slides and I don't believe we've made a record of it.

MR. DOTSON: Let's see what slide it is.

The last one was 9, and this is 10. And I'll provide this copy to the Court when I'm done, and I have yesterday's as

well.

What didn't we hear from the State Engineer even in response to a question from you, and that was a defense of the consumptive use analysis and how the State Engineer can legally apply such a consumptive use analysis in any portion of its work and holding of 1309 in light of the statute specifically disallowing such an analysis on the Muddy River.

I did not hear, and maybe I dozed off, but I did not hear, and I was waiting for it, an explanation as to how that would be appropriate or make sense.

I did not hear the State Engineer make that, and I know the Court asked a question where it was basically deferred, and I think it was deferred because there is no explanation as to how it's okay.

NRS 533.3703 specifically outlaws that sort of an analysis to be applied to these waters. Here's the provision in the section. This is Section 2. These provisions of this section do not apply to any decreed, certificated or permitted right to appropriate water which originates in the Virgin River or the Muddy River.

Now, Vidler seemed to suggest that that was all right and that some analysis in that regard should be done. And it seems transparently obvious that the reason why any party would be a proponent of this is to reduce the amount of water that MVIC and others holding water on the Muddy River and through

the decree are allowed to use and to change the calculation.

And it's a multistep. You have to, you know, do that first so that you can either segment it by basins or do some sort of a budget analysis. I don't prepare -- I don't pretend to understand exactly where it's going, and I don't need to. All I need to know is that you can't do it. And so any analysis that allows a justification for a reduced sum to be delivered of decreed water rights is improper and illegal.

Now, we're at Slide 11, Your Honor, prior appropriation. First in time, first in right.

THE COURT: Well, let me ask a really quick question.

MR. DOTSON: Please.

THE COURT: So, you know, I know they you have this sum of 33,000 -- is it 900?

MR. DOTSON: 900. That's the predevelopment decreed flows.

THE COURT: Okay. And I know that there were some different calculations that were done by Coyote Springs and Vidler regarding -- because it sounds like you're looking at historic grants of water and the way that they calculated water then. And now we have different ways of calculating that water. Can you kind of walk me through that a little bit as far as how it relates to the predevelopment flows.

MR. DOTSON: I will. I will. To the best of my ability.

And again, there are -- there's different submissions of evidence in this regard, but the -- oh, I grabbed the wrong thing.

The --

THE COURT: And just to be clear, so the predevelopment flow number that you have is based on your calculation; is that correct?

MR. DOTSON: No.

THE COURT: No. Okay.

MR. DOTSON: So the 33,900 comes from page 61, I believe, of the decree. This is the State Engineer's conclusion. And indeed I think I mentioned earlier --

THE COURT: The decree or the --

MR. DOTSON: Or on the order of 1309. It came from 1309. And the State Engineer, I argue that number -- I've argued in this proceeding that that number is supported by substantial evidence.

THE COURT: Okay. But that is also -- I mean, I guess what I'm trying to get at is this number, the 33,900 is based on taking prior historic sort of ways of calculating water and then trying to, you know, put that in more modern terms. Is that correct?

MR. DOTSON: Well, sort of and not really.

THE COURT: Okay.

MR. DOTSON: Let me -- I'm going to direct you to --

well, first I'm going to explain where I think it came from.

THE COURT: Okay.

MR. DOTSON: And because I've got an hour and 20 minutes. I'm not going to need it all, but we can definitely take some time here to have a discussion.

THE COURT: Okay.

MR. DOTSON: The 33,900 is found at 1309 and in Order 1309, and it is a number arrived at by the State Engineer that we have argued in this case is supported by substantial evidence. I've alluded to the fact that we may withdraw that position, and I have actually directed the Court to Order 1169, which was the 2002 pump test order. And in particular to I think it's Footnote 12 of that order where at that time the State Engineer Ricci used a 36,000 acre-foot annual number for the Muddy River. So there are different estimates, and --

THE COURT: But it's all based on what was originally contained in the Muddy Water River Decree and how they measured the water then?

MR. DOTSON: Sure. So, yes. When they litigated this in the -- well, I guess it would be it's, like, '17, well, through '20, the -- they had evidence as to how much water was being diverted at that point in time, and they're basing it on that, and they're claiming these uses. And, you know, I haven't read the record that existed. I don't know if a record exists from that. There's charts at the back that counsel has

referred to, and I've read those, and I, in fact in one of my prior slides, it might have been the middle one I put the summary of the water that was awarded, and those cubic feet per second, you can run a calculation over that, but obviously a river like this in an arid climate is going to vary from year to year.

And so in looking at the record from this proceeding at 41,930 through 42,029, there is an analysis that describes, and I'm going to try to find the exact spot, how those SNWA hydrologists, they used historic data from the period of the decree and since the decree, and there were criticisms in the record below of how accurate that is, and there are years where there's no data kept as to how much water is running through the river, and we have numbers now, and there's been discussions of ICS credits in this case. SNWA has made a big deal about the ICS credits, which are certified every year, and they're used to determine that intentionally created surplus that goes into Lake Mead and then is relied upon apparently by them.

And so no doubt, which maybe is what you're asking, the calculations should be better today than they were in 1920, though what is funny, and I think this was an anecdote that I think Mr. Taggart related, which was sometimes using a tape measure and a stick is a pretty accurate way to figure out some quantity of anything. And when I was a kid, we used to -- I

worked at a service station, and we had a computer, early computer that tracked how much gas was supposed to be in the underground storage tanks.

But every day, we took a stick, and we dumped that stick down, and we put on a spiral notebook the amount. And you know what one was more accurate? The stick, right, because there's -- you know, I don't know what's happening. I think we figured out that eventually there were holes in the tanks. Different story.

But here's the thing. They put the water, and there's been some pictures of this, into a channel at various points, right, or they -- and when it goes through the channel, and if the channel -- it depends on the nature of the water source, obviously, the channel has a known width. I wish I had a picture I could put up. And then that creates a gage because you can tell how -- because they know the volume of water that is now moving through this usually concrete channel. They can see the height of the water, and then they can record it. And that's when they were talking about, oh, this has a faulty transducer and things like that, and so you have --

Now, some areas where the measurement is constant, right, so you have a record, a hydrograph, that's what these hydrographs are, right, because really, when I was sticking the tanks back in the '80s, that kind of created a hydrograph too. It just was of petroleum. And we could see where the

tank was. And then when we had to order more gas. Well, it's the same thing really except now it's a natural thing. It's a river, and at least this is how I -- now, you're inside my head knowing how I've been thinking about this, right, but --

THE COURT: Well, I mean, in the historic information, it was more about diversion rates; right? Diversion rates as --

MR. DOTSON: Well, originally it was diversion rates, but they're still making estimations of how much water is in the river.

Now they know they're using the whole river, and it's clear from the fact that we had a decree that there started being disputes over well, you're using water that I've been using, and I'm no longer getting as much water as I should get. And really, that's what's referred to yesterday, and I'm rebutting, which is, well, wait a second. What's your remedy? Your remedy is you can't go and sue. That doesn't seem very efficient to my client or to me that you go sue preemptively before you allow the State Engineer to do its work.

But -- let me see if I -- maybe one of these stickies.

Court's indulgence. I'm just going to take a moment to look at the spot.

Okay. So if you look at the beginning of this report, it starts out with the decree and some historical

information, and then we have some reports that are contained in Section 2. And I want to see. Because one of the things, and I think I actually cite to this in one of our briefs is there are periods of time where the flow is much higher, and that's why I -- I think I stated in my first opening that -- I might be getting some help here as to where to look, but that I like to settle cases, and I like to compromise, but sometimes you can't compromise.

But one thing I thought we could compromise on, because I have permission to was that predevelopment flow at 33,900. And that was based upon historic information, but -- and it is supported by substantial evidence. It doesn't mean I actually think it's right, you know. It's like well, can I stipulate that my client has been injured? Yes. Can I stipulate that my client has been injured to at least a million dollars? Sure. Do I think it's 2 million? Yes. Will we settle for a million five? Okay. Right? It's that analogy to me.

And so I'm not -- I'm not finding it.

THE COURT: I took you way far off.

MR. DOTSON: No.

THE COURT: I really just -- I think you've answered my question on historic --

MR. DOTSON: I'm pleased to ask -- try to answer any question you have.

The point is that as you look in the record, and I don't know if you're going to do posthearing briefs at all. If you do, I can try to slip you the --

THE COURT: I hadn't thought of that.

MR. DOTSON: -- slip you the --

Do we have the number?

No. You would think I'd be able to find the stupid page. I'll find it as soon as I sit down, of course.

But the point is it's based upon historical information, and there are, I will concede, that there are years where, to my recollection, there were periods of time where they had no data, and then there were years, and most of it was older information where they had a number. They had an estimate. It's still going to be an estimate, and it's still going to have to be averaged over time.

And so that's where you rely upon the expertise of the State Engineer to make those sort of determinations.

Okay. Yeah. So if you turn to record on appeal 41962, and if we had this ELMO, but let me just tell you. So there's a hydrograph there, and it shows the gage flow, and it shows the flood flow, and the first thing that is highlighted either by me or Tom O, whoever Tom O was, the mean annual flow measured at the --

MS. PETERSON: Your Honor, I am going to object to that because he's reading from evidence that has -- it sounds

like it has interlineations in it, and that's the documents we're not supposed to be looking and referring to.

THE COURT: So I --

MR. DOTSON: The text --

THE COURT: Correct me if I'm wrong.

MR. DOTSON: Yeah.

THE COURT: Is it that they were highlighted, and now they're just plain text that were put in on the amended, or are there actual notes on them?

MR. BOLOTIN: Your Honor, this is James Bolotin from the -- representing the State Engineer.

The document that has highlighting also has some red notes by someone with a last initial --

THE COURT: Tom O or whatever?

MR. BOLOTIN: Well, that's what shouldn't -- I kind of --

THE COURT: Should not be considered?

MR. DOTSON: I will not read the notes.

THE COURT: Okay. So --

MR. DOTSON: There's no notes on the screen.

THE COURT: Do you have an objection to the highlighted portion even though it's highlighted?

MS. PETERSON: I do have an objection to the highlighted portion. And it sounds like the record on appeal that was filed is blurry, and the amended record or -- I can't

remember what it's called, is blurry, and you can't see it.

MR. BOLOTIN: Yeah. So the amended record is what we were talking about earlier this morning that needs to be fixed again with the -- we probably need to withdraw the amended record and file a -- an errata or something to fix those pages in a way that everybody can read, but also doesn't have the highlights or the notes.

THE COURT: Well, the amended record is not in our Odyssey.

MR. BOLOTIN: It's -- I spoke with --

THE COURT: Well, I know you spoke with them, but when I pull it up, is not in there at all. So -- what I can see.

MR. BOLOTIN: And there was a --

MR. DOTSON: Can I respond to the objection?

THE COURT: Yes, you may respond to the objection.

MR. DOTSON: Your Honor, the page which we are referring has no interlineation. There are only interlineations that -- of a few pages of the entire text. And they are easily obvious because they are of a different nature than the text of the report.

THE COURT: Okay. So then if you just --

MR. DOTSON: Read --

THE COURT: -- the text of the report, which is something that would be in the amended --

MR. DOTSON: Right.

THE COURT: -- I think that would be proper.

Is there a response to that?

