

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78092

Tonopah Solar Energy, LLC,
Appellant

v.

Brahma Group, Inc.,
Respondent

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Elizabeth A. Brown
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Appeal
Fifth Judicial District Court
The Honorable Steven P. Elliott
Case No. CV 39348

**APPELLANT'S APPENDIX
VOLUME 5**

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In the Matter Of:

Tonopah Solar Energy, LLC. vs Brahma Group, Inc.

CV 39348
D2

FILED
FIFTH JUDICIAL DISTRICT
MAY 17 2019

Nye County Clerk
DEBRA BENNETT Deputy

HEARING

September 12, 2018

Job Number: 502251

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FIFTH JUDICIAL DISTRICT

9

STATE OF NEVADA

10

COUNTY OF NYE

11

SEPTEMBER 12, 2018

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TRANSCRIPT OF TAPE-RECORDED HEARING

14

IN RE TONOPAH SOLAR ENERGY, LLC. V. BRAHMA GROUP, INC.

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Job Number: 502251

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1 THE COURT: Good afternoon. You may be seated.

2 MR. ZIMBELMAN: Thank you.

3 THE COURT: I don't know, is this the seat or a
4 bat?

5 MR. ROBERTS: I don't know what he -- I think he
6 uses it for a seat.

7 THE COURT: Maybe I'll just put it there. Well,
8 today we're here in the case of Tonopah Solar Energy
9 versus Brahma Group and it relates to Tonopah Solar
10 Energy bringing a -- a motion to expunge a lien and
11 I've had a chance to review a lot of documents and,
12 uh, hopefully I've read everything that relates to
13 this, very interesting case. You know, quality, uh,
14 legal minds went into this.

15 So anyway, I think I should, uh, go to Tonopah
16 Solar since they're the -- the moving party on this.
17 And you may need to introduce yourself since I don't -
18 - don't know any of you.

19 MR. ROBERTS: How are you, Judge?

20 THE COURT: Fine.

21 MR. ROBERTS: Uh, my name is Lee Roberts --

22 THE COURT: Okay.

23 MR. ROBERTS: -- with Weinberg, Wheeler, Hudgins,
24 Gunn & Dial.

25 THE COURT: Okay.

1 MR. ROBERTS: I represent Tonopah Solar Energy,
2 LLC. Uh, we had a case, I believe, when you were
3 sitting up in Reno. Uh, it was a Kuhmo tire that
4 exploded when it was overfilled at a gas station, been
5 a few years.

6 THE COURT: Okay. That must've been -- been a
7 while back.

8 MR. ROBERTS: And this is my, uh, associate,
9 Colby Balkenbush.

10 THE COURT: Okay.

11 MR. BALKENBUSH: Good afternoon, Your Honor.

12 MR. ROBERTS: And would -- would you like
13 opposing counsel to make their appearance --

14 THE COURT: Okay. Maybe -- maybe --

15 MR. ROBERTS: -- or should I proceed?

16 THE COURT: -- maybe that's good if the other
17 side would introduce themselves.

18 MR. ZIMBELMAN: Thank you, Your Honor. My name is
19 Eric Zimbelman. I'm with the law firm Peel Brimley --

20 THE COURT: Okay.

21 MR. ZIMBELMAN: -- and my partner, Richard Peel
22 is next to me. Behind me is, uh, Ronnie Cox, also a
23 partner and our client representative is David
24 Zimmerman from, uh, Brahma Group. He's the vice-
25 president.

1 THE COURT: Okay. Well, I did write down the four
2 of you who are sitting there as seeming the chief, uh,
3 group that were doing the briefings. So that -- that
4 worked out pretty well.

5 Okay. Well, Mr. Roberts, uh, maybe I'll just let
6 you go and explain to me what you think are the main
7 issues. And -- and I know I was -- if there was one
8 issue that I was really trying to figure out, it's
9 this issue of --

10 You know, you're -- you're claiming that, uh, the
11 lien filed by Brahma was a lien against BLM property
12 and then was subsequently amended to only lien the
13 assets of, uh, Tonopah Solar sitting on, uh, BLM
14 property and the allegation that you've made is that,
15 well, once you file a defective lien, it can't be
16 amended. And, uh, I'm -- I've been working on that
17 one, you know, why can't you amend it and, you know,
18 if --

19 You know, you -- you always wonder as a judge,
20 you know, are you being, you know, led down the -- the
21 wrong way on some of these things and it's awfully
22 hard to tell. But why don't you go ahead and you can
23 go through your whole thing, uh, whatever you'd like
24 to do.

25 MR. ROBERTS: Thank you. Thank you, Your Honor.

1 Uh, that -- that is the very first point that I would
2 love to emphasize, because I -- because I think it is
3 dispositive and you do not need to go any further with
4 our additional theories if you find that the original
5 lien was void.

6 The original notice of lien is attached as
7 Exhibit 2 to our motion to expunge and it's also
8 attached as Exhibit 6 to the Brahma opposition.

9 So there's no dispute as to the original notice
10 of lien. The notice of lien expressly states that it
11 does apply to and lien BLM land.

12 There's really no dispute about that. If you look
13 at their opposition at Page 3 of 20, they acknowledge
14 and refer to these parcels as the BLM parcels.

15 They're owned by the BLM and the lien itself, at
16 paragraph five, says the owner of the property is
17 Bureau of Land Management and Tonopah Solar Energy,
18 LLC.

19 So the -- these simple owners, the BLM, Tonopah
20 Solar has some sort of usufruct, the right to occupy
21 and use the facility and build a plant there, but --

22 THE COURT: So the equivalent of a lease?

23 MR. ROBERTS: The -- well, Your Honor, I -- I'm
24 cautious to say that. It's -- it's -- it's similar to
25 a lease, but there are, uh, at least some cases in

1 other states that talk about the type of rights that
2 come with a lease and if you simply have the -- the
3 right to use and profit from the occupancy of land,
4 it's more in the nature of a usufruct.

5 So I'm not prepared to agree it's a lease, but I
6 don't think that's dispositive at this point,
7 although, it -- it may become an issue at some
8 further, uh, point down the road.

9 But it -- it's like a lease, it gives us the
10 right to build the plant there, to generate
11 electricity, to sell it to Nevada Energy and to use
12 the revenues from those sales to pay back a \$737
13 million loan guaranteed by the department of energy.

14 But for the purposes of -- of this argument, the
15 property the BLM is expressly liened and although they
16 list a number of parcels, The Court can find out
17 exactly what they're attempting to lien by going to
18 Exhibit A, which they attached.

19 What they say is that they're liening common
20 materials provided to the Crescent Dunes Solar Energy
21 pro- -- project and paragraph eight says the
22 description of the property to be charged as attached
23 as Exhibit A.

24 Exhibit A is not a document from our lease with
25 the BLM, it's part of a guarantee with the department

1 of energy and I get to that later in our second prong.

2 But parcel one is the Genti [ph] line.

3 Parcel two is the solar energy project. So that's
4 what they say they supplied material to, parcel two in
5 Exhibit A. And parcel 2 in Exhibit A are only two
6 pieces of land, uh, 012-141-1 and 012-151-1.

7 And if it helps The Court for a graphic
8 illustration, you can refer to Exhibit 3 to their
9 opposition, which is the actual lease with the BLM and
10 Exhibit A to the lease as this pretty diagram of the
11 actual facility that they say they supply common
12 materials to, solar energy project. And so you can
13 actually see the outline of the solar energy project
14 on Exhibit A to the lease.

15 And if you look closely, you can see the Township
16 5 North Range 41 East and 4 North 41 East and the
17 entire project is in those 2 parcels. Those two
18 parcels are undisputedly owned by the BLM. The
19 original notice was filed against the BLM.

20

21 MR. ZIMBELMAN: I'm sorry, is that in your
22 filing?

23 MR. ROBERTS: Uh, it's, uh, Exhibit 3 to your
24 opposition.

25 MR. ZIMBELMAN: Okay. Thank you.

1 MR. ROBERTS: Exhibit A to the BLM lease. I think
2 it's conceived that you cannot lien the fee simple
3 interest of the United States and ultimately, in some
4 of their subsequent amended liens, they made clear
5 that they were not lienning the interest of the BLM.

6 THE COURT: Well, you -- you've asserted that in
7 their third go-around, uh, which may be the last one -
8 - anyway, you're -- you're -- you've asserted that
9 they did only go after, you know, your improvements
10 upon the BLM fee simple, uh, but that you're saying,
11 well, they -- they can't do that, because they really
12 have to go back to square one, I guess, is what --
13 that you're saying, is it has to be a new lien, not
14 amending a de- -- defective lien, according to your
15 reasoning.

16 MR. ROBERTS: Correct. And we -- we've cited
17 cases from California, from Tennessee and from Iowa
18 stating the general proposition that if you attempt to
19 lien against a piece of property that's not subject to
20 the lien, it's void and you cannot amend it, you
21 cannot restate it, you've got to start over.