MS. PETERSON: There's not, but Mr. Dotson just said I'm not going to read the interlineations. So it sounded like he was reading -- I mean, now he just says it's not -- the interlineations --

MR. DOTSON: Well, there's no interlineations.

MS. PETERSON: -- are not on the report or on that page. So I don't know what he's talking about.

MR. DOTSON: No. I said I was reading the report. I'm sorry if it was misunderstood.

THE COURT: All right. So just the text of the --

MR. DOTSON: Just the text of the report.

MS. PETERSON: And I don't think it was misunderstood. I think it was misstated.

THE COURT: Okay.

MR. DOTSON: That's very possible. Oftentimes my -- we are, in oral argument, not as perfect in our words and our speech as we should be.

THE COURT: So you were talking about the mean annual flow measures.

MR. DOTSON: Yeah. I'm going to make -- I'm going to just read some portions from 41962.

And so the mean annual flow measured at the Moapa

gage in 1946 was 46.8 CFS, cubic feet per second, 33,900 acre-feet. I don't know what was in the State Engineer's mind, but I find it remarkable that that's the exact number he eventually arrived at.

The --

THE COURT: Did you say 36 or 46 --

MR. DOTSON: I'm sorry. 33,900 acre-feet.

THE COURT: Okay.

MR. DOTSON: 33,900 acre-feet.

THE COURT: And that was in 1948?

MR. DOTSON: That was 1946.

THE COURT: All right.

MR. DOTSON: The bottom of that paragraph, the average flood adjusted mean annual flow was 47 cubic feet per second, which is, in parentheses, 34,000 acre-feet. This says AFY, which I assume it means per year.

THE COURT: Per year.

MR. DOTSON: The next paragraph,

> The 1946 predevelopment base flow also corresponds with information compiled by Eakin, a guy we've heard a lot about, parentheses, 1964. Eakin, 1964, reported a 25-year average flood adjusted mean annual flow of 46.4 cubic or CFS, parentheses, 33,600 AFY, parentheses. Using intermittent -- this is why I said I could

tell there was gaps in the data -- data between 1914 and 1962.

In addition, Eakin, 1964 estimated that approximately 2,000 to 3,000 AFY of spring flow was being consumed by phanerophytes (phonetic) between the spring orifices and the gage.

And these are a type of plant, by the way, Your Honor, that does well in the desert.

MS. PETERSON: Your Honor, I am going to object, and I'd like this noted for the record that SNWA, whose time has already passed to present their case, is now helping MVIC and providing him documents to support his oral argument, his rebuttal.

MR. DOTSON: I'll put it on the record. I'll use my time.

Counsel for SNWA just provided me a unhighlighted page to offer to the Court. So it is -- and allows me -- well, I assume that's why he gave it to me. It also allows me to confirm that the text is the same on the document that I'm looking at as on the document that will be in your amended record.

THE COURT: All right.

MR. DOTSON: So --

THE COURT: Your objection is noted for the record, and I will note that this was sort of in response to my

question, and I have totally taken him far off from your argument.

So I'll have you just get back to your argument.

MR. DOTSON: All right. I'm going to read the last sentence here, and then I will -- because I think I am really at the end of your -- of answering the question.

Because there's an Eakin and more report you'll see in the middle of that page. And just you can obviously just read the page, that has the 36,000 AFY, which I'm going to guess is what Mr. Ricci was relying upon.

All right. Back to what I was talking about.

So it's been long recognized -- it's recognized from the decree, that the Muddy River was fully appropriated. That's the whole importance of that second grant to MVIC. There's no more water to give. The water is fully appropriated, and any water not put to beneficial use for those above MVIC are to be put to beneficial use by MVIC.

And notably, the other parties in the litigation, which is why I described the page that has the stipulated portion of the order, concurred, apparently, since they signed the stipulation, with that sort of a process.

Our State's water rights statutes forbid the reallocating adjudicated water rights, and that's the case that counsel and I have also have both been citing to. And that would not be appropriate here. It's not appropriate to -- but

our objection to 1309 is not only is it because it's not appropriate to reopen and modify the decree, it's also not appropriate through an order by the State Engineer to circumvent the intent and holding of the decree. And that's what 1309 did, and that's why we object to it, and that's why we filed a petition for judicial review.

NRS 533.085, nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with the law prior to March 22, 1913.

I think that MVIC's are the only water rights that come before the nonimpairment statute. And so I cite to this. I cited to it in my opening. I'm citing to it now because it's not that we're relying just on one statute. It's not that we're just relying on the common law of prior appropriation. It's not just that we're relying upon sound public policy and public interest. It's not just that we're relying on common sense. It is all these things together that support and protect these decreed rights.

Okay. Now, we're moving to 12.

But you know what, even if it was just the decree and this -- frankly, just if it was the decree and the enabling act, that would be enough. But I don't have to stand just

there. It's the decree, the enabling act for the State Engineer, and it's this statute. You can stand just on those. You don't need all of the things I just listed.

533.0245, the State Engineer is prohibited from carrying out duties in conflict with the decrees or orders. That's what this did. The 8,000 acre-foot cap is inconsistent with well supported elements of 1309.

In other words, this is where I say you can't come to conclusions which are supported with lots of substantial evidence over years of measurement on amount of flow, say that that amount you're not even getting close to it any more and then develop a level of pumping that you're going to allow that -- where you think well, it might actually keep going down if we allow this, but that's what we're going to do. Those are inconsistent with logic.

It's a violation of 533.0245, and that's what -- sometimes it's easier in the law just to rule on exactly what's in front of you, and then the pieces together make the bigger picture. I'm not saying you can't look at the big picture because you have to obviously, but even if I'm just looking at this narrow, simple thing, the ruling is clear. That part of -- well, we hope it's clear, that part of 1309 is improper, illegal and must be stricken and reversed with instructions to follow the decree, follow the order, follow the statute.

Again, with the 8,000 AFA, it's based only on the

fact that the Muddy River is nearing equilibrium. It doesn't speak to at all in the analysis what it takes to get the flows back to what they were. It simply is an acknowledgment that they aren't where they should be.

It's incorrect to contend that a separate legal action should be necessary. That would ignore this entire statute. It may be necessary. It may be appropriate, but it shouldn't have to be. You shouldn't have to have a decreed right, and it would defeat kind of the whole concept of public policy of having a State Engineer if every decreed right owner had to separately, we have two parallel systems where you had to separately move in and enjoin somebody before they drill their well because you think it's going to impair you.

You don't have to do that. That's not what the system is. That would ignore the statute and the purpose of having the State Engineer's office where you have a group of experts, and you have an administration of the waters of the State of Nevada by those experts which take into account these decreed rights, which are the supreme highest rights in that system.

Moving on to 13, which is the last. What are we asking for? I've got to look at Steve's notes. I've not got them all yet.

Okay. We're asking you to remand with instructions to strike the illegal portions of 1309, and the factually

unsupported conclusions while leaving the supported conclusions.

It was argued that you can't do that. Well, I think that's exactly what we do. We see appellate courts do this all the time where they say, well, this is right, but I'm going to remand this to you because you have to consider X, right, say it's a different context that I have dealt with before. You didn't provide enough support for your attorney fee motion, right. So it's remanded. The attorney's fees have been granted. They didn't change that part, but you've got to provide this additional support for your attorney fee motion. You have to provide the invoices, whatever.

I'm just drawing an analogy to something else that's much simpler. But maybe it's not actually simpler. Because what am I really asking you to do? I'm asking you to remand with instructions to follow the law, which that is the law, by the way. You're supposed to submit your attorney's fees with your affidavit and your confirmation of this and give the other side your, although redacted, attorney fee invoices, and that's what I'm asking you to do here.

I'm asking you to remand, tell the State Engineer to follow the law, acknowledge that certain things he did were right and seem to be supported by substantial evidence, but these other things, these other conclusions you had can't be supported by substantial evidence if -- because they're

inconsistent with the base conclusions. Specifically you can't conclude that 3,300 acre-feet a year is not flowing into the river, which is fully decreed and still say, but we're going to do -- allow pumping that we know won't change that. That's -- you know, that's a circumvention of the decree.

And so it is entirely appropriate, in our view, that you remand with these specific instructions.

Thank you, Your Honor. And again I want to thank you very much for your time this week.

THE COURT: Okay. Thank you.

So right now it's 11:30. Would you all like to do an early lunch break or -- I mean, I know Nevada Cogeneration, so since you are up, I don't know how long you're looking at, if you --

MR. FLAHERTY: I would not be done by noon, Your Honor.

THE COURT: Okay. So should we take our lunch break now and then come back at 12:30? Would that work for everyone?

MR. FLAHERTY: Yes, Your Honor.

MR. BALDUCCI: Your Honor, I did have slides delivered. I don't -- I can deal with this after lunch or before.

THE COURT: I'll let the boss decide.

(Proceedings recessed at 11:29 a.m., until 12:33 p.m.)

THE COURT: Okay. I think everyone is here.

(Pause in the proceedings.)

THE COURT: Okay. The floor is yours.

ARGUMENT FOR NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2

MR. FLAHERTY: Well, thank you. Good afternoon, Your Honor. Frank Flaherty here on behalf of Nevada Cogeneration Associates Numbers 1 and 2.

I would like to start with a little housekeeping of my own. I just want to let the Court and the parties know that I did provide a copy of the PowerPoint slides I presented Tuesday morning to the clerk. I e-mailed them to her, and I asked my assistant to e-mail them to all counsel.

And if anybody didn't get it, I would just request that they let me know, and I'll make arrangements.

THE COURT: Okay. Thank you.

MR. FLAHERTY: I did not compare notes with counsel for Dry Lake in preparing my presentation, and I probably should have because a lot of what I say is going to sound very similar. I thought about editing myself, but then I've got three hours and 13 minutes, and I didn't -- I didn't want to run the risk of editing myself out of an important point.

THE COURT: Sure.

MR. FLAHERTY: So bear with me if it gets redundant, please.

THE COURT: No problem.

MR. FLAHERTY: And the first redundancy, I will pare

it down. I think Dry Lake already spoke to the point raised by Muddy Valley Irrigation Company, MVIC, that the challenge to the formation of what I call the superbasin in Order 1309 is not timely. It should have been filed after Order 1303. 1303 was an interim order. It was not appealable. You and I discussed this a bit Tuesday morning, Your Honor. And the only thing I think I'll add to that -- I'll add a couple of things.

One is I can give you a cite. It's to a -- it concerns a District Court decision and whether or not that was final. But it's *Lee versus GNLV*. That's 116 Nevada 424. And basically unless an order disposes of all the substantive issues and leaves nothing but miscellanea, like attorney's fees for a later time, it's not final. It's not appealable.

And then also echoing what Dry Lake said, if we imagined a situation were all eight of these petitions -- there were no intervenors, all eight of these petitions were against the State Engineer, and the only issue before the Court was, was there authority to form this superbasin, and we had I think 20 plus briefs, hundreds of thousands of dollars in attorney fees, you blocked out two weeks in your calendars, and then Mr. Bolotin stood up here yesterday afternoon and told you you had to throw the whole thing up (indiscernible) it was untimely, I think if there was a stapler up there on the bench, Your Honor, you'd be tempted to throw it at him. So the idea that this can be raised now is nonsense.