22 The OTAC [ph], we believe, applies those
23 principles in Nevada and I was inv- -- involved in
24 that case and it went up, uh, to the supreme court and
25 there was an initial pleading, which should've had a

1 malpractice affidavit attached to it and it didn't.
2 And then they later amended and said, here's the
3 affidavit and -- and what the Supreme Court said is
4 the initial pleading was void and of no effect and you
5 cannot amend a void pleading.

6 The initial pleading was void for violating an
7 arrest 11.258. The district court had no discretionary
8 authority to allow PCS to amend its plea.

9 So on the one hand, it's clear that a lien
10 against BLM land is void, ab initio. Under the OTAC
11 case, the Supreme Court said, if you have a void
12 pleading, you can't amend it and there's no discretion
13 to allow it.

14 Their attempts to amend and restate a void lien
15 can be of no effect, because they're attempting to
16 revive and continue the date of filing of a void
17 instrument.

18 They could've started over and only liened our
19 interest, but they chose not to do that until they got
20 to the third restated lien at which point they say,
21 you know, to the extent, uh, it's required by law,
22 this con- -- should be construed as a new lien against
23 just the lease hold interest, but that doesn't come
24 until the third restated lien.

25 So I think the -- the -- the way the procedural

1 posture of the case is is that third restated lien did
2 not exist at the time we filed this motion.

3 We're seeking to void the initial notice of lien
4 and any ineffective and void amendments of that lien
5 to the extent that that third restated lien can be
6 construed as a new original lien only against our
7 interest.

8 It's our position that's not before The Court
9 today. And that also gets to something else I need to
10 disclose and did not have time to put in supplemental
11 authority.

12 I did mention to opposing counsel, uh, today for
13 context, we have an ETC contractor building the plant
14 named Cobra and Cobra was performing warranty work and
15 then refused to continue performing.

16 My client, Tonopah Solar Energy, hired Brahma to
17 complete the warranty work and we are trying to charge
18 back every dollar that they're billing to us to Cobra
19 under their contract.

20 It's our position that Cobra ultimately owes any
21 legitimate costs incurred in performing warranty work
22 after they left the job site and we demanded that they
23 bond off this lien under that theory and it just came
24 to our attention, uh, last night that Cobra had
25 actually bonded off a portion of this amount last

1 week. They posted a bond, uh -- bonding of \$7.1
2 million times 1 1/2, so it's about \$10.6 million.

3 It doesn't cover the whole thing, but the lien
4 they bonded off is the third restated lien that, to
5 the extent, its original lien is not before this
6 court.

7 So I think that that can provide some comfort
8 even to the extent it finds the original notice of
9 lien void together with any subsequent amendments to
10 the extent there is a new notice of lien that doesn't,
11 uh, involve the BLM land.

12 Uh, it has now been at least partially bonded off
13 and there's partial security, \$10.6 million, for the
14 current claim of \$11.9 million total.

15 So -- so there -- there is something out there.
16 It's not a situation where it's going to be, uh,
17 punitive and unjust and there's also no evidence
18 before The Court that to the extent there's a
19 difference, my client doesn't have the money to pay
20 it.

21 We're just trying to get this void lien removed
22 from the property, because it's asserting improper
23 leverage against us by attempting to lien against the
24 interest of the BLM.

25 So going back to this theory we would ask the The

1 Court to expunge the original notice of lien and all
2 subsequent restated and amendment notices of the void
3 lien, however, we agree that we're not acknowledging
4 that the form of the third restated lien is sufficient
5 to state a new and original lien, but to the extent
6 that it claims to do that, that issue is not yet
7 before The Court, because we're here only under this
8 unusual, uh, statutory provision under NRS 108.2275
9 where The Court has the authority to determine the
10 validity -- the facial validity of a lien, uh, even
11 though no action has -- has been formerly filed just
12 on motion practice.

13 THE COURT: Okay.

14 MR. ROBERTS: So that -- that would be our
15 primary argument and I think our arguments are -- are
16 well set forth in the briefs that this was a void
17 instrument.

18 It undisputedly liens the interest of the BLM and
19 that to the extent you try to restate and amend void
20 instrument is simply not allowed under the OTAC
21 decision or the law of other states where a lien
22 initially tried to attach to property it wasn't
23 allowed to attach to and then later they tried to
24 amend the property description to be something would
25 be proper to attach to.

1 Uh, and -- and I think it makes sense, Your
2 Honor, because the whole point of lien filings is the
3 deadlines are important, liens have to be noticed
4 within a certain statutory period, they have to be
5 filed within a certain statutory period and it's very
6 important that the date of filing is triggered by a
7 lien which validly can attach to the property it
8 describes.

9 And in this case, their original notice of lien
10 could not validly attach to the fee simple interest of
11 the BLM as they attempted to do.

12 THE COURT: We then get to the second part of the
13 argument, which, you know, if -- if you find the first
14 lien is void, we get our remedy, you don't need to
15 reach any further issues, but should you find that the
16 amended and restated liens are proper under Nevada
17 law, we still believe that even that third restated
18 lien, under the facts of this case, is void as a
19 matter of sovereign unity.

20 And the key here is that unlike the case, uh,
21 that they cited, basic refractory, uh, you know, the
22 old basic, uh, magnesium plant, uh, 1956 supreme court
23 case where this Nevada Supreme Court said you can lien
24 a leasehold interest even though the United States is
25 the fee simple owner, because you're not -- you're not

1 impairing the government's interest in any way.

2 It's just got a different leaseholder who's now
3 obligated under the terms of the lease to perform. The
4 thing that distinguishes this case from that case and
5 all the out-of-state authority that they cited in
6 their supplement is that the improvements that they're
7 attempting to lien in the third restated lien have
8 already been conveyed to the United States as security
9 for the DOE loan of \$737 million.

10 Now, we attached, uh, in a late-filed supplement,
11 some pages from the guarantee agreement with the DOE,
12 which I understand they're objecting to on the grounds
13 that they have not yet been verified and not properly
14 in evidence and that they came late. But I would draw
15 the attention to Exhibit 4 to their opposition and
16 this has been in the record from the beginning and
17 they knew it.

18 And they're going to draw the attention of The
19 Court to it and what this is is this is a construction
20 and permanent deed of trust with assignments of rent,
21 security agreement and fixture filing filed by Tonopah
22 Solar Energy, LLC, that's us, to Chicago Title Agency
23 of Nevada for the benefit of PNC Bank, but then if you
24 re- -- keep reading, it says, "In its capacity as
25 agents for the secured parties."

1 So even though PNC Bank was given this
2 assignment, it was in capacity as agent for the
3 secured parties also defined as the beneficiary.

4 Page 2 of 30 of this public filing, matter of
5 public record, uh, with the official records of my
6 county document 77457B is it states that PNC Bank is
7 acting in its capacity as collateral agent in such
8 capacity together with any successor collateral agent
9 appointed in accordance with the guarantee agreement
10 for the U.S. Department of Energy defined as the
11 beneficiary.

12 So this has been part of the case since they
13 filed their opposition that they were aware of and had
14 a copy of the instrument which conveyed all of our
15 interest in the improvements to the department of
16 energ- -- energy as security for a loan and they
17 guaranteed a \$737 million loan.

18 The extent of the conveyance is defined on Page 3
19 of 30 under mortgage property where we convey all the
20 estate rightal [sic] -- right, title and interest of
21 the grantor now or hereafter acquired in the real
22 property, the land, and the following things under D2
23 we convey all buildings and other improvements now
24 owned or hereafter acquired by grantor now or at any
25 time situated place or constructed upon the land and

1 all building materials, building equipment, etc.,
2 etc., etc.

3 In other words, everything that they are now
4 trying to lien and they say is not the property of the
5 BLM had, before they started work, been conveyed to
6 the department of energy security for a loan and they
7 want constructive notice on that, because they --
8 before they started work, this instrument was recorded
9 in 2011 and they didn't start work under this contract
10 until February, 2018.

11 So they want constructive notice that we had
12 already conveyed our interest in all of the
13 improvements, including the things they were improving
14 to to the department of energy. So now --

15 THE COURT: But -- but this is really just a, uh,
16 you know, security for loans. Uh, it sounds to me it's
17 sort of like, you know, well, there's somewhat of a
18 claim as if there's a lien, but it's different, it's
19 more security for a loan. Uh -- uh, you know, this --
20 this doesn't sound like truly it's the property of --
21 uh, it's not really a conveyance of the -- the title
22 to the --

23 MR. ROBERTS: It is a deed --

24 THE COURT: -- [inaudible] -- it's -- it's just
25 security and making it secured; isn't it?

1 MR. ROBERTS: You're -- you're right, Your Honor.
2 Even though the words say, we're conveying it to the
3 agent told hold and trust, under the Nevada statutes,
4 that is to be construed as merely the granting of the
5 security interest in the property until it's
6 foreclosed upon.

7 I -- I would agree that the words themselves have
8 to be construed in light of the Nevada statutes, which
9 simply give the government a prior security interest
10 in everything they're trying to lien, a prior superior
11 interest in everything that they're trying to lien.
12 But now you go to the cases that talk about sovereign
13 immunity and when sovereign immunity bars a suit
14 against the United States.

15 And in our original briefing, we cited Fahey
16 versus Omelvanie [ph], we're -- we're citing the
17 supreme court decision in United States v. Alabama
18 said, the supreme court has held a proceeding against
19 property in which the United States has an interest is
20 a suit against the United States.

21 And we've also cited a number of other cases from
22 other jurisdictions where if the United States has an
23 actual security interest in the property, a suit to
24 foreclose on that property is a suit against the
25 United States and is filed by sovereign unity.

1 And that's what makes this case different than
 2 basic refractory and other general cases saying you
 3 can lien a leasehold interest when it's sitting on
 4 government land, because in this case, the BLM owns
 5 the land -- the United States owns the land through
 6 the BLM, but now the United States has a security
 7 interest in the improvements through the department of
 8 energy.

9 So no matter what they're going after, they're
 10 going after something in which the United States has
 11 an interest and if they win and they foreclose, it
 12 will impair the interest in the United States without
 13 the consent of the United States to that suit. The
 14 other issues, which -- which I just wanted to very
 15 briefly touch on, Your Honor, is first of all, the --
 16 the notice of lien as an independent and alternative
 17 grounds under NRS 108.2456.

18 You can only file a mechanics lien for work done
 19 in the 31 days before a notice of right to lien is
 20 given to the owner. It was our contention originally,
 21 on information and belief, that that was not done,
 22 because they're supposed to send us a copy of that
 23 under the statute. We didn't have any record of
 24 receiving that copy. They subsequently filed a
 25 supplement after the original scheduled hearing date,

1 which proports to be a notice of right to lien given
2 to the United States.

3 THE COURT: I -- I saw that, but I didn't pay a
4 lot of attention or remember exactly when that took
5 place, but I -- I thought that was a, you know,
6 subsequent remedial action, you know, trying to cover
7 bases.

8 MR. ROBERTS: Actually, no, Your Honor.

9 THE COURT: No. Okay.

10 MR. ROBERTS: The -- the -- this contract was
11 signed February 9th. This notice was served February
12 15 --

13 THE COURT: Okay.

14 MR. ROBERTS: -- uh, of 2017. So --

15 THE COURT: So it's not a subsequent remedial
16 effort --

17 MR. ROBERTS: -- it -- it is not --

18 THE COURT: -- it was --

19 MR. ROBERTS: -- a subsequent measure, Your
20 Honor.

21 THE COURT: Okay. Thi- -- thi- -- this goes way
22 back.

23 MR. ZIMBELMAN: And -- and I'm going to interrupt
24 --

25 MR. ROBERTS: So --

1 MR. ZIMBELMAN: -- Mr. Roberts, but I'll -- I'll
2 just advise The Court, uh -- uh, I will take the blame
3 for that. We, quite frankly -- I read their affidavit
4 and assumed that they were right about that and I just
5 did a poor job of following up and making sure that
6 that didn't in fact exist. We went back, checked with
7 the client, sure enough it was done.

8 THE COURT: Okay. Great.

9 MR. ROBERTS: So -- but it wasn't done, Your
10 Honor. That's the problem. Something was done. But
11 what -- what the statute requires was not done, uh,
12 and that's our contention.

13 You have to keep in mind that Cobra, the people
14 who just filed the bond and that we're suing to make
15 complete their warrant work, uh, Brahma did work
16 directly for them, had previously put the BLM on
17 notice and tried to file a lien against the project
18 for work in which Cobra was the general contractor and
19 not work they did directly for us. The point is is
20 they're out there working on a project.

21 In order to comply with the lien statute, the
22 owner has to be given notice not only I'm working on
23 the project, but this is who my contract is with. And
24 if The Court will look at the notice of right to lien
25 filed with their substitute, their, uh, supplement, it

1 says, "The name/address of the person or firm who
2 contracted such labor, services, equipment or material
3 is Solar Reserve."

4 So we're Tonopah Solar Energy and the services
5 agreement attaches Exhibit 1 to our motion says we're
6 Tonopah Solar Energy, LLC. Whatever this is it's not
7 the contract they're filing a lien on, because that's
8 -- they contracted with us. So this notice is not
9 effective to give them the right to lien for services
10 provided under their contract with us.

11 And we're -- we're -- the United States Bureau of
12 Land Management is listed as the owner and only the
13 two parcels that I described, 012-151-1 and 012-141-1,
14 are listed as the location of the improvements.
15 Tonopah Solar Energy is up here as the under the
16 lender block.

17 So Your Honor, it'd be our position that whatever
18 this is it's not sufficient to comply with the statute
19 and we believe that the statute has to be complied
20 with in order to have a valid lien.

21 And even if they say that they had a contract
22 with us and they're only seeking to lien the
23 improvements now and therefore, notice to the lessee
24 of the improvements is sufficient.

25 If The Court will review the -- the notice of

1 owner requirements under the statute and then compare
2 it to some of the other provisions of the statute,
3 you'll see that the notice to owner has to go to the
4 owner, but in four or five other places, they talk
5 about the owner or the lessee.

6 So in some places, they say the owner or lessee,
7 but in the notice to owner, they say the notice goes
8 to the owner and that -- that makes sense, because if
9 you're -- even if you're just going to foreclose on
10 improvements, the owner of the land needs to know
11 what's going on before those foreclosure proceedings
12 can take place and they need to know what's going on
13 as the work is provided so that they can take action
14 if they want to -- to prevent the -- the, uh, lien
15 from accruing and their tenant from doing this.

16 THE COURT: Well, I did make a note to the Brahma
17 Group, made a reference to NRS 108.22148 or 48, I -- I
18 can't really read my own handwriting, but it's to the
19 effect that the owner of a ground lease is the owner
20 for purposes of the lien statute.

21 So they're -- you know, that -- that's certainly
22 one of their defenses that I'm sure they're going to
23 raise, that -- that the statute itself, you know, says
24 you don't have to contact, uh, really BLM, they --
25 they contact you, you know, because they have a direct

1 con- -- you know, they don't have to contact you,
2 because you're already on notice, because they had a
3 direct, uh, contract with, uh, Tonopah Solar Energy. I
4 think that -- you know, that's something that they --
5 they --

6 MR. ROBERTS: And -- and that is something --

7 THE COURT: -- refer to, which --

8 MR. ROBERTS: -- they raised --

9 THE COURT: -- was of interest to me.

10 MR. ROBERTS: -- and that's why I'm trying to
11 distinguish this, because NRS 108.245, which requires
12 the notice of lien says it has to go by certified mail
13 to the owner of the property. NRS 108.22172, defining
14 property, means the land, real property or [inaudible]
15 claim of an owner for which a work of improvement was
16 provided, including all buildings thereon.

17 NRS 108.226, prime contract defined, in that they
18 had a prime contract with us means a contract between
19 a prime contract and the owner or lessee of the
20 property. NRS 108.22164, prime contractor defined, is
21 a person who contracts with an owner or lessee. So the
22 -- the statute clearly distinguishes between the owner
23 of the land and a lessee of the land who has a less
24 than a fee simple interest.

25 And they call it owner or lessee -- owner or

1 lessee, but in the notice of lien, it just says it
2 goes to the owner. And I think -- we think that --
3 that the lien statute has to be strictly construed and
4 -- and we will stand on our briefing and argument on
5 that issue, Your Honor.

6 THE COURT: Okay.

7 MR. ROBERTS: The -- if The Court finds that the
8 lien is valid for any number of reasons, rejects all
9 of our other arguments, we would still ask that the
10 lien be distinguished as to all parcels other than
11 012-141-1 and -012-151-1, because those are the only
12 two projects where they improved. They're the only two
13 parcels that we acknowledged they improved.

14 All of the other parcels were taken from our gua-
15 -- from our guarantee agreement with the department of
16 energy and as you know, there's a big difference
17 between a voluntary transfer of the security interest
18 pursuant to agreement and a mechanics lien attaching
19 by statute. The mechanics lien can only attach to the
20 real property on which the improvements that they
21 performed work are located.

22 They can't attach to other land we own or have an
23 interest in that they didn't work on or didn't
24 improve. With regard to the department of energy, we
25 had other land that we bought for water rights, we had

1 other interest in property and they wanted -- we
2 conveyed all of that to them with security to pay back
3 the \$737 million. That doesn't mean that all of that
4 land is subject to a lien when only the two BLM
5 parcels were improved by Brahma.

6 So if The Court disregards all of our other
7 arguments, we'd still ask that the lien be expunged as
8 to the properties and the parcels which they did not
9 improve.