The argument that the challenge to the superbasin formation is untimely is untimely in itself, okay. And since I just said the word superbasin, I want to kind of define the parameters when I use that term. I have to confess that I hadn't been thinking about joint administration as an issue until you brought it up the other day on the bench, Your Honor.

When I say superbasin, this is what my client's gripe is. We have several formerly separately administered groundwater basins now combined --

THE COURT: Into one.

MR. FLAHERTY: -- with a surface water source and by imposition of the 8,000 acre-foot cap or maybe less, conjunctive management.

So when I say superbasin, that's shorthand for all that, okay.

The first thing I want to do is I want to talk about some concessions the State Engineer made in oral argument. And some of them might be better characterized as confirmations rather than concessions.

And before I do that, as an initial matter, there's only one attorney here in this courtroom with authority to speak for the State Engineer. So if that attorney makes a concession deliberately or inadvertently, right -- it could have been a strategic decision in consultation with his client, that's binding essentially on us, right. And so an intervenor,

such as SNWA, doesn't have any right to get up here and try to walk back a concession made by the State Engineer. That makes no sense.

So what are these concessions and confirmations? Well, first of all, historically groundwater has been managed on a basin by basin basis. We got that this week. Previously it had already been established by way of the State Engineer's testimony before the legislature in 2019 that historically groundwater and surface water had been administered separately.

The other thing we now know there's agreement on, at least with the State Engineer and the petitioners, is that NRS 533.024 mandates, it doesn't just encourage, it mandates that the State Engineer use the best available science.

There's also been a concession that there is no explicit authority in the statutes for the State Engineer to engage in conjunctive management.

The last -- the last concession or confirmation might be a better term for this one is that the six criteria announced in Order 1309 were developed after the parties presented their evidence. And I want to just dwell on that one briefly.

SNWA says, well, that's okay, and I'm paraphrasing here, because essentially this was really something more akin to a science symposium where everybody was just getting together, sharing their science and trying to understand how

this system worked.

Well, if that were really the case, then this ex post facto application of these six criteria, well, that may have been okay. I talked Tuesday morning about the statement from the hearing officer at the outset of the hearing that led to 1309 where she said it wasn't an adversarial proceeding, and it wasn't a contested case. If that were really true, it might have been okay to have the science symposium and then develop these six criteria, but that's not true because -- and we know that's not true, Your Honor, because we had eight aggrieved parties here in front of you.

I want to turn now to some items that are specific to my client, NCA.

Now we know as a starting point in the law the State Engineer's decision is considered prima facie correct. That's our point of departure in this proceeding.

Now, NCA has argued specific deficiencies in terms of substantial evidence in the State Engineer's decision to include the area encompassing NCA's production wells in the superbasin. That put the onus on the State Engineer to essentially rebut that, to point you to citations in the record, the substantial evidence, the best available science in the record that justify, that support the inclusion of NCA's production wells. But he didn't do it. He had his chance, and he didn't do it.

First, let's talk about the multiple linear regression analysis, the MLR analysis that was conducted by SNWA. As you may recall, Your Honor, NCA relied upon that in the hearing before the State Engineer because it demonstrated there was no correlation or a low correlation between water levels in the superbasin and what was going on with NCA's production wells, okay.

In response to that, the State Engineer had said, well, multiple experts criticized SNWA's MLR analysis, and therefore I didn't rely on it.

In response, not just Tuesday morning, but in the briefing, NCA said, no, that's wrong. Only two experts criticized SNWA's MLR analysis, and that criticism was limited to the application of that analysis in California Wash and in Garnet Valley, not in the Black Mountains Area.

But when the State Engineer came up and delivered his response, all he did was just say again many experts criticized the MLR analysis. He did not provide you to a citation in the record on appeal.

Your Honor, I suppose you already understand this and I -- but it's not your job to comb through the 50,000 plus pages of this record on appeal and start looking for -- you know, counting experts who are criticizing an MLR analysis. That was the State Engineer's job. And that makes sense; right? He built the record on appeal. He should be the one

most familiar with it, and he's the one making the argument about these multiple experts.

So in terms of the record, in terms of what's been presented to you, the best available science in the record is that SNWA's MLR analysis, as applied in the Black Mountains Area with regard to NCA's production wells shows no correlation or a low correlation and therefore justifies exclusion, not inclusion of NCA's production wells in the superbasin.

NCA also stated in its reply brief that there was no substantial evidence comprised of the best available science in the record to support the Muddy Mountain thrust fault as the basin boundary. Again, the State Engineer got up here and said there's substantial evidence supporting the Muddy Mountain thrust fault as the best boundary. But again, no citation to the record, nothing, nada, zip, zilch.

So these failures alone on the part of the State Engineer in this proceeding mean there was no substantial evidence for inclusion of NCA's production wells in the superbasin. That in itself, if you get past authority, which we're going to talk about as others have talked about, that in itself would entitle NCA to a remand on that question, a remand on what is the appropriate southeastern boundary of the superbasin, and does that boundary include or exclude NCA's production wells.

Now, the reason I have this up here is perhaps the

State Engineer thought that presenting this to you would be substantial evidence for inclusion of NCA's production wells, but there's a problem with that, Your Honor.

If you look at it, the very bottom of the map, and this is folded in half -- I'll state for the record this is the State Engineer's exhibit. It is derived from record on appeal Number 69 from pages 41982 through 41984. It's essentially a map of the superbasin, and there's several hydrographs, I believe is a term, superimposed on the map. And the hydrograph and the part of the exhibit we're interested in is the very bottom, BMDL-2, okay. That is a well, right, and the BM is for Black Mountains, and the DL is for Dry Lake, another party to this proceeding.

Now, the problem with that is that is not NCA's well okay. So that's one problem.

But the bigger problem is that well is to the west of the strike-slip fault that we talked about on Tuesday morning, Your Honor. You may recall that I presented you with a couple of slides. I presented you with Slides 17 and 20 for my presentation, and I think maybe this is a good point here. I'll go ahead and switch out. So just kind of you can see there it's BMDL-2.

I'm going to put a different exhibit in here. This was Slide 17, and it's from the record on appeal Number 973 at 52605. And you may recall, just kind of bringing you back,

Your Honor, to Tuesday morning, we identified the Dry Lake regional thrust fault as this dotted black line trending southwest to northeast. And then to the right of that or to the east and south of that is the strike-slip fault. This is the one discussed at length during the hearing by NCA's expert, and we established that that arrow is not pointing to the horizontal red line. It is pointing to a dotted blue line trending northeast -- excuse me, southwest to northeast.

And then finally, further to the right, further to the southeast is the Muddy Mountain thrust fault, yet another dotted black line trending southwest to northeast.

All right. And so the significance of this is you can see the strike-slip fault, the dotted blue line. Sitting right on top of the dotted blue line is BMDL-1, okay. That's not the one we saw just a second ago on the exhibit I had up there, okay. That one is BMDL-2, all right. That is the one the State Engineer showed on that demonstrative exhibit for inclusion of the Black Mountains Area in the hydrographic basin.

And I'm happy to switch the slides back if you want.

THE COURT: No. I actually have this right here, and I'm looking --

MR. FLAHERTY: Perfect.

THE COURT: Yeah. So, yeah.

MR. FLAHERTY: And so here's the problem, right.

BMDL-2, well, sure, it justifies, you know, this is consistency, this correlation between the water levels and that well in the superbasin. It does, in fact, justify inclusion of a portion of the Black Mountains Area in the superbasin, but not the portion that includes NCA's production wells. Because right below that green dot, BMDL-1, you see the blue and the red squares. Those are NCA's production wells and monitoring wells, and they are sitting on the fault, in the fault.

THE COURT: Just so I'm clear, the point is that the BMDL-2 is actually within the strike-slip fault whereas BMDL-1 and also the production wells sit on top of the fault?

MR. FLAHERTY: I can't confirm that. The point is --

THE COURT: Or close to it.

MR. FLAHERTY: The point is the BMDL-2 is to the west of the strike-slip fault?

THE COURT: Okay. West. Okay.

MR. FLAHERTY: -- which could be a boundary, right.

And NCA's production wells and monitoring wells are in the fault itself. I don't know where BMDL-1 is. I don't know if it's in the fault or if it's in the superbasin. I don't know.

THE COURT: Well, I guess you can't really tell. I mean, it looks very, very close to the fault.

MR. FLAHERTY: It does.

THE COURT: Maybe -- maybe it is a little bit to the

west of that. Okay.

MR. FLAHERTY: But apparently BMDL isn't cited on that State Engineer exhibit. Apparently they relied on BMDL-2 and the hydrograph for that.

And then I just have another slide here, Your Honor, that makes it just a little bit -- this is Slide 20. And this is from the record on appeal.

Oops. So everybody can see it I'll move it a bit.

Record on Appeal Number 990 at 52909, okay. And as I recall -- as you may recall this was from a larger exhibit, and there was a little square that was blown up, and this is the blown up square.

And this just shows it to you again, Your Honor. The little red glob on the dotted blue line is NCA's production wells. And on this exhibit it shows BMDL-1 and -2 wells off to the -- off to the left and off to the west, okay.

And this has -- the dotted purple line is the proposed administrative adjustment to the boundary off the fault just to reflect the fact that NCA's wells are in the fault.

So the point of all that, Your Honor, was that that blown up exhibit with BMDL-2 in the Black Mountains Area, that is not substantial evidence comprised of the best available science in the record that would justify inclusion of NCA's production wells in the superbasin.

Now, and the significance of this will bring us back to Order 1309 itself, and I'm not going to try to put the slides up again, Your Honor -- or actually I guess I can use the ELMO. And just this is just a quote, a block quote from Order 1309, and you can see there --

THE COURT: The other way.

MR. FLAHERTY: Let me turn it the other way, please.

You can see there I highlighted Criteria Number 5, okay. And Criteria Number 5 is geologic structures that have caused a juxtaposition of the carbonate rock aquifer with low permeability bedrock are consistent with a boundary. So a geologic structure would be a fault, okay. So a fault is consistent with a boundary. It doesn't say it is a boundary, but it says it's consistent with a boundary.

And then Number 6, I'm going to try to paraphrase this one a little bit. It says, when there's uncertainty, right, there's information indicating a close hydraulic connection, but there's uncertainty, limited, poor quality or low resolution water data to determine the extent of the connection. It says a boundary should be established such that it extends out to the nearest map feature.

Well, if we extend out from the superbasin to the nearest map feature, the suggestion for the hydraulic connection is BMDL-2, as shown in the State Engineer's exhibit.

When we extend out, we don't go all the way out to

the Muddy Mountain thrust, as the State Engineer did. We go out to the strike-slip fault identified by NCA -- by NCA's expert, right. We talked about the slides, the pictures, the data. That was arbitrary and capricious.

And we already complained and made our case that developing the criteria after the fact was arbitrary and capricious and a violation of administrative due process, but we went a step further here in that he did not even apply the ex post facto criteria in the manner he said he would, yet another violation of the administrative due process.

I want to switch gears now and talk a bit about the Humboldt River and Assembly Bill 51. And don't worry I'm not going to get into -- I'm not going to tell you all about the Humboldt River. I really want to talk more about the failure of AB51.

It was interesting SNWA relied on a United States Supreme Court case for the proposition that you shouldn't read too much into the legislature's failure to enact a bill. But, of course, in the context we're in here, the United States Supreme Court, that's just persuasive authority. That's just a bunch of -- another bunch of judges, right, who have an opinion, right.