10 And to put this in context, and -- and I think
11 it's especially important that it address this now,
12 the affidavit filed by Mr. Peel last night indicated
13 that he thought we had the burden of proof today to
14 expunge the lien, that we had the burden of showing
15 that it's an improper lien and should be expunged.

16 Uh -- uh, that's not actually what the supreme
17 court has said. And, uh, if I could -- could approach,
18 Your Honor.

19 THE COURT: Certainly, that's fine.

20 MR. ROBERTS: Thank you. I'm providing The -- The
21 Court in response to Mr. Peel's affidavit filed last
22 night, uh, the case of JD Construction, the IBEX
23 International Group 126 Nevada 366, 240 P. 3d 1033
24 from the supreme court in 2010 and this was an appeal
25 of a property owner motion to expunge a contractor's

1 mechanics lien.

2 And there's a big discussion in here about what
3 type of hearing is required, what's sufficient to
4 satisfy due process, who has the burden of proof and
5 what it comes down to, Your Honor, is on the last
6 page, right before the footnotes and headnotes 22, 23
7 and 24, while we did not completely agree with the
8 district court's reasoning regarding who is the most
9 credible witness in the case, we affirm its decision,
10 because conclude that it nonetheless reached the
11 correct result.

12 JD Construction had the burden to show the
13 adequacy of its lien, but it failed to do so. So what
14 the -- what the supreme court has said here, and --
15 and you'll see that summary quote makes sense if you
16 read the whole decision, Judge, is that in a motion to
17 expunge, even though it's filed by the owner, the
18 contractor has the duty to prove, by preponderance of
19 the evidence, that its lien is not frivolous.

20 And under the current record, it had the burden
21 to show that it improved every parcel, which it seeks
22 to attach in this lien. It hasn't done that. We can
23 see that they improved the two parcels owned by the
24 BLM that I stated earlier. So there's not an issue
25 there if the lien is otherwise valid, but there is a

1 complete lack of evidence before this court that they
2 improved any other parcel.

3 And even if The Court rejects all of our other
4 arguments today, the lien must still be expunged as to
5 those parcels, which they did not improve and which
6 they have not met their burden of showing The Court
7 today in brief. Do you have any, uh, questions, Your
8 Honor?

9 THE COURT: Not of you at this time. You know,
10 we'll see what the other side has to say about this.

11 MR. ROBERTS: Thank you, Judge.

12 THE COURT: Thank you.

13 MR. ZIMBELMAN: Well, thank you, Your Honor. Uh -
14 -

15 THE COURT: All right. Then, uh, you may proceed.
16 And you're Mr. --

17 MR. ZIMBELMAN: Zimbelman.

18 THE COURT: -- Zimbelman.

19 MR. ZIMBELMAN: Um, I -- I guess, [inaudible] I'd
20 like to address the issue of burden of proof.

21 Well, the JD Construction case was actually about
22 an excessive lien and in fact, uh, just above the
23 section Mr. Roberts read, it says, "JD [inaudible]
24 that the district court [inaudible] the mechanics lien
25 was excessive, because this court's decision was not

1 based on admissible, reliable and substantial
2 evidence. We disagree."

3 And it goes on to explain why. Um, so Your Honor,
4 the -- the issue about, uh -- uh -- uh, the district
5 court reaching the right conclusion about the adequacy
6 -- adequacy of the lien they're talking about the
7 amount; okay? This is not a motion to deem our lien
8 excessive.

9 This is a motion to expunge our lien and it's
10 done -- there's a summary proceeding, um, brought
11 pursuant to 108.2275, done without the benefit of any
12 discovery, without the -- without any lawsuit having
13 been filed, their motion, they started the original
14 proceeding as the statute allows them to do.

15 And so Your Honor, the -- the -- the simple fact
16 is based on the, uh, case law that we've cited in our
17 brief that they have the burden of proving.

18 And they have the burden of proving the
19 following, that in order to obtain an order releasing
20 the lien, which is what they're asking you to do, uh,
21 The Court has to determine that the notice of lien is
22 frivolous and -- not an or, and made without
23 reasonable cause. That's what you'd have to find in
24 order to grant their motion today.

25 And I would submit to Your Honor that that

1 question can be answered with respect -- or with the
2 reference to one document only and that is the
3 contract.

4 As we've pointed out in our brief, the contract
5 adopts Nevada law and expressly provides that Brahma
6 may lien in the e- -- uh, in the event that, uh,
7 Tonopah Solar, uh, im- -- uh, improperly withholds
8 payment. Now, Nevada law would overrule that
9 limitation on the right to lien; right?

10 It says that any stipulation, condition or
11 provision which attempts to limit the lien rights for
12 and by the statute is void and unenforceable.

13 So that limitation couldn't apply anyway, but
14 assuming it did the contract acknowledges that we have
15 a right to lien and in fact, it requires us to collect
16 lien release documents like you would do on any other
17 Nevada project and we did.

18 Um, and, uh, the -- the, uh -- you know,
19 ultimately, we -- we are claiming that payment was
20 wrongfully withheld, because we haven't been paid;
21 right?

22 So in that -- in the broad sense, yes, um,
23 payment has been wrongfully withheld and we are
24 seeking the very right the contract gives us.

25 I would submit that on the frivolous and, uh,

1 made without reasonable cause standard, that that ends
2 this -- the discussion. If your contract says you can
3 and you do, how can you come back in a summary
4 proceeding and say you can't?

5 Now, that, uh, issue aside, uh, I -- I think I'd
6 like to address sort of the issues as they came by way
7 of the briefing sort of finishing with this sovereign
8 immunity question last, um, even though I -- I just
9 really needed to -- to address a couple of the points
10 Mr. Roberts raised. The, um -- the initial brief was
11 based on -- on essentially three arguments. One --
12 one, well, you can't lien, because it's federally
13 owned and we lien federally owned land. We didn't.

14 Two, if the lien's void and can't be saved by
15 amendment, we've shown that that's just not true. And
16 three, that there was no -- no notice of right to
17 lien. Again, so let me address those in turn.

18 Um, with respect to the argument that we lien
19 federal and it's just not accurate. I get that the
20 lien document itself referenced the BLM and I'm --
21 and, uh, I'm not sure that that was in- --
22 inappropriate.

23 But the, uh, exact, uh, thing that we liened in
24 the -- in the original lien, and that's, I believe,
25 Exhibit 1 through our brief -- excuse me, Exhibit 6,

1 the description of a property to be charged with the
2 lien is Crescent Dunes Solar Energy Project, more
3 particularly described in Exhibit A.

4 Now, Exhibit A happens to be the exact same
5 Exhibit A that lis pendens to their construction via
6 trust.

7 Uh, and in addition, their own brief says that
8 the project consists of the following parcels and it
9 lists every single parcel that is in our -- in our
10 lien.

11 Uh, they've identified what the work of
12 improvement is and we've liened that work of
13 improvement, which we have a right to do. I'll come
14 back to that as it, uh, relates to one of their other
15 arguments.

16 And -- and remember that under NRS, uh,
17 108.22108, a work of improvement is the overall scheme
18 of improvements; right?

19 It's not this little piece or that little piece
20 or you worked on -- you worked on the front yard so
21 you can't lien the house even though the front yard
22 work was part and parcel of this work of improvement.
23 Um, with respect to the argument that the lien is
24 void, right, uh, number one, they're relying on the
25 basis that are talking about pleadings.

1 They're trying to -- cases where if somebody
2 files a -- a -- a -- a pleading, has a defect in it of
3 some kind, tries to relate back an amended pleading
4 and it was too late; right?

5 Um, it deserves a lot of, you know -- enormous
6 amount of pru- -- prudence about relation back and --
7 but -- well, this isn't a pleading, this is a lien;
8 all right? So first -- but first and foremost, there
9 was nothing to -- that -- that needed to be amended to
10 make the lien not void.

11 It was -- it was not void to begin with. Um,
12 nonetheless, it has been amended a -- a -- a number of
13 times, uh, because of dollars and to make a
14 clarification; right?

15 And even if it was defective to begin with
16 because it listed BLM property or allegedly
17 [inaudible] the lien deal in property or to be
18 interpreted to a lien to be on the property, it's been
19 clarified and amended to make sure that that is
20 absolutely not the intent of the lien, which the
21 statute allows.

22 Um, and in fact, NRS 108.229 is incredibly
23 generous, the lien claims. Um, it says that at any
24 time, before or during trial, right, any time -- if I
25 try to amend my -- my complaint in the middle of a

1 trial, you say, get out of my courtroom, but that's
2 not what the lien statute says. The lien statute says
3 you can do it during trial, may record an amended
4 notice of lien to correct or clarify the lien
5 claimant's notice of lien.

6 And it is going to be allowed unless it's deemed,
7 uh -- uh, immaterial variance, immaterial, contrary to
8 the way they've attempted to present it in their
9 brief, um, is only something that results from fraud
10 or is made intentionally or misleads and adverse party
11 to that party's prejudice, but only to that extent.