I found a Nevada Supreme Court case. I'm going to have trouble pronouncing the name here. It's Salaiscooper -- S-a-l-a-i-a-s, Cooper -- versus the Eighth Judicial District

Court. 117 Nevada 892, and I'll say right now, Your Honor, it's not right on point, but I'll tell you about it, and it's more persuasive because it's our Supreme Court opining on the significance or not of failed legislation here in Nevada.

In that case, the appellant contended that the legislature's failure to pass a particular bill reflected the legislature's intent, okay. The Supreme Court said, no, it didn't, okay. So these Supreme Court disagreed with the appellant. But it said no. The reason the Supreme Court said no is because the legislature had not considered the bill. In other words, a bill was put in in front of the legislature, but then the sponsor of the bill pulled it, and the legislature never got a chance to consider it.

Well, that's not the case here. The Nevada Legislature did consider the bill in a lengthy committee hearing, and that's a committee where the bill died.

Now, I'm paraphrasing here. I'm not a stenographer. SNWA referred to that -- to AB51 or that hearing as a mess or a fiasco, and I just want to put a pin in that because I'm going to come back to it, okay.

So the *Salaiscooper* case stands for the proposition that legislative intent can be inferred from the legislature's failure to pass a bill after considering it, which it did in this case. The inference here as argued by NCA is that the legislature is not ready for conjunctive management. And I

think I made some arguments like that on Tuesday morning as well.

I want to talk now about the comment that the petitioners --

THE COURT: We'll let me -- so let me just ask you a question because, you know, you're talking about AB51.

MR. FLAHERTY: I am.

THE COURT: So, you know, as many bills are, many bills have different components to the bill, and that bill may fail for any number of reasons based on smaller components of the bill. How would a Court be able to look at a bill with all these other different kinds of components to it that may have ended up killing the bill to make a decision whether or not the legislative intent had to do with this portion or that portion or another portion? Do you see what I'm saying?

MR. FLAHERTY: I do. I understand, and I'm going to answer your question, but I'm going to start by encouraging you -- I know you have a lot of reading to do, but I would encourage you to take a look at the bill because it's only six pages.

THE COURT: Which is small.

MR. FLAHERTY: Right. And better yet, it's --

THE COURT: But how long is the testimony?

MR. FLAHERTY: Well, there's only about a page. There's only about a page of new text in the bill, and I'm

going to get back to that.

The testimony is basically a parade, and it's been a while since I read the legislative history myself, but I think there may have been already presentations, but it was a parade of people coming in in opposition, people with interest in the Humboldt River, Humboldt River Basin. And, you know, we can only speculate, right. And I would submit that's why the bill failed.

But to me that's a signal, especially after the State Engineer says, the (indiscernible) said to the legislature, hey, what you did in 2017 was helpful, right. That was the policy statement about conjunctive management. But he says I don't have the tools. I don't have what I need to move forward. He made it very clear. But then apparently these folks all came in, and the legislature said, well, whether you have the tools or not, we're not doing it.

THE COURT: Well, but that isn't fair to the Nevada State Engineer for me to speculate about what the legislative intent wasn't?

MR. FLAHERTY: What the legislative intent wasn't?

THE COURT: Right. Because you're saying that because -- well, I guess I should say because your argument is that this case stands for the idea that failure shows the legislative intent. And you said we can only speculate really as to why it sort of failed. So is that really a sound basis

for me to look at to see the legislative intent in not passing that bill?

MR. FLAHERTY: I think maybe we take one step to the left or the right here.

THE COURT: Okay.

MR. FLAHERTY: And instead of looking at it strictly in terms of legislative intent, we look at it in context because, I mean, the real reason I wanted to tell you about AB51, and I did, is because of what the legis -- excuse me, because of what the State Engineer said.

THE COURT: What his testimony was.

MR. FLAHERTY: He said he didn't have it, right. And we didn't get to 1329 on Tuesday. I'm not going to transgress your -- you partially sustained an objection from the State Engineer. I'm going to bring this up to the edge of that objection in a little bit and then stop, but --

THE COURT: So and let me just be clear. So the AB51 really had to do with conjunctive management; correct?

MR. FLAHERTY: Right.

THE COURT: Okay. But so then do you disagree that in the legislative declaration that that implicitly gives him the powers to conjunctively manage and that there's previous case law that shows that he can -- that he has to consider conjunctive management?

MR. FLAHERTY: No, I wouldn't concede that, Your

Honor.

THE COURT: Okay.

MR. FLAHERTY: I would not. Because of -- not just because of the failure of AB51, but because of what the State Engineer said himself.

THE COURT: Okay.

MR. FLAHERTY: And some of the other practical realities we've been discussing in this case, and we're going to talk about that more today, the separation of powers and things like that. So I think I started that point on relating back to a blinders comment that the parties here are asking you to put blinders on and ignore the science.

To the contrary, I think the State Engineer and intervenors on his behalf are asking you to put blinders on with regard to the reality of AB51 and what was going on up in the Humboldt River basin in connection with AB51.

And I already encouraged you to take a look at AB51. I told you it's just about a page of text. And here's the important thing. When you look at that page of new text, it says nothing about the Humboldt River. It's plainly not limited to the Humboldt River, which is one of the things that was represented to you, Your Honor. They said, oh, this has nothing to do with the Humboldt River. That was a unique case. That has nothing to do with what's going on here in the Muddy River basin, but that's not what you're going to see if you

look at the text of AB51. It would've applied in the Humboldt River and related basins, the Muddy River and related basins. It would've given the State Engineer the tools he said he needed to go forward with 1309, but he didn't get them.

So that brings us up to Order 1309 -- excuse me 1329, and the objection you sustained in part from the State Engineer.

And you said you were -- you mentioned the *Mack* case, right.

THE COURT: The judicial notice.

MR. FLAHERTY: Yeah. So I went ahead, and I took a look at the *Mack* case that evening I believe. The citation for that is 125 Nevada 80. And I looked at -- I focused really on pages 91 to 92.

And just so there's no surprises, I'll state that the case was abrogated, but it was abrogated on other grounds. So it's still good law for the proposition we're debating here. And indeed, the general rule, as stated in that case, is Court's don't take notice of the record in a different case even if that different case is connected. That is, in fact, the general rule; however, the Court said, like any good judicial rule, it's flexible in its application.

THE COURT: Right. I mean, if it's closely connected.

MR. FLAHERTY: And we're going to parse words; right?

THE COURT: Yeah. But then who defines closely related; right?

MR. FLAHERTY: Right. So the Court said under some circumstances it will take judicial notice of records in another case, and the Court said, well, to determine whether or not there's an exception to the general rule, you have to examine the closeness of the relationship between the two cases.

THE COURT: Right.

MR. FLAHERTY: In the *Mack* case, it was Darren Mack's murder conviction. I guess that's case A.

So you're familiar with the facts.

THE COURT: Oh, I'm familiar with the facts, yes.

MR. FLAHERTY: Okay. So --

THE COURT: We get a lot of preaching about judicial safety based on that case.

MR. FLAHERTY: Oh, that's right. I forgot about that part of the case.

So back to the objection into 1329. Now Slide 2 from my presentation on Tuesday was already in the record. I've already put in the record, and I read it to you, and then the objection came up and was partially sustained. And so I'm not going to run afoul of your objection -- of your ruling just by repeating the only thing we talked about in Slide *2*, which was just the title of Order 1329.

And the title of Order 1329 is --

MR. BOLOTIN: Your Honor, objection. The title is part of the exact -- this is James Bolotin for the State Engineer.

The title is part of the same document, and this *Mack* V Mack situation is -- I think your ruling, Your Honor, might be law of the case at this point. It's been ruled on on multiple judicial notice requests up to this point. And a key part of your rulings in those decisions was that you couldn't put stuff in that came after Order 1309. Order 1329 came after 1309.

THE COURT: That is correct.

So here are the issues with me even considering 1329. Mr. Bolotin is right. It came after the record on appeal in this case.

Two, I don't find that they are closely enough connected under *Mack v. Mack*, and I will tell you why. Under *Mack v. Mack*, I think that case actually had to even do with two cases that were within the same jurisdiction. And they were very closely connected. They actually had to do with the same person. So I think one had to do with a civil case and one had to do -- or I mean the family case, and one had to do with the criminal case.

In this case you're talking about a case that's out in Humboldt County, which is a completely different

jurisdiction than our -- or not jurisdiction, different District Court, and it -- while it may involve the same type of legal argument, I don't find that the facts are so closely connected that I can take judicial notice of it.

MR. FLAHERTY: Well, Your Honor, I just -- I don't want to -- I certainly don't want to debate with you, but, I mean, the facts are physics, science, and if the state of the law can be a fact, that's a fact as well. I mean, there -- things don't change. It's --

THE COURT: I mean, I can't even take judicial notice of, you know, cases that are in my own Odyssey system. You know, in order to make decisions, and I think, you know, even if it's like a, for example, you know, I've got a -- if I have a civil commitment case and I'm looking at the family court case, I don't necessarily -- I don't necessarily have the ability to take judicial notice of -- or actually I'll give you a better example.

I had a criminal case, a criminal case where the charges were child abuse and endangerment. There was a family case for termination of parental rights. I was not allowed to consider the termination of parental rights case in the child abuse and endangerment case, and it became relevant because -- and I could not look myself independently in that case to see what was happening regarding the trial in the termination of parental rights case, not to find the facts of that case, but

just to know when it was happening because I was planning on having the defendants in my court get remanded.

So the instruction was that I was given from my chief because of the *Mack* v Mack case is that it is only if the criminal defense attorneys actually bring it up to me as their information to me. So I can't independently look even though it's involving the same two people and that -- so that is the kind of close connection that even under those circumstances I think I have to be very, very careful about.

And I think if you're talking about physics and science, I just don't find that that's quite close enough for me to be able to take judicial notice of that.

MR. FLAHERTY: Let me try it a little bit differently.

THE COURT: Okay.

MR. FLAHERTY: I promise you I won't spend all afternoon on this.

THE COURT: No problem.

MR. FLAHERTY: Well, first of all, 1329 is not a -- it's not a District Court case, right. It's --

THE COURT: It's an order I guess.

MR. FLAHERTY: It's an order, right.

THE COURT: Which makes it even less so.

MR. FLAHERTY: Well, it's an order from an administrative agency. It's an order from an administrative

agency that is a party to this proceeding, okay.

THE COURT: And it still came after the record on appeal in this case. So I don't think it's really something that I can --

MR. FLAHERTY: All right. And just I will -- I won't run afoul of the objection. I just want to kind of preserve my point on the record.

THE COURT: Absolutely.

MR. FLAHERTY: If you were so inclined to revisit this later and change your mind, Your Honor, I would simply ask that you look at pages 6 through 7 of Order 1329, specifically the whereas paragraph that starts at the bottom of page 7 and carries over to the top of page 8 and consider what's stated there in the context of the issues before this Court and the State Engineer's testimony before the legislature in 2009 regarding AB51.

And with that, I am happy myself to move off of 1329.

THE COURT: Okay. Thank you.

MR. FLAHERTY: I want to turn now to the State Engineer's authority. And I'm paraphrasing you now, Your Honor, but I believe you said from the bench perhaps more than once on this question of authority, I need you to spell it out; I believe is what you said, okay. But the State Engineer and their intervenors, and what you were asking to spell out was the authority to do the superbasin with conjunctive management,

but they failed.

Now, they're pushing really hard on the argument that the superbasin as a basin and the boundaries thereof is a fact issue. It's a science issue, right. Maybe. Okay, let's say we're going to give them that. If we give them that, that doesn't change or resolve the legal issue which is, does the State Engineer have authority to form this superbasin and engage in conjunctive management. That's a question of law, and you get your shot at that *de novo*, Your Honor.

And we've talked about a lot with statutes cited by the State Engineer and intervenors. We heard about 533.024(1)(e), which the State Engineer has now informed us is just a lens that the legislature wants the State Engineer to look through. Well, whatever that means, a lens, that doesn't equate to authority to engage in conjunctive management.

We heard about the Muddy River Decree. We heard about 533.0245. That statute says it prohibits the State Engineer from impairing the Muddy River Decree, which makes a lot of sense because he's just an administrative agency, and that's a decree from the judicial branch. So he's prohibited from impairing that. But you cannot equate a prohibition on the one hand with authority on the other. The fact that you can't do this, the fact that you can't do A doesn't give you authority to do B. That's a non sequitur.

And the same can be said with regard to the

Endangered Species Act. The State Engineer -- I think we've heard testimony from CBD that, you know, prohibited from engaging in a take, right. They cannot do a take. Again though, the fact that you can't do a take doesn't equate to authority for conjunctive management.

And on that point, the State Engineer derives power from an express grant from the Nevada Legislature. He derives zero authority from the United States Department of Fish and Wildlife. He derives no authority from the United States Congress.

Now, don't get me wrong. With regard to the Endangered Species Act, we understand that the State Engineer has real and valid concerns regarding the Moapa dace, regarding what might happen if the federal government decides to get active. But concerns or fear, that's not a source of authority. The State Engineer doesn't derive authority from fear. No administrative agency does. He needs to express the concerns to the legislature, right.

Now, this brings me back to something I put a pin in earlier, the comment that AB51 -- it was a fiasco, okay. And I want to be careful with what I say here. I'm going to say something. I'm going to quickly kind of qualify it and put it in context: That's disrespectful to the legislature. Now, context. That's not a potshot at SNWA, you know. When I say disrespectful, I'm speaking in terms of the separation of

powers, okay.

We've got three coordinate branches of government, okay. The State Engineer is not a branch of government. Unless he's a twig. I don't know. There's three branches of government, right. And so it's not for the State Engineer to second-guess the legislature, okay. The State Engineer doesn't get to second-guess the legislature. The Governor can. The Governor has a veto. Court's don't really second-guess the legislature, but sometimes Court's intervene because the legislature perhaps has done something unconstitutional, but the State Engineer doesn't get to do that. It's not for this Court or the State Engineer to usurp the legislative function.

You know, at the outset of this hearing, Your Honor -- I want to hit a couple of points here.

I said that the State Engineer had created a situation where the irresistible force was colliding with the immovable object. Senior groundwater rights. Senior surface water rights or vice versa, right.

I want to use a different kind of visual now. I want to talk about that old expression the square peg in the round hole, okay. The round hole is the Muddy River Decree, right. It came around in 1920, right, 1920. There was water coming out of the ground and making a river. Nobody didn't spend a lot of time figuring out, hey, where the heck does that water come from? They were, like, wow, water. Let's get it, right.

Let's get it, you know, and we wound up with the Muddy River Decree. That's the round hole.

The square peg is reality. It's where we are today, Your Honor. We've got multiple groundwater users. You heard testimony about technology, population growth. You know, now we're getting water from the ground in the areas surrounding the Muddy River. And for purposes of this case, we're talking about 1100 square mile area. So things have changed, okay.

We've also heard a lot of talk about you're the decree court. You're the decree court. Now, although they're telling you you're the decree court, you're the decree court, and even though this decree originally came from this Court apparently, they're also telling you that you have no authority to change it either, right. The State Engineer can't change it. You can't change it. I guess the implication here might be nobody can change the Muddy River Decree. And maybe there's some heads nodding behind me, like, oh, yeah, right. Yeah. Right.

Okay. So let's proceed. Let's proceed on this basis. We heard this morning about a tentative settlement agreement among MVIC, SNWA and the State Engineer. And apparently under this tentative settlement agreement, you, as the decree court, are going to appoint a watermaster or a special master, and that special master is going to be the State Engineer who of course has already reached an arrangement

of sorts, tentatively reached an arrangement of sorts with MVIC and SNWA.

Now, Your Honor, I don't know if you use special masters a lot. I don't. I don't have a lot of familiarity with them.

THE COURT: So, I mean, the Eighth Judicial District Court does use special masters for specifically, you know, large cases, complicated discovery issues, things like that.

MR. FLAHERTY: Right. So my understanding then is a special master is essentially your proxy; right?

THE COURT: Correct. So usually they do -- they would make some sort of reports and recommendations that I would approve. So it's kind of like a hearing master. So we have lots of hearing masters, and I was a hearing master. So we do either a report or recommendation -- well, mostly it's a report and recommendation that is then approved by the Court, the District Court that oversees that special master.

MR. FLAHERTY: And I'll just speculate, Your Honor, that you were a hearing master because the Judge who appointed you thought you were reliable, a smart person, someone that can be counted on.

And so now if this settlement goes through, and, of course, this settlement presupposes that you haven't completely invalidated Order 1309 for lack of authority. But suppose this settlement goes through. So by appointing the State Engineer

as your special master, you're saying, okay, I'm comfortable with the State Engineer being my proxy. I have faith. I don't think he's in any way compromised and impartial of objectivity in this situation.

So let this -- so stop right there for a second, and now let's go back to 1920. Right. None of these -- well, I'm not going to say none of the petitioners because we have these intervenors and quasi-petitioners here, but so NCAA, of course, was not a party in 1920 in the Muddy River Decree, right.

So going back to this round hole, I guess the best analogy I can come up with is that the groundwater users in this new superbasin are essentially the equivalent of people who are, quote, unquote, stealing water, right. They don't have a decreed right, but they're intercepting this water. They're taking this water. And so it's like they're stealing water.

And, in fact, you saw a slide the other afternoon from SNWA I believe. They filed a notice of alleged violation with the State Engineer. And they said every groundwater user in the superbasin is stealing our water. Okay.

So now we're all going to go to the special master. All right. I know what I'm going to say when I get accused, my client is going to say when I get accused of stealing groundwater. I'm going to say, Judge, Your Honor, what are you talking about? You told me I could have that water. Well, how

is that going to work, Your Honor? They're trying to jam a square peg into a round hole, and it's not going to work.

But it works for them, of course, and I don't fault them. Water is a scarce precious commodity. They want every molecule they can lay their hands on, okay. But it's not their water. I understand it's not my client's water either. It's just not their water, and they keep on talking about the Muddy River Decree and how it can't be fixed -- excuse me, can't be changed. You can't change it. The State Engineer can change it.

Well, you know why they don't want to go back to the legislature, Your Honor, because the legislature can change the Muddy River Decree. The water belongs to the public. As counsel for Dry Lake reminded you, it belongs to the public, and the legislature represents the public, okay.

So this is an attempt to evade an inconvenient meeting with the legislature. I think inconvenient is an understatement.

So I've digressed a little bit, Your Honor, and just on that point, just the idea that my client is having to explain itself to a hearing master about why it's using water when the hearing master is the person, entity that said you could use the water, we're entering the theater of the absurd at that point.

But I want to continue with the discussion of

authority.

You heard about 534.110, sub 6. That's the authority you investigate. That doesn't equate to the authority to engage in conjunctive management.

534.110, sub 2, sub b, authority to engage in pump testing does not equate to the authority to engage in conjunctive management.

I believe Dry Lake covered 533.430, sub 1, and 534.020, sub 1, the 533 statute being surface water and 534 being groundwater. But those basically stand for the proposition that you got to protect existing rights. Well, Order 1309 does not protect existing groundwater rights. It guts them.

533.120 and 534.120, that was rule-making. But as you, yourself, observed, Your Honor, it's only rule making in furtherance of express powers conferred by law, by the legislature. We don't have that here.

534.030, that's an administration of a designated basin. That's no help because this is not about the State Engineer designating a basin. It's about creating a superbasin for purposes of conjunctive management.

We even heard a citation from the Water Words Dictionary. That's the State Engineer's own document. He can't rely on himself for authority in this context, Your Honor.

The arguments from the State Engineer and the intervenors in terms of statutory authority is the statutory equivalent, I guess, of throwing a bowl of spaghetti against the wall and hoping something would stick, right. The noodles are the different statutes, okay.

But it's just a big mess.

Now that's the way I've described it.

SNWA described it in much loftier terms, as a mosaic of power. Cue music, please.

Okay. Well, I -- you know, at least a mosaic I guess is typically made of tiles. That might be something solid, but that's not the case here.

Really what we're talking about is a house of cards, okay. It's a flimsy legal argument constructed on the gossamer threads of wishful thinking. Order 1309 is invalid. It's an invalid exercise of conjunctive management that the State Engineer does not have the authority to do. He couldn't get it from the legislature. He still doesn't have it.

Your Honor, I'm happy to be redundant now, and thank you for your patience, your diligence and your careful attention and consideration.

THE COURT: Okay. All right.

So next we've got Georgia-Pacific.

Mr. Foletta.

MR. FOLETTA: Yes. Thank you.

ARGUMENT FOR GEORGIA-PACIFIC AND REPUBLIC ENVIRONMENTAL

MR. FOLETTA: Thank you, Your Honor. Lucas Foletta for Georgia-Pacific and Republic.

I think the case has been pretty well argued at this point on both sides. That said, I do want to make a few points in a few different areas just to mainly respond to some things we've heard from the State Engineer and parties supporting the decision on the last phase of the case.

The first area I want to talk about, really, is the standard of review. There's been a lot of discussion about it. What I want to talk about is really what seems to be the State Engineer's principal defense of his evidentiary findings. What you see in his brief and what you hear in the argument a lot is that obviously he's entitled to peak deference. These are highly technical decisions. He proposes that there's sort of this spectrum of deference on which this case sits at the highest deferential end of the spectrum and that you should refrain from evaluating the evidence substantively. That's not how substantial evidence works, and if it was there wouldn't be a substantial evidence standard because you wouldn't be doing anything other than deferring to the State Engineer's factual findings.

We've said it a couple of times, more than a couple of times that the substantial evidence standard requires the Court to determine whether a reasonable mind would accept the

evidentiary basis of the State Engineer's decision as adequate. That does not mean that -- that does not -- what the State Engineer proposes, that essentially he can weigh evidence of one party more than another, he can be persuaded by whatever he finds to be persuasive, and that not being persuaded by someone's evidence is not a legal failing, it's just his decision not to be persuaded by that evidence. But that doesn't satisfy the substantial evidence standard because the question remains.

And what the function of the Court is is to determine that whatever the basis of the State Engineer's decision was must be -- must meet the objective standard of a reasonable person who is looking at the same evidence. And that reasonable person -- you have to decide that a reasonable person would have deemed that evidence to be adequate. That means you have to look at the evidence. You have to do your best to understand what the State Engineer was thinking, why they were evaluating the evidence they were, why the State Engineer was persuaded by what he was persuaded by, and you have to look at that in the context of the record as a whole.