12 So, um, unless you can prove that somehow, we
13 made a fraudulent lien filing or intentionally, uh,
14 tried to do something, um, then you demonstrate that
15 you were prejudice by that.

16 We -- none of that exists here. They have not
17 made any attempt to -- to argue that it does. So we're
18 -- clearly, we're entitled to amend our lien. Um, and
19 in fact, the second amended lien -- or excuse me, the
20 first amended lien makes it clear -- I take that back,
21 the second amended.

22 I was right the first time. In Section 8,
23 describing the property states that the real property
24 owned by the Bureau of Land Management is not charged
25 with the lien. And so in other words, it was -- it was

1 Brahma's attempt to say, just in case you
2 misunderstood the intent of our lien, we're not trying
3 to lien federal land; okay? So we did that. We did it
4 again the third amended lien.

5 Um, in the third amended lien, as Mr. Roberts
6 pointed out, we also said, you know, this is a
7 separate and independent lien filing to the extent
8 it's somehow not, um -- uh, not timely as an
9 amendment.

10 Um, or excuse me, to the extent that it is
11 timely, it's a separate lien if for some reason we
12 couldn't amend, but clearly, the statute gives us the
13 right to amend and there's no -- has been -- really
14 been no argument that we -- that we don't need the
15 statutory definition of that right.

16 Um, with respect to the notice of right to lien,
17 a couple of points I want to address, uh, based on Mr.
18 Roberts' presentation today.

19 Um, the Nevada Supreme Court has been very clear
20 that with respect from the notice of right to lien,
21 substantial compliance is all that's required; right?
22 In fact, the statute lists the form and it says you
23 need to substantially comply with this form.

24 This form [inaudible] substantially in the form
25 set forth below as it does in a number of other places

1 where it actually gives you a statutory form.

2 And, um, in this case, the form, and they're not
3 arguing that it's not substantially in the correct
4 form, what they're saying is, well, we identified
5 Solar Reserve as the contractor, except we also
6 identified Tonopah Solar and BLM as the owner and they
7 were all provided with copies of notice of right to
8 lien, which means they had actual notice in the
9 statutory form; right?

10 So you have to go to extreme measures to conclude
11 that we didn't at least substantially comply with the
12 -- with the statute, right, and that, um, the BLM and
13 Tonopah Solar had actual notice of our presence on
14 site.

15 Um, they didn't. They did by way of the form that
16 we served on them pursuant to the statute and if there
17 was some technical, minor variance in that document
18 itself, it doesn't change the fact that we
19 substantially complied and that actual notice had been
20 received.

21 The Hardy [ph] case, in particular, Your Honor,
22 talks about substantial compliance and it says, even
23 if you didn't give notice of right to lien, if the
24 owner knew you were out there, that's substantial
25 compliance. That's good enough.

1 Um, more fundamentally, we aren't liening BLM
2 land; right? So what's the point? Why do we need to
3 give them a notice of right to lien anyway?

4 We did it out of an abundance of caution, but it
5 isn't their land that we are liening. It is in fact
6 the work of improvement, right, the project and we
7 gave notice to the project owner. We did. They knew.
8 We provided them notice. That's, in and of itself,
9 sufficient. Yeah.

10 And in fact, uh -- uh, my partner just pointed
11 out to me that that notice of right to lien, where it
12 lists the owner is Tonopah Solar Energy, it says, care
13 of Solar Reserve, the Santa Monica address that is,
14 you know, their -- their address.

15 Um, in any event, clearly, we've -- we've met
16 that -- that standard. Oh, the last issue, before we
17 go into the sovereign immunity question, uh, is this
18 argument that, uh, you should, uh, limit our lien to
19 parcels we've worked on.

20 Now, first of all, I'm not here -- and I'm not --
21 I am not prepared to, uh -- to concede that we only
22 work on parcels Mr. Roberts has identified as having
23 been worked on.

24 Um -- uh, I'm not prepared to [inaudible] that.
25 My client's not yet prepared to [inaudible] that.

1 Maybe that's true. Ultimately, it's irrelevant and
2 it's irrelevant, because the lien statute gives us the
3 right to lien a work of improvement.

4 And it's, uh, been identified, as they've
5 admitted, as we've put in our notice of lien, as
6 exists in the Exhibit A's, our lien and of the deed of
7 trust.

8 The work of improvement is this whole thing and
9 it includes parcels that Tonopah Solar pledged as
10 security from the United States government; right? It
11 includes all of this, whether somebody worked on it or
12 not, that's the project.

13 That's the overall scheme of improvement. You
14 can't divorce part of that, especially after you've
15 included some of it in your own security instru- --
16 instruments.

17 I mean, it's not like it's, uh, a piece of
18 property in Florida that they attached as additional
19 security. It's right next to it; right? It's all this
20 big chunk of land, um, and --

21 THE COURT: Well -- well, going back to, you
22 know, the -- your -- the beginning of your argument --

23 MR. ZIMBELMAN: Sure.

24 THE COURT: -- I'm trying to remember this, you
25 know, correctly, and I may or may not, but I -- I

1 thought you said that in the contract, the area of
2 work was identified to be more than these two parcels.
3 Was that in your contract with the Brahma Group or was
4 this, you know, something --

5 MR. ZIMBELMAN: No. The contract --

6 THE COURT: -- something a little different?

7 MR. ZIMBELMAN: No. The contract just talks about
8 the project; right? The Crescent Dunes Solar Energy
9 project. And the lien talks about the Crescent Dunes
10 Solar Energy project in their brief.

11 Their original motion talked about the project
12 and it identified the parcels that are encompassed by
13 the project and that includes every single parcel that
14 we're talking about today and that's the point that
15 I'm making.

16 And -- and more importantly, the statute talks
17 about a work of improvement. It doesn't talk about,
18 well, you have to file a separate lien on this parcel
19 and that parcel and this parcel.

20 And if you only worked on the front, uh -- uh,
21 40, you can't -- you can't lien the back 40 even if
22 the back 40 and the front part -- 40 were part of the
23 same work of improvement. That is completely contrary
24 to the sta- -- statutory scheme.

25 If I may, NRS 22188, it's unfortunately a very

1 lengthy statute, but it is the definition of work of
 2 improvement and you'll see that, uh, talked about in
 3 the Byrd Underground [ph] case quite -- quite, uh, at
 4 length, um, and the work of improvement means the
 5 entire structure or scheme of improvement as a whole,
 6 including without limited -- limitation all work,
 7 materials, equipment to be used for or in a
 8 construction, uh, of -- or alteration or repair of the
 9 property and any improvement thereon, whether under
 10 multiple prime contracts or a single prime contract
 11 and then it lists a couple of exceptions; right?

12 And those exceptions are one, if a scheme of
 13 improvement consists of the construction of two or
 14 more separate buildings, each of which is constructed
 15 on a separate legal parcel of land pursuant to a
 16 separate prime contract only for that building. In
 17 other words, go to example, the classic example is
 18 when a, uh, residential homes contractor goes out and
 19 hires somebody to build building pads, that might be a
 20 work of improvement building 100 building pads.

21 Then it goes on and hires a contractor to perform
 22 the erection of a building on parcel A and it hires
 23 maybe even that same contractor to the separate
 24 contractor to go build on parcel B -- B and another
 25 contractor on parcel D.

1 Those are all separate works of improvement, but
2 that work to establish all of those pads was a single
3 work of improvement. That's the classic example.

4 Now, we have nothing like that here. We have the
5 work of improvement, which is a so- -- uh, the solar
6 energy project and that's what we liened and that's
7 what the statute allows.

8 THE COURT: So somewhere other than your contact
9 is a definition of Crescent --

10 MR. ZIMBELMAN: Someone other than the contract.
11 Sure.

12 THE COURT: -- Crescent Dunes, uh, Solar Power
13 project?

14 MR. ZIMBELMAN: Um, sure. And I'll -- I'd like to
15 actually tell The Court exactly, uh, where that
16 somewhere else is, uh, among other places. Um, it is
17 in their -- in their original brief and I think I
18 pointed that out in -- in our brief as well. Ronnie,
19 if you could help me out.

20 MR. COX: It's on Page 4.

21 MR. ZIMBELMAN: Page 4. Okay. Oh, you know what -
22 - yeah. There it is. Okay. Thank you. Um --

23 MR. COX: Footnote.

24 MR. ZIMBELMAN: -- oh, yeah. I'm sorry, it's a
25 footnote. It's Page 4 of their notion, footnote 1.

1 And, uh, footnote one follows the discussion about --
2 uh, as follows.

3 Importantly, for purposes of the motion, CSC is
4 the project developer and oversees BGIs work on the
5 project, but the land the project is located on
6 belongs to BLM herein after the property, footnote --
7 the footnote says.

8 The property on which the project is located
9 consists of the following parcels and then it lists
10 every single par- -- parcel that we're talking about.

11 So they, themselves, have stated to this court
12 what the work of improvement is. They identified all
13 the parcels that consist of or of which this work of
14 improvement consists. So the property and the
15 improvements thereon.

16 That's -- I mean, that -- that is dispositive, in
17 my view. That's what they told The Court coming out of
18 the gate and I -- I've seen no other attempt to define
19 the work of improvement any other way.

20 THE COURT: I -- I -- I want to raise something
21 which actually wasn't raised, uh, by Mr. Roberts, but
22 they, uh, talk about, uh, the, uh, dismissal of -- of
23 claim and, uh, release of lis pendens. So notice of
24 voluntary dismissal without prejudice and, uh, release
25 of lis pendens and how --

1 MR. ZIMBELMAN: Oh, I think they were --

2 THE COURT: -- and how the -- all that's left
3 really is this -- this lien, but the -- the deal was I
4 -- I've noticed that this, uh, dismissal without
5 prejudice is case number CV-39237 --

6 MR. ZIMBELMAN: Right.

7 THE COURT: -- which is not a case that was ever
8 assigned to me. What I've been assigned is CV-39348.
9 So 348, not 27- -- 237. And maybe you -- you can help
10 me understand this, I don't know really anything
11 about, uh, 39237 other than now I know that, uh, the
12 Brahma Group has dismissed that.

13 MR. ZIMBELMAN: Right. So if I may --

14 THE COURT: And I'm -- I'm assuming it was some
15 sort of earlier case.

16 MR. ZIMBELMAN: Yeah.

17 THE COURT: Uh, well, it's a -- it's a different
18 case than, uh -- than this one, this Tonopah Solar
19 Energy versus Brahma Group is so- --

20 MR. ZIMBELMAN: Now, I -- I -- I --

21 THE COURT: -- something else.

22 MR. ZIMBELMAN: -- I could be wrong, this was a
23 little bit before my time on this -- on this case.

24 THE COURT: Uh, okay.

25 MR. ZIMBELMAN: But I believe that what happened

1 was there was an initial lawsuit filing. Um, however,
2 it was dismissed, because the lawsuit -- the -- the
3 contract requires there to be mediation; is that
4 correct?

5 MR. COX: That's correct. And client just
6 confirmed that they had initially filed their
7 complaint and, um -- uh, TSE raised the argument that
8 the contract had a condition precedent of mediation
9 before he could go forward and file your complaint.

10 So as a result of that, they voluntarily
11 dismissed it, uh, went to mediation, which they
12 weren't successful in res- -- resolving the dispute
13 and here we are today.

14 So the case that's before you is properly before
15 you. The case that previously existed was dismissed
16 voluntarily without prejudice.

17 MR. ZIMBELMAN: And furthermore, uh, there is
18 another lawsuit in Clark County that's now been
19 removed to federal court by TSE and the reason for
20 that is that the contract says that any -- any lawsuit
21 arising out of the contract must be filed in Clark
22 County and that shows [inaudible].

23 So because of that, we were forced to file in
24 Clark County, nonetheless the -- the lien action,
25 whether by way of this motion or a mo- -- or a

1 foreclosure complaint has to occur obviously in Nye
2 County, because that's where the property is,
3 [inaudible].

4 So, uh -- but with respect to that earlier case
5 and its dismissal on that, I really don't think it has
6 any bearing on, you know, the issues today, but, uh,
7 just for your -- obviously, for your information.

8 THE COURT: And -- and maybe I'm asking the wrong
9 guy, because you're -- you apparently haven't been in
10 this thing from, you know, day one of, uh, the project
11 --

12 MR. ZIMBELMAN: Right.

13 THE COURT: -- and how it was funded and all
14 that. But I -- I have made, uh, I guess, assumptions,
15 you know, over handling the, uh, Cobra pro em [ph] to,
16 uh, some of all that, that -- that this project
17 probably is a President Obama stimulus, uh, project,
18 you know, from the stimulus days, uh, you know, how it
19 kind of gets going.

20 Well, you know, we're going to go out and build.
21 You know, it's a shovel-ready project. You know, this
22 is one of those. Uh -- uh, am I right that that's sort
23 of the genesis of this?

24 MR. ZIMBELMAN: I do believe that the -- that the
25 impetus or, uh, sort of the financing, when they talk

1 about the loan guarantees and all that, some of that
2 came out of the ARRA, the, uh -- uh, I forget what
3 that stands for, but essentially, the Obama Stimulus
4 Act. And I remember that from an earlier case that
5 we've had with Cobra with one of our other clients,
6 uh, with the project.

7 Uh, so yeah, it -- it goes back to those days,
8 uh, in some way. How TSE's involvement relates to it
9 those -- those are --

10 MR. ROBERTS: I'm sorry, Your Honor, for
11 interjecting, we don't know, as we sit here, exactly,
12 uh, whether it was a, uh -- a statutory impetus as an
13 executive order that caused this all to come about.

14 What we do know is is that there's a project
15 that's been constructed that is the subject of monies
16 owed for our client. And so I'm concerned about
17 speculating about how this project came about, we just
18 don't know.

19 I have the client representative and, um -- who's
20 been with the client for a period of years and he
21 doesn't know exactly what the impetus was for this
22 project being constructed. So, uh, that's what we can
23 impart to you. That's what we know.

24 THE COURT: Okay. Well, it's sort of relevant. Uh
25 -- uh, it comes -- comes about from wondering about

1 the other case and, you know, the other -- or I think
2 I always thought was kind of humorous is that -- well,
3 we're stimulating, you know, the American economy, but
4 the -- the two companies that were doing all the work
5 were, uh, Spanish companies.

6 MR. ZIMBELMAN: Yeah. That's a bit ironic; isn't
7 it?

8 [laughter]

9 Um, all right. So let's jump down to the
10 sovereign immunity issue; right? Because this is what
11 they've come back with on the reply; right?

12 I mean, uh -- uh, I have a lot of respect for Mr.
13 Roberts, but I think that the -- the fact that they're
14 coming back and relying on this argument now on re- --
15 on reply indicates, quite frankly, the weakness of
16 their other positions that we presented pretty, uh --
17 pretty substantially in our opposition.

18 Um, Mr. Roberts, uh, quoted to you from U.S.
19 versus Alabama, right, and, um -- and -- and quotes
20 you the sort of general rule that goes back to the
21 Dugan [ph] case from 1963, the United States Supreme
22 Court, um, where the -- the court had to, uh, consider
23 whether sovereign immunity was implicated by a lawsuit
24 attempting to sue local officials of a federal
25 governmental agency to try to enjoin them from, um,

1 interfering with their wa- -- their common law water
2 rights.

3 That was one of the early cases about damming and
4 does the government have the ability to stop the flow
5 of water, because by God, we've got the -- the
6 riparian rights going back 150 years.

7 And so they were trying to enjoin that process
8 and this federal statutory scheme and of course --
9 well, of course, it implicates the federal government.

10 I mean, first of all, you've got federal
11 government officials who are being sued, but fur- --
12 you know, more fundamentally, you've got a federal
13 project, um, and you're telling us that you want to
14 enjoin these federal officials from actually doing
15 exactly what they're required to do, which is impact
16 in some way the flow of water; okay? Um, that doesn't
17 seem very surprising, I don't think, then and -- and -
18 - and certainly not now.

19 Um, and then there have been a number of case
20 that have -- that have gone around and -- and sort of,
21 uh, further interpret; right? And one of those cases
22 is the, um -- uh, electrical co-op case that they've
23 cited, a rural electrical co-op, uh, case.

24 Um, you know, that case is -- is pretty
25 fascinating, because, um, the actual rule from that is

1 that the court -- and that was the 7th Circuit.

2 The court rejected the contention that, quote,
3 "Any suit implicating a security interest held by the
4 United States is inescapably a suit against the United
5 States that should be barred by sovereign immunity,"
6 right, the exact opposite of what Mr. Roberts is
7 asking Your Honor to determine today. It said
8 [inaudible] -- well, yeah, uh, we convey all these
9 things to the federal government.

10 Okay. Well, you didn't convey it's a security
11 interest. Yeah. But because the government has a
12 security interest, that means sovereign immunity's
13 implicated.

14 That is exactly the opposite of what the cases
15 they cited in their brief say, exact opposite. In
16 fact, in rural electric co-op, right, they said that,
17 uh -- that -- that that's -- that that's not true, uh,
18 and they give a number of reasons why that is and
19 there are examples of why that is.

20 And they said, well -- caveat, we're not saying
21 that could never be the case; right? We're not saying,
22 you know, it could never be sovereign immunity
23 implicated by the fact of there being a security
24 interest held by the United States government, but
25 you've got to prove it, kicked it back down to the

1 district court. Guess what the district court said?

2 District court said, no -- no, sovereign immunity is
3 not implicated here.

4 And the mo- -- the reasons, uh, that they said
5 that, right, is that there was no credible evidence of
6 a likely resulting loss to the government's trea- --
7 treasury nor any impairment of the agency's regulatory
8 manner, because there was nothing more than the
9 government's say-so and speculation and no evidence of
10 extinguishment the wholesale power contractor would
11 impair the co-op's ability to service its debt
12 resulting in a loss to the treasury.