The idea of deference is that -- and it's kind of slippery. It's hard to decide what that actually means when you're talking about substantial evidence. But what the Nevada Supreme Court has said in Wilson v. Pahrump, which is the case that the State Engineer cites for this proposition of kind of

peak deference, is that the deference owed is in relation to the rule that the reviewing court is not to substitute its judgment for that of the State Engineer. What that means is it's not your job to decide whether the State Engineer was right or wrong, it's your job to decide whether there is a legitimate basis for the State Engineer to have made the decision that he did. And that's where the notion of arbitrary and capricious in this comes in.

The reason I bring that up is I just want to talk about a few pieces of evidence that we haven't talked about in relation to the standard and give you a sense of how I think you can go about looking at the record. So we have talked in our briefs and other people have about the idea that some of the evidence that was presented to the State Engineer was not of a sufficient quality to allow him to reach the decisions he reached about the relationship of the basins and the pumping levels. And Ms. Peterson had talked about this, too. You know, there was evidence put in by Vidler at the hearing about the difficulty of measuring water levels in wells. You know, you heard about transducers and so forth.

There was also evidence put in at the hearing from, I believe it was North Las Vegas, that talked about the impact of barometric pressure on water levels and that what your barometric pressure is could have an impact on what your water levels are. The idea is that this is another factor that could

lead to a lower water level; something other than just the pumping going on. And so that raises the question of whether -- what was actually the cause of water levels changing.

We at the hearing also talked about the fact that there were disparate measurement techniques used to measure some of these water levels, groundwater levels and so forth. And that because those disparate measurement techniques were not calibrated to one another, it wasn't -- you couldn't reach -- you couldn't rely on the data because it wasn't clear that the data was measuring the same thing in the same way.

These are all faults that undermine the credibility of the evidence that the State Engineer relied on. And it is appropriate and, in fact, it is required that you look at that evidence that was put into the record as to the credibility of the evidence he relied upon and make a determination as to whether it was reasonable to rely on that evidence. That is the type of evidentiary review you should undertake.

You can do other things, too. It's not -- you know, a reasonable person wouldn't conclude that there is a rational basis to reach a particular factual conclusion if there's one fact in favor of that conclusion and a thousand facts against it; right? So the weight of the evidence is something else you can look at. And so you have a lot of tools at your disposal.

It is not an attractive task, but it is something the

Court has to do. And I'm not suggesting you're not going to do it and don't want to do it, but I do think the way that the standard has been talked about suggests that you're not supposed to do a review of that kind at all, and that's not the case.

The next area I want to talk about is the due process concerns that we've raised and that have been discussed. So we raised due process concerns, as we've talked about before, in a number of different -- or with respect to a number of different aspects of the case. Principally, our due process concerns relate back to the notice provided in the case. You know, I don't know Your Honor's career chronology, I don't know how much administrative law experience you have. Certainly you obviously have experience with notice.

THE COURT: Absolutely zero. I was a criminal defense attorney before this.

MR. FOLETTA: Okay. Well, perhaps something like criminal law, notice is a -- is the fundamental due process consideration, generally.

THE COURT: So as a criminal defense attorney, I am very familiar with due process.

MR. FOLETTA: Right. But in the context of administrative law, what's so important about notice is that unlike, perhaps, in a court proceeding, whenever a government agency, in particular the State Engineer, is going to undertake

a particular action, there's a requirement that they provide the public with notice; right? And sometimes the nature of the notice depends on the nature of the action, but the fact is that every consequential government action of the type that we're talking about here is initiated with a notice.

You know, I don't want to call it an antiquated requirement because it's not, but sometimes you could view it as impractical because, you know, how many people are running around the State Engineer's office checking bulletin boards to see if something is going to potentially happen to them. But that notwithstanding, the law is crystal clear that notice is an essential requirement of due process as it relates to administrative proceedings like this.

The thing that's important to keep in mind about notice, and I think this is a general principle that is kind of in response to some of the things we've heard about this argument, is that the harm associated with failing to properly notice an administrative proceeding is presumed and that's because the harm occurs with respect to the public generally.

Notice is very much about the person who's not at the proceeding, not so much the people who are there, right, because there's a lot of professional people here who watch this stuff, who show up to State Engineer proceedings all the time, keep an eye on things and will be there potentially whether there's an appropriate level of notice or not. But

there's a lot of people who don't, and so the protection that notice affords is for the public generally.

So if there is a deficiency in the notice, it cannot be cured because, you know, all the same players who show up at all the State Engineer proceedings showed up at this hearing and should have had a pretty good idea about what was going on. That doesn't work. If the notice was bad, the notice was bad, and the case has to be vacated, as we've talked about before.

The reason I'm bringing that up principally is in response to the argument of the other side, for example, with respect to the criteria, the six -- the criteria of six. I think it was Mr. Taggart who suggested that, well, the criteria shouldn't have been a surprise to anybody. This is the type of criteria anybody who's looking at this type of data or trying to make this type of decision would rely upon. And so -- and everyone was there at the hearing. You knew we were having a hearing on 1303 so, you know, you had your opportunity to put evidence in and, you know, you should have known where this was heading. That kind of goes to my point, which is that it's irrelevant what people who were at the hearing knew or should have known about what the criteria was or was not going to be.

Southwest Gas and *Dutchess* are very clear that the State Engineer has to give notice to the public of the factual basis that the decision will be relied upon, and in this case that did not happen. I was just going to read the paragraph

that kind of makes that point, which is that -- this is in Order 1309 where the State Engineer is talking about the criteria and he says, quote, "The State Engineer has considered this evidence and testimony." He's talking about the evidence regarding consolidating the basins. He says,

> On the basis of a common set of criteria that are consistent with the original characteristics considered critical and demonstrating a close hydrological connection requiring joint management in Ruling 6254 to 6261, and more specifically including the following.

And then he lays it out. The point here of reading that quote is that the State Engineer was clearly articulating the criteria on the basis of his review of the evidence after the fact. He wasn't articulating a criteria that everyone should have known was taking place. It was the product of thought.

The other way we've raised notice was just in relation to the fact that it's our contention that a management and policy decision was made in this case, in particular the decision to consolidate the basins and subject them to conjunctive management and joint administration. The principal rebuttal to that is that really didn't change anything. You know, when we subjected these basins to conjunctive management

and joint administration, effectively removing the basin lines from the map, you know, that didn't -- affect is my term, a cognizable injury on new water rights holders in those basins because the State Engineer hasn't taken the next step to actually engage in additional management of the basins that might affect you differently now because you don't have the same priority you had when we were doing this basin-by-basin.

I think Mr. Robison talked about this really well when he talked about the affect of the order on his client. So he talked about the subdivision map and being shut down, you know, his client's project being shut down and that 1309 effected a clear and concrete, you know, deprivation on his client in that way.

My clients are a little differently situated but they're no less harmed by the action the State Engineer took in 1309, which is to say I think it's misleading to suggest that just because the next step hasn't been taken, you haven't already been deprived of something, because water rights holders clearly have -- a water right is a paper right. It is -- but notwithstanding that it's a paper right, it's still a property right, as we've heard many times. So it's the same -- it's a bundle of sticks like every other property right. But very much because a water right is a property right, it very much is the legal attributes that make up the right.

And so property rights, if you have a piece of

property, say a piece of land, you can sell it; you can build on it; you can not do anything with it; you can hold onto it. Property rights -- or, excuse me, water rights are the same. You can sell it. You can ask the State Engineer if you can pump. You can move the water from one place to another. You can make decisions about how to run your business based on what you think you can do with the water, what your options might be. The point is that the attributes of the right are the things you can do with it in the context of the legal framework that governs it. So the legal framework that governs it in part is based on prior appropriation.

Obviously, when you change the way that the State Engineer is going to address any request you might make in connection with your right, meaning if you change the framework or the backdrop that is going to frame his decision whether to allow you to pump or not, allow you to move your right or not, you have affected a change to the right. Right? You've made it different than it was before. And so just because they haven't come in with a second step and decided who's going to get water and who doesn't doesn't mean that nothing yet has happened. Clearly very much has happened.

People who are now in the position that my clients are, having to make decisions about where they're going to get the water, are they going to be able to get water, can they grow their business here, do they need to move, there are all

sorts of considerations now they have to make because the nature of their right changed. That is a -- you know, was proximately caused by 1309. And I think if you listen to some of the intervenors, they actually make that point for us.

You hear the -- like the Church, NV Energy, their kind of take is like, well, you know, if you hold on to water rights long enough in Nevada there's going to be some bumps in the road and what you've really got to understand is that all that really matters is how old is the right relative to every other right that comes after you, not just the ones in your basin.

But everybody on this -- you know, I'm going to regret this, but a new mega-list of water rights that is now the first water right ever issued in Nevada, and the person on the bottom is the last one. That may be conceptually accurate to some degree, but the fact is those basin lines have differentiated that list for decades. And so by changing that fundamentally, they've changed the nature of the rights that my clients hold. And consequently there clearly was an impact that gives rise to the due process consideration.

The other area we talked about due process in is -- there's a couple and I'll go real fast. You know, Your Honor had highlighted this in some questionings. The other due process consideration was just the establishment -- or failure to notice the fact that a criteria is going to be established

at all. I won't talk about that, but that's just sort of a reminder that that's on the due process kind of checklist.

The other thing that's in our brief that I will talk about just probably for one minute is the idea that even the consideration of the Endangered Species Act and the specific impact on the dace was not noticed at all. So if you go back and you look at the notice, you've got the 1303 categories. There's nothing in there about the dace, endangered species, anything like that. There is a criteria about stream flows, but when you look at the decision the impact of stream flows on the dace is prominent. It's one of the key planks of why the State Engineer made the decision he made.

And again, going back to *Dutchess* and *Southwest Gas*, you've got to know what the factual basis of the decision is going to be. There was no specific notice of particular impact on the dace being at issue. And so -- or maybe not being at issue, but potentially serving as a fundamental reason why the State Engineer would take the action they did, and so there's a failing there as well.

The last area I really want to talk about is the question of authority. I think that the best place for Your Honor to -- or the best way to work through this is to in particular focus on the statutes that the State Engineer cited in the order; right? The statutes that the State Engineer cited in the order because there's, I think, four or so that

are in the section on authority. And then to consider the arguments that the State Engineer has made here as to what his authority was.

The principal argument that I heard or articulation of the source of authority is the idea that the State Engineer has got a duty to protect senior water rights. The State Engineer has got a duty to preserve decreed rights, or to not violate a decree, rather. The State Engineer follows the best science. That's the policy of the State. And so if the best science says that senior rights are going to be jeopardized or decreed rights will be violated in the absence of action from the State Engineer, then the State Engineer has the authority to take action and protect those rights. I think that's a very problematic view, and I'll say why.

But just in terms of the analysis itself, the reason I'm suggesting that you focus on the order and the State Engineer's arguments is not because I don't think other people have things to say about it, and I think people have pretty much dispatched with all these arguments. So they don't concern me.

But the question is did the State Engineer have authority to do what he did in this case? It's not a search and rescue mission to go out and try to find a statute, any statute, a principle, any principle that could somehow, some way be brought enough maybe to justify this action. The State

Engineer did what he did in this case for a reason and the question is, is the reason legitimate? Is the reason -- is the law that he provides you a basis to do it?