13 Basically, the court said, look, the government's
14 just asking us to take their word for it and we're not
15 going to do that.

16 Well, that's exactly what Tonopah Solar is acting
17 you to do today, take our word for it; right? And
18 they've provided you this affidavit from Justin Pew
19 [ph] who hasn't even worked for Ton- -- Tonopah Solar,
20 he works for a contractor for Tonopah Solar.

21 And he offers you on information and belief --
22 and you should always be -- red -- a red flag goes up
23 when someone says, I swear, under penalty of perjury,
24 that -- that I have personal knowledge of the
25 following information on information and belief.

1 That's what he said. And he goes on to tell you
2 about all these things are going to happen, we're
3 going to lose money, we're not going to be able to pay
4 our debt and so forth and so on.

5 That -- that's just speculative and there hasn't
6 been a -- a shred of discovery into that issue,
7 obviously and that's why we've presented Your Honor
8 with the affidavit from my partner saying, look -- and
9 we understand that that's essentially what's required
10 under Nevada law. If you're going to ask for
11 discovery, you've got to provide an affidavit.

12 So that's what we've done and we've said, Your
13 Honor, if you have any inclination whatsoever of
14 buying into the sovereign immunity argument, you've
15 got to give us an opportunity to explore those facts.
16 And -- and why?

17 Well, one reason is this, again, the case that
18 they cite, the, uh, rural electrical co-op case, says
19 that, uh, when -- when The Court engages in that
20 analysis, right and that rare case when that -- uh,
21 the government security interests might implicate
22 sovereign immunity; right?

23 You need to do -- go on a case by case analysis
24 of the essential nature and effect of the proceeding
25 as it appears from the entire record.

1 Our entire record consists of a -- all
2 information and belief affidavit presented in our
3 reply; right? So not only have they failed to, you
4 know, bring -- bring to Your Court's attention, uh,
5 sufficient facts, um, it's grossly unfair to the
6 extent you think what they have brought you is
7 somehow, uh, you know, a factual basis for that kind
8 of a finding.

9 It's grossly unfair to make that kind of a ruling
10 against us without giving us the opportunity to
11 explore that, take a deposition, um, get all of the
12 loan documents. They attached a few pages of a loan
13 guarantee to their latest filing and they did it late
14 last week, four pages of what's obviously a hun- --
15 several hundred-page document with numerous amendments
16 and addendums.

17 You know, we don't know what's in there. There
18 might be something in there that requires them to bond
19 or honor our lien. In fact, there's language in that
20 document that talked about an es- -- uh, permitted
21 liens in the, uh -- one of the pages that they
22 provided.

23 They provided four pages of this document and one
24 of them talks about permitted liens. Um, oh, I'm
25 sorry, I'm actually talking about the deed of trust.

1 The deed of trust has a reference to -- to
2 permitted liens. And this loan guarantee is a document
3 that's talked about in the deed of trust, um, and it
4 says that, uh, permitted liens is defined in the loan
5 guarantee; okay?

6 So the loan guarantee itself is going to describe
7 what those permitted liens are. We don't know. It
8 might be mechanics liens. Good reason to believe it is
9 mechanics liens is the contract we entered into that
10 expressly allows us to record them; right?

11 Unless TSE is violating its contract with the
12 federal government, they have given us a right to lien
13 that is a permitted lien.

14 I mean, uh, that's the only -- that's the only
15 implication I think exists from the facts on the
16 record before The Court today, uh, and based upon that
17 -- based upon the fact that we have a contract that
18 says within the lien and based upon the application
19 [inaudible] which is expressly incorporated in the
20 contract, I respectfully submit, Your Honor, that, uh,
21 this motion should be denied in its entirety. Thank
22 you.

23 THE COURT: I, uh -- I think we probably should
24 take a -- a recess before continuing on and try to
25 take a break, you know, an hour, hour and 15 minutes

1 or something like that to make it better on everybody.

2 So let's take a recess.

3 BAILIFF: All rise.

4 [recess]

5 THE COURT: You may be seated. All right. Okay.

6 You know, the -- before we go -- go further anymore, I
7 want to go back to Mr. Zimbelman to maybe go over this
8 one more time, the, uh -- the issue of, uh -- that has
9 concerned me the most. You know, I'm -- uh, I'm
10 probably leaning your way on the sovereign immunity.

11 I'm having a hard time kind of going with somehow
12 you can't even lien property that's just put up for
13 security to somebody else, including the government,
14 but -- but I'm still worried about, uh, you know,
15 trying to make the appropriately ruling on the first
16 notice of lien that, uh, Tonopah Solar Energy says,
17 well, you attempted to lien the property of the BLM
18 and you really weren't allowed to do that, you know,
19 and -- and that you can't correct that at a later
20 date.

21 And if -- and if I'm supposed to rule in your
22 favor on that point, what do I say; you know? How do I
23 counter the other side's argument? And I think you
24 attempted to tell me, but --

25 MR. ZIMBELMAN: Well, I've got a couple

1 [inaudible].

2 THE COURT: -- I'm not -- not sure that I still
3 get it and --

4 MR. ZIMBELMAN: -- uh, I've got a couple of
5 things to say about that.

6 THE COURT: -- uh, somehow, I need to -- somehow,
7 I need to so-called get it, understand, you know, why
8 you should win that point.

9 MR. ZIMBELMAN: So here's a couple things. One,
10 I've been presented, Your Honor, with a single case
11 that says that, uh, an imme- -- a lien is entirely
12 void, because it attaches, um, some properties part
13 and overall attachment.

14 You know, let me back up. We have a lien the
15 moment [inaudible] a project, an argument before;
16 right? A lien exists by virtue of a statute.

17 And under Nevada law, you have a right -- you
18 have a right to lien and if you have a lien, upon the
19 performance of work -- performance of work, materials
20 or equipment; right? Performed or to be performed,
21 which is why I said arguably even before you said foot
22 on the project.

23 You have that right that exists. It's an inchoate
24 right, regardless of whether you file some document or
25 not.

1 The notice of lien is a perfection vehicle, an
2 instrument; right? It's the written document that
3 perfects the lien that you have. That's all it is. The
4 lien exists. So it can't be void, right, because it
5 exists by virtue of the work we performed.

6 And, um, we agree we don't have a lien in BLM
7 land; right? Uh -- uh, everybody agrees to that. Um,
8 what we have is a right to lien the land that's not
9 BLM land and the improvements that constitute the work
10 of improvement.

11 THE COURT: On BLM land.

12 MR. ZIMBELMAN: Well, even if it's on BLM land,
13 absolutely.

14 MR. PEEL: Can I just interject?

15 THE COURT: Sure. Sure.

16 MR. PEEL: I actually had an opportunity to
17 participate in the drafting of amendments to the
18 statute back in 2003 and 2005 and, um, what we see in
19 large part that's in the statute, either blame me or
20 pat me on the back, depending upon how you look at it,
21 are a byproduct of what our clients, we represented
22 AGC and a number of subcontractor trade organizations
23 at the time, that were trying to get changes made in
24 the statute.

25 Um, in doing so, though, we made it very clear

1 that under NRS 108.222, a lien claimant has a lien and
 2 this is important that The Court understand this. It
 3 says, "A lien claimant has a lien upon the property,
 4 any improvements for which the work, materials and
 5 equipment were furnished or to be furnished and any
 6 construction disbursement account established pursuant
 7 to the statute."

8 Then it goes on to say, "For if the parties
 9 agreed by contractor otherwise upon a specific price
 10 or method for determining a specific, uh, price for
 11 some or all the work." The point is is that the lien
 12 exists the moment that there's some type of an
 13 agreement for the lien claimant to step foot on that
 14 project. 108.226 goes on to say, "To perfect a lien."
 15 So there's a number of steps that you have to take to
 16 perfect a lien.

17 One of them is if you don't have a direct
 18 contract relationship with the owner, you've got to
 19 get a -- give a notice of right to lien and that's set
 20 forth in 108.245. And if you don't give it, then the
 21 argument is is that you're -- you don't have lien
 22 rights.

23 There is an exception to that and that is
 24 codified in the W.E. O'Neill [ph] case or the Hardy
 25 case, which stood for the proposition that if the

1 owner knows of your existence on that project, no
2 notice of, uh, right to lien is required to be given.

3 So that's step one in the perfection process.
4 Step two, you have to cause a notice of lien to be
5 recorded with a certain period of time and that
6 particular section goes through and id- -- identifies
7 exactly when the lien -- the notice of lien must be
8 recorded. So you have a lien, you're just perfecting
9 it by having given your notice of right to lien.