The reason I think that the way Mr. Bolotin characterized the legal basis here is so problematic is because it is -- it undermines the entire statutory scheme. And I talked about this before, but if the idea is that -- or the idea he seems to be expressing is like we've got this prime directive, we protect senior rights, we don't violate decreed rights, we follow the science. If the science says something bad is going to happen to those people, we do something. We have the authority to do something to stop it.

There is no rule of law that says that. There's no grant of authority that says, State Engineer, go forth and protect senior water rights. It reflects, I think, an over-generalization of the prior appropriation doctrine. What I mean by that is that we have a very specifically articulated regulatory scheme for water law. The State Engineer's authority is set forth in numerous statutes across several chapters. People have pointed out multiple times that virtually in every case or every statute that seems to be even relevant to this conversation, it articulates a basin by basin approach.

What the State Engineer is saying is that, well, that's all fine, that statutory scheme works as long as the

science doesn't tell us we need a different rule, because if the science says that basin by basin doesn't work because senior water rights will be undermined or jeopardized because of applying the rules in that way, then we get to do it a different way. We get to apply the management tools we have on a multi-basin basis, on a joint administration basis under conjunctive management. And that throws the baby out with the bath water, like completely, because it means that the entire regulatory framework we have only applies under a certain set of circumstances. But the Legislature didn't say that.

The Legislature doesn't say this is the system for when the science is consistent with the system, and when the science is not consistent with the system you can do whatever you need to do. Like I said, there's no rule for that. There's no rule that authorizes the State Engineer to sort of freelance and figure out ways to protect senior water rights holders.

The prior appropriation rule, which is where all this comes from, if you listen to the State Engineer, is specifically articulated in the statutes. And what's interesting about it, and you can kind of find this -- I'll give you a few. NRS 533.430(1), NRS 533.265, I think it's (2), and 533.090(1) and (2).

These statutes -- I got this from the *Walker River* case that people have been talking about the last couple days

where the court says,

> Nevada water statues embrace prior appropriation as a fundamental principle. Water rights are subject to existing rights. They're given dates of priority and determined based on relative rights.

So this is the Nevada Supreme Court articulating the source of the prior appropriation rule.

These statutes, again going to my point, don't say that the State Engineer can do what he needs to do to protect senior water rights. They articulate a clear basis for application of the prior appropriation rule. So it applies in a context; that's the point. And so the prior appropriation rule applies.

For example, if my client wants to go out and pump water, they've got to contend with the prior appropriation rule and the State Engineer can't let them pump water if it's going to jeopardize a senior right. It's not -- the prior appropriation rule isn't a grant of authority.

If you look at the State Engineer's brief, what he says is we've got an ongoing duty to protect senior water rights. End statement. No citation, nothing, no statute, no case, no nothing. It's taken as a given that this is just something the State Engineer does. And I think at a high level that's true, but it's not fair to use a generalization that

describes the nature of the State Engineer's obligations under the statutory scheme to claim that he's got authority separate and apart from the existing statutory scheme. He's saying that rule sits above everything else and it doesn't. It sits in the context of everything else and that's how you have to understand it.

The last kind of technical point I want to talk about is -- well, maybe I should just tie that off. Again, just to close that point, it's our view, obviously, that the State Engineer does not have the authority to make this decision. It's certainly not based on his kind of like policy-driven articulation of his obligations and it's not rooted in any specific statute we've talked about here.

The timeliness issue that Mr. Dotson raised a couple times about whether we could even be here, I don't mean this disrespectfully, but honestly when I read that the first time I just completely threw it away. I thought, well, that's ridiculous. Like, of course we're legitimately in this court. And maybe it's because I do administrative law all the time. I don't know. But what this order says, that order in paragraph 1 says,

> The Lower White River Flow System consisting of Kane Springs Valley, Coyote Springs Valley, et cetera -- it names all the other valleys -- is hereby delineated as a

single hydrographic basin. The Kane Springs Valley, Coyote Springs Valley, dot, dot, dot, are hereby established as sub-basins within the Lower White River Flow System hydrographic basin.

I mean, the State Engineer exercised authority. It's in an order. The order is live. It's appealable. It doesn't matter that even if, which it didn't, but let's say there's a prior order on the topic, it doesn't matter. I mean, state agencies visit and revisit issues like this over and over and over again, and if they exercise authority in the form of an order, it's appealable. There's no res judicata. There's nothing like that. We're clearly legitimately here. And I agree with everything people have said about interim orders.

I think just to close, I think I would say that the thing that's kind of noteworthy about this proceeding is that the decision to subject the basins to conjunctive management and joint administration didn't do anything to actually solve the problem. And that's not for this Court to decide, but it has really just created chaos and confusion and it's been counterproductive.

And whether or not the State Engineer intended to immediately scramble priorities, as people seem to concede now, it would be the inevitable result of the joint administration of the basins and has left everybody trying to figure out what

comes next and how to deal with it. And that alone demonstrates, I think, the nature of the harm that has occurred in the case. The State Engineer kind of suggests that, well, that wasn't the intent of what we were doing and the idea is that we will deal with management later. But if that's true, then there was no reason to consolidate the basins, subject them to conjunctive management and joint administration in the first place. It was done to set the table for the future actions.

That doesn't mean nothing has happened, but it was the first step in a series of actions to manage the basins. But it had to be taken because of how they want to manage the basins. If they want to subject everyone to a pump limit, if they want to, you know, curtail rights, they had to take this step first because obviously they felt like it was the best way to manage everybody by putting them in the bathtub together. That's a real thing, and it has had no really perceptible impact on the outcome of the substantive issues, I'll say, to date.

The one other point I want to make is that there's a question about whether this whole thing is sort of form over substance and it goes to kind of the authority question. Like, did the State Engineer actually do something different or could he do indirectly what he did directly in the order? And I think that's kind of a difficult question to answer. The first

part of the answer is no. If what you're saying is could he scramble rights within a basin on his own --

THE COURT: No.

MR. FOLETTA: And I know you're not asking that.

THE COURT: No. That's not what I'm --

MR. FOLETTA: But I'm saying that, no, he couldn't do that; right? And so my point is that that's why 1309 is not -- is not something that did nothing or something that could be achieved another way. It did a very specific thing that could never happen any other way.

The other part of the question is can the State Engineer, I suppose, manage things the same on a basin by basin basis, or at least consider some of the same considerations? And I agree with what other people have said, is that I think he could to some degree do all of that. It's a little hard to say because we don't know what the tools are he's going to use next.

With all that, Your Honor, we would ask that you vacate the order for the reasons we've described. Thank you.

THE COURT: Thank you.

All right. So why don't we take a ten-minute break. Does that -- why don't I say this. Why don't we do a fifteen-minute break. So we'll come back at 2:05. And then I think we close up with Lincoln and Vidler. Thank you.

(Proceedings recessed at 1:52 p.m., until 2:09 p.m.)

THE COURT: All right. Are we back on the record?
COURT RECORDER: Yes.
THE COURT: Okay. Are we good on time?
Great. So, Mr. Klomp, you're going first?
MR. KLOMP: Yes. Thank you, Your Honor.
THE COURT: Okay.
MR. KLOMP: I'll go first and then Ms. Peterson will wrap up, the co-petitioner.
THE COURT: Sounds good.
MR. KLOMP: Wayne Klomp on behalf of Lincoln County Water District. And again, I just want to echo the sentiments of all counsel of gratitude for you and the courtroom staff for your patience with all of us.
THE COURT: Well, let me just say to everyone, it has been a pleasure to have the finest water law attorneys in our state in my courtroom. It's been a real treat for me. So I really appreciate all the hard work that you've all put into this. I know that pouring through 50,000 pages of record on appeal and getting the briefs prepared for me has been a monumentous task, so I do want to say that I appreciate all of your hard work.
MR. KLOMP: Thank you, Your Honor. So in the famous last words of every attorney ever, I will be brief.
ARGUMENT FOR LINCOLN COUNTY WATER DISTRICT
MR. KLOMP: First, I just want to correct a couple of

issues that were made during answering statements and then conclude with one point about the bundle of rights that Mr. Foletta spoke about.

There was a statement that the case *Mineral County* does not apply because it was dealing with a decree and here we're dealing generally with water rights, groundwater rights, not a decree. *Mineral County v. Lyon County* is 473 P.3d 418. That case was a certified question to the Nevada Supreme Court from a federal court asking about the reallocation of or reprioritization of rights and the application of the public trust doctrine to Nevada's -- all of Nevada's water, groundwater, navigable waters and non-navigable waters.

The conclusion of the *Mineral County* case was that although -- and this is from page 425:

> Although we recognize that the public trust doctrine applies to prior appropriated rights and that the doctrine has always inhered in Nevada's water law, we hold that Nevada's comprehensive water statutes are already consistent with the public trust doctrine.

So that tells us two things. One, yes, the public trust doctrine applies. But also, that the comprehensive statutory scheme already accounts for the public trust doctrine. It does not provide an independent basis for Order 1309.

And specifically, the *Mineral County* case goes on to talk about that principle, that it's already within the statutory scheme. And now I'm going to turn to page 427 of that decision:

> Finally, the State Engineer is permitted to declare preferred uses and regulate groundwater in the interest of public welfare, which includes -- and then it goes into the statutory basis for doing those things -- curtailing groundwater rights during water supply shortages for example.

And then it goes on to say,

> The statutory scheme therefore sufficiently places an affirmative duty on the State Engineer to maintain public trust resources.

And again, that's from the Nevada Supreme Court stating that that is not an independent source of authority. The authority is within the comprehensive statutory scheme. Second, there was a criticism by one of the parties about the placement of -- I think it's KMW, the well for -- in Kane Springs Valley.

THE COURT: For Kane Springs. Uh-huh.

MR. KLOMP: Yeah. And I wanted to talk a little bit about why that was placed there, and we're going to go to Slide 2. So this is a memorandum to the State Engineer from a

deputy state engineer. It's dated June 21st, 2000. This is in the record at 36658.

And go to Slide 3. And I'm going to have trouble reading this because the part we want is under that blackout. But what it says is -- he's talking about placing two more wells in the carbonate on the north end of CSI's project. And it says,

> One should be along the line between MX-5 and Ash Springs and the other one -- the other somewhere in the mouth of Kane Springs Wash as it enters Coyote Springs Valley.

So that provides really the basis for why that well was placed there. It was where the State Engineer wanted it.

And I want to follow up now with another one of Mr. Foletta's statements. He talked about the bundle of sticks and how the -- we have vested property rights. A water right, an appropriation of water is a vested property right.

And go back to Slide 1. So when Lincoln and Vidler received their appropriation under Ruling 5712, the State Engineer was required under the statutory scheme to make certain findings and by law he was prohibited from appropriating water. And this is kind of a case study. This is what happened in Ruling 5712, but you can imagine that it will apply to any water right that's been -- a groundwater right that's been appropriated.

And we talked about these in our opening, and I'm not going to go through them again, but when Ruling 5712 came out, that was 2007. None of the parties that are in this room appealed that decision except for we did, and it was resolved. That appeal was resolved. But those parties had 30 days to appeal, and none of them did.

One of the bundles of those rights, when you are granted an appropriation, is that you have to use that appropriation where you say you're going to use it; right? So in our application we said we're going to use this in Coyote Springs Valley and we were awarded an inter-basin transfer of that water.

One of the other rights you have is you have the right to use it to draw the water out of the ground from the place that you say you're going to draw the water out of the ground. If you want to move that place, you have to apply for a permit from the State Engineer, a permit to change the point of diversion; right? You can't move the point of diversion to a place outside of your hydrographic basin because that would be a new appropriation of water.

THE COURT: In a different basin?

MR. KLOMP: What's that?

THE COURT: In a different basin?

MR. KLOMP: Correct. And so our -- Ruling 5712 ties that to Kane Springs Valley basin. In 2013, so this would have

been after the pump test, there was an application to change the point of diversion for the water rights appropriated with Ruling 5712. And this is in the record at ROA 994. Application numbers 82727 and 82728 were filed with the State Engineer's Office to change the point of diversion within -- again, within Kane Springs. And those were granted and also in 2013.

None of the parties here protested those change applications, but they had 30 days to do so following the granting of those applications. And the statutory reference for changing a point of diversion is 533.345.

The reason that I bring this minutia up is because it illustrates the bundle of rights. The parties that have water rights outside of Kane Springs can apply for -- prior to 1309 they could have applied for a change of point of diversion within the hydrographic basin that they were in. Following 1309, they can now apply for a change of point of diversion within the entire Lower White River Flow System and maintain their priority date, whereas before they could not do that. So that is just another example of one of the ways that 1309 fundamentally changes the nature of the water rights that Lincoln and Vidler appropriated in Kane Springs, but also the nature of water rights within the Lower White River Flow System.

So when the State Engineer says that he doesn't have

to follow *stare decisis*, that may be true in a court or in an opinion from the court, but it is not true when it comes to depriving people of their vested property rights and it's not true when it changes, fundamentally changes the nature of those property rights. And with that, Your Honor, I think that was fairly brief, but I'm going to turn the time over to Ms. Peterson.

THE COURT: That was brief. Okay.

ARGUMENT FOR VIDLER WATER COMPANY, INC.

MS. PETERSON: Thank you, Your Honor. Karen Peterson. And I'm just going to start with the question that you've asked some of the other parties about connectivity because I figured we would probably get it, so let's just start right there. And what we have noticed in this proceeding and throughout all these proceedings is that the parties -- well, the State Engineer and SNWA, Muddy Valley Irrigation Company, the intervenors and Center for Biological Diversity all equate connectivity with impacts and that --

THE COURT: With impasse?

MS. PETERSON: Impacts.

THE COURT: Okay.

MS. PETERSON: Impacts to their rights, so that --

THE COURT: Oh, impacts.

MS. PETERSON: Impacts. I-m-p-a-c-t-s.

And that connectivity equates with impacts and that

therefore all these water rights, all these individual water rights and all these individual basins need to be managed -- jointly managed and conjunctively managed. And connectivity does not equate to impacts to other rights, and that's displayed outright in Order 1309. And what the State Engineer found in portions of Order 1309 --

And, Mr. Hurth, if you could go to the pumping slide.

THE COURT: Which slide is this?

MS. PETERSON: Slide Number 5.

And again, this is the Lower White River Flow System and the Kane wells are not on this map because this is the result of the pumping test from 1169 and Kane wasn't involved in that. But the Kane wells are where the boundary is there. Oh, gosh. Yeah, the red dot, but I don't know that the record is going to be able to see the red dot. So it's on the line between Coyote Spring Valley Basin 210 and Kane Springs ranch or Kane Springs Valley.

I probably have a better way to say this. It's south, the south end of the valley, southwest portion of the valley. And I know it's in the record where those wells are. But the pumping -- the State Engineer found in Order 1309 and it's in the Record on Appeal at page 7 and also at page 60 that the pumping of 5,290 acre feet from Coyote Springs caused sharp declines in discharge at the springs. And the State Engineer also found in Record on Appeal at 65 that the Muddy River

Spring area -- and those are delineated on your map here -- that the alluvial and carbonate pumping affects the Muddy River and captures the river flow.

So you also see the pumping on that map with regard to the various parties that have been identified, the pumping in those basins. And so we already know from the pump test where the impacts are from pumping and those -- what pumping affects the Muddy River and what pumping affects the springs for purposes of the Moapa dace. And so what is happening with Order 1309 is that they're pulling Kane Springs in.

Let's say they're pulling Garnet Valley in. And there's no evidence in the record that the pumping in particular for like the wells in Garnet, there's actually no evidence of pumping from the wells in Kane impacts the springs or the dace, yet they're pulled into this joint management and conjunctive-use-management scheme that the State Engineer has set up, and their rights have been impacted because of the 8,000 acre feet cap that the State Engineer has put on the pumping. Yet again, there's no evidence that pumping from Kane Springs at all or pumping from the other wells -- again, Garnet is probably the furthest away -- that that pumping is the pumping that impacts the springs or the river.

And so that's what the beef is about just relying on connectivity and throwing everybody in is that our rights, Kane Springs, and we'll show you later on in the chart. I mean,

they're way down at the bottom of that printout that Mr. Robison had with regard to where everybody stands now based upon the reordering of the priorities.

So, for example, Kane Springs, our rights -- there's no evidence our rights would affect anybody in Garnet Valley, anybody's pumping in Garnet Valley. Yet again, we're junior. We're not able to pump our rights because we're lower in priority than somebody in Garnet Valley or somebody in Hidden Valley.

I don't think there's anybody in Hidden Valley, but even in -- I can't even read all these basins that are in there. But we're being prejudiced in not being allowed to pump our rights because we've been thrown into this basin, yet there's no evidence that our pumping impacts anybody else.

And so the other thing I hear is everybody kind of on that side of the room talking about existing rights, existing rights, existing rights, and that our rights have to yield to everybody else just because now we're the lowest ones in this super-basin, with the lowest priority in this super-basin, yet we're not impacting anybody by our pumping or there's no evidence that we're impacting anybody by our pumping.

And my question is -- our question is, the rights that are in the Muddy River Springs Area and the rights that are in the lower Coyote Springs Area, whose rights, even though they're senior rights -- let's say they're the Church's rights

or NV Energy's rights, they're Moapa Valley Water District's rights, they're also subject to existing rights. They're junior to the Muddy Valley Irrigation Company. How come their rights -- how come their rights aren't enforced as subject to existing rights because they're the rights that are impacting the springs and the river?

They're shifting by the scheme that they've created. They're shifting their burden of their rights being subject to existing rights and shifting that to make us give up our water rights, which are not impacting anybody else's, so that their priorities are preserved, but ours are not, and we're not even impacting anybody.

THE COURT: So as I understand your argument, you're talking about the proportional impact of where those -- where that pumping is done to the Muddy River or the springs as it relates to how the rights would now be recategorized.

MS. PETERSON: Correct.

THE COURT: Okay.

MS. PETERSON: And so --

THE COURT: I mean, so what you're saying is just because it's connected doesn't mean that proportionately there's a higher impact or a lesser impact. In fact, I think what you're arguing is -- and I just want to make sure that I have your argument, you know, straight, is that there are certain water rights holders who are closer to the Muddy River

and the springs and their connectivity and the pumping has a much higher, direct correlation to the reduction in the springs and the Muddy River, but everyone is all kind of put in that same pot of where they are depending on when they got their rights.

MS. PETERSON: Correct.

THE COURT: Okay.

MS. PETERSON: And it even gets better. If you look at the Notice of Alleged Violation that Mr. Taggart put up yesterday, and we have that slide and it starts with Slide 4, and this is the Notice of Alleged Violation, the first page, I think, of it. But in this first paragraph here he indicates -- or, sorry, SNWA indicates that studies performed in the Lower White River Flow System have demonstrated that groundwater pumping in the Lower White River Flow System ultimately depletes Muddy River stream flows on a one-to-one ratio and pumping in certain areas, such as the Muddy River Springs Area, cannot occur over the long term without depleting spring and stream flows.

And so the State -- like I said, the State Engineer has already found in Order 1309 that Coyote Springs -- and he has it twice in there -- caused sharp declines in discharge at the springs. And that the Muddy River Springs Area, both the alluvial and the carbonate pumping, affects the Muddy River and captures the Muddy River flow. And it also indicates further

in that ruling that he's not going to allow -- he's talking about where you can change your water rights in the Lower White River Flow System -- he's not going to allow anybody to put more water rights, more water rights into the Muddy River Springs Area to pump because obviously that's going to cause a greater impact.

So -- and I think it builds on what Mr. Foletta was saying because obviously if we -- if I applied for a water right and I was right next to the spring and I was going to impact the spring, yeah, the State Engineer should not grant that water right application. He shouldn't grant that water right application. And when we applied in 2005 and were granted our water rights in Kane Springs, the State Engineer -- he did make that determination that he didn't think the hydraulic connection was enough for the quantity of water that we applied and received, that it would impact the Muddy River springs or the dace.

And then now he's changed that after Order 1309, but he still indicates in Order 1309, and we've cited it on a slide and it's ROA at 55, that the degree of hydraulic connectivity is not known yet for Kane, but I'm going to put you in because I want to -- put the basin in because I want to manage that basin along with everybody else. But we don't know exactly what the hydraulic connectivity is with Kane Springs, and so I'm going to put you in so that there can be further study.

So he's saying he doesn't know what our hydraulic connectivity is with regard to the dace and the springs and what the connectivity is and what the level of connectivity is. But he acknowledges that there's a 60-feet change in elevation between the water levels in Kane Springs. And it's the water levels in the Lower White River Flow System that he's talking about is the change, you know, that 60 feet, that six stories, and that's evidence of low permeability under his six criteria and also weak hydraulic connectivity. So the point I'm trying to make is that he's thrown us all into this huge area.

The pumping test shows that there's been impacts from certain wells already in certain areas. They caused sharp declines in the springs, which of course could affect the dace. And yet, he's thrown everybody in together and treating us all equally with all -- you know, subject to seniority and allowing those -- the pumpers that are closest to the river and causing the most impact, allowing them to continue to pump, but then not allowing us to pump because he's got this -- I agree with CSI that he backed into this artificial 8,000 cap and he's affecting everyone and creating chaos. So, again, basin by basin is appropriate because he could handle this problem by looking at the --

Could we put that map back up.

-- he could handle the problem by looking at the lower Coyote Springs Valley basin. He could look at the

problem in the Muddy River Springs Area. He could manage those basins.

If you look at the pumping -- if you're talking about a one-to-one ratio, if you look at the pumping -- could you put up the pumping records from 2017. And this is in the ROA at 510. If you look at 2017 and you look at what the pumping is from the Muddy River Springs Area, it's 3,553 acre feet. And then if you look at Coyote Springs Valley, it's 1,961. I didn't do the math to add those up beforehand. That's like 7,000 acre feet right there.

If SNWA is correct that there's a one-to-one ratio, what they're saying is when you pump 3,553 acre feet out of Muddy River Springs Area, it's a one-to-one ratio with the river flows. You're taking one foot out of the river. That's what they're saying there in their Notice of Alleged Violation. And I haven't looked at their studies to know if that's true or not, but that's what they're saying. So if you want to find your river flows back, I mean, that's where you get it, right from that pumping right there.

But you don't cut off the property rights of Kane, and you don't cut off the property rights of Garnet. You don't cut off the property rights of Cogen because of something that's being caused by what's going on there in that pumping with Coyote Springs basin and Muddy River Springs Area. And that's not how it's been done on a basin-by-basin area, a