10 And then by recording a notice of lien, the third
11 step in the perfection process is causing that 1- --
12 that notice of lien to be given or served on the owner
13 as prescribed by the statute. The fourth step is that
14 you have to file a complaint to foreclose on that lien
15 within six months of the date that the lien was
16 initially recorded.

17 Now, in our case, um, one of the things that
18 they've argued is is well, you don't have a lien, um,
19 or your lien is void because of the fact that you
20 caused this phantom, fictitious lien to be recorded
21 and you supposedly, uh, included in that lien the
22 description of the fee simple interest owned by the
23 BLM.

24 Well, um, going back to 108.226 it sets forth --
25 sets -- sets forth the -- the specific language that

1 has to be included in the notice of lien.

2 We don't create that. We don't have any ability
3 of modifying it to, uh, you know, an -- an extensive
4 extent. The [inaudible] is there. In fact, it's in the
5 statute.

6 So that's what we have to use. And so one of the
7 arguments that we heard counsel or TSE make is well,
8 going back to the notice of right to lien you didn't
9 identify any contract and party.

10 Well, that statute doesn't say anything
11 whatsoever about having to specifically identify the
12 contracting party or you lose your lien rights. To the
13 contrary, it says you simply have to give a notice of
14 right to lien to the owner, which we did.

15 We gave it to TSE and we also gave it to BLM.
16 Interesting, and Eric pointed this out, in that notice
17 of right to lien, um, TSE's, uh, agent for receiving
18 process or receiving mail is Solar Reserve and they
19 have the same address.

20 And so we in fact did properly give notice to TSE
21 who is the owner of the improvements and BLM and that
22 document establishes that.

23 Let's go back to the notice of lien. Now, with
24 respect to the notice of lien, the statute's very
25 clear, 108.229 says you have the right to amend your

1 lien -- your notice of lien at any time clear up to
2 the time of trial.

3 And in our particular set of facts, if there was
4 some type of, uh, inconsistency, some type of, uh --
5 uh, ambiguity, we have the right to clarify that,
6 which we did.

7 And again, in each one of those amendments, we
8 said to the extent that, um -- that, uh, this could be
9 a new notice of lien and the time period hasn't
10 expired, then it'll be treated as a new notice of lien
11 in addition to maybe modifying the prior lien.

12 So they want to make the argument and, uh, tie it
13 back to the pleading or a complaint filing. Not so.
14 There is no statute that gives you an exception for a
15 complaint if it is improper to begin with whereas with
16 mechanics liens, 108.229 expressly does just that. It
17 gives a lien claimant the right to amend and to
18 correct and to clarify. That's what we did. There is
19 no harm, there's no foul.

20 That lien wasn't invalid from the beginning,
21 because we also identified in the original lien, not
22 just BLM, but TSE.

23 And going on with that it wasn't us who defined
24 who the -- what the project is, it was -- it was TSE.
25 They defined the project and they defined what parcels

1 it included and they have stated this is the work of
2 improvement upon which the work was performed.

3 We didn't define that. Now they're back-peddling.
4 They're saying, well, it really was only these two
5 parcels, you didn't work on these other parcels.

6 Again, no proof where were, they just were making
7 that argument, uh -- uh, to The Court, um, by the
8 removing papers and they want you to accept that as
9 being a true statement. It's not, um, or this whole
10 project -- the whole work of improvement is subject to
11 mechanics liens under the statute.

12 Eric went through in sub- -- uh, some detail the
13 definition of work of improvement. 108.226 says you
14 have, uh -- uh, you have the ability of reporting your
15 lien against the work of improvement. In fact --

16 MR. ZIMBELMAN: Richard, here you go, it's right
17 here.

18 MR. PEEL: -- in fact, what the statute says --
19 it says, "To perfect a lien, a lien claimant must
20 record a notice of lien in the office of the county
21 recorder, the county where the property or some part
22 thereof is located in the form provided in Subsection
23 5."

24 And then it goes through and it talks about, uh,
25 the time periods. It says, "Within 90 days after the

1 date in which the latest of the following occurs, one,
2 the completion of the work of improvement."

3 It doesn't say the completion of your work, it
4 says the completion of the work of improvement.

5 And then it goes on to say, "The delivery of
6 material or furnishing of equipment by the lien
7 claimant for the work of improvement or the last
8 performance of work by the lien claimant for the work
9 of improvement."

10 So again, it's everything that's in the box.
11 Everything that they said this is the project is what
12 is subject to a lien.

13 And again, Eric took The Court, uh, through the
14 exceptions and he's correct that one exception was
15 specifically there in the old statute before I even
16 got involved.

17 It had to do with residential construction,
18 because what they didn't want you to do is to be able
19 to go out and cause a lien to be recorded against the
20 whole subdivision if there were separate contracts for
21 separate buildings, meaning sep- -- separate reside- -
22 - residences that are constructed on each of those
23 separate, uh, parcels of land. Well, we don't have
24 that here and we don't have the other exception in
25 play here.

1 And so the end result is is what we have is we
2 have, uh, 108.222 saying Brahma has a lien, because we
3 entered into an agreement for -- to provide work,
4 materials or equipment for a work of improvement.

5 We then have the perfection of that lien by the
6 giving of the notice of right to lien, which was
7 properly and timely given and then we have the notice
8 of lien, which was a timely recorded and which is
9 subject to clarification and amendment pursuant to
10 108.229.

11 That's what we have. And so based on all the
12 facts that are before you on that issue, uh, our lien
13 is timely and it's been properly perfected to-date.

14 Now, the last step we have not done yet and we
15 still have time to do it and that is to file the
16 complaint to foreclose on the lien. And depending on
17 how this hearing goes, uh, that will be the next step
18 that we would take.

19 So, uh, end result is, uh, we do have a valid
20 lien. And I hope that answered your question. Do you
21 have derivatives of that?

22 THE COURT: No. I think you -- you did your best
23 to explain it to me and hopefully I understand it well
24 enough to -- to be worthy of your explanation.

25 MR. COX: Well, thank you, Your Honor.

1 THE COURT: All right. Mr. Roberts, uh, you're
2 going to explain it to me again.

3 MR. ROBERTS: Thank you. Thank you. Okay. I'll --
4 I'll focus first on -- on the issue that you've
5 addressed; all right?

6 THE COURT: Okay.

7 MR. ROBERTS: And that is the -- the void lien
8 and whether or not an amendment could revive the void
9 lien by removing the, uh, Bureau of Land Management as
10 a party to whom the lien, uh, is intended to attach.

11 We -- we've relied on the OTAC case and -- and
12 yes, it is a plead, but -- but contrary to what Mr.
13 Peel just represented, there's also a rule that allows
14 amendment of pleadings; right?

15 Rule 15 of the Nevada Rules of Civil Procedure
16 says, "A party may amend a party's pleading as a
17 matter of course at anytime before responsive pleading
18 is served."

19 There's a rule that specifically says you can do
20 it as a matter of course, yet, in the OTAC case, the
21 court said, hey, if it's a void pleading, it can't be
22 amended under the rule. It can't be revived and that's
23 why it parallels to -- to the OTAC decision and to the
24 pleading requirements of the rules.

25 I think that the -- it is proper for Brahma to

1 focus on the right to amend under 108.229. And if you
2 recall Mr. Zimbelman read to you the specific
3 instances where you can amend under NRS 108.2291, "The
4 lien claimant may record an amended notice of lien to
5 correct or clarify the lien claimant's notice of lien.
6 A variance, a difference, between a notice of lien and
7 an amended notice of lien does not defeat the lien and
8 will not be deemed material unless" --

9 And -- and then we look under Section A, "Unless
10 the variance results from fraud, you're not
11 contending, or is made intentionally." Do you get
12 that? So you can amend as long as the variance, the
13 difference, was not made intentionally. So to convince
14 you, they have a right to amend that void lien.

15 They had to convince you today they did not
16 intentionally lien the land belonging to the BLM, that
17 it was not intentional that they listed the BLM as the
18 owner and it was not intentionally that they stated
19 that their lien applied not only to the improvements,
20 but to the land. And I would suggest to Your Honor
21 that's simply not credible if you read their notice of
22 lien.

23 They don't list Tonopah Solar Energy as the owner
24 and then mistakenly give the legal description of the
25 BLM land. They say the owner is the BLM and us and

1 they intentionally liened both the improvements and
2 the land.

3 Again, going back to the notice of lien, Your
4 Honor, which is, I think, critical here paragraph
5 eight of the notice of lien says, "A description of
6 the property to be charged with the lien is the
7 Crescent Dunes Solar Energy project described on
8 Exhibit A."

9 Exhibit A, Page 4 of 7, has two distinct
10 sections. One is the improvement, underlined colon,
11 the solar energy project is the plant located on the
12 land and the second thing they say they're attaching
13 is the land.

14 They intentionally attached the land, they
15 intentionally named the BLM as the owner and they
16 intentionally filed the lien against the BLM. You
17 can't vary to fix an intentional lien.

18 They have to prove it wasn't intentional, but
19 it's not credible. They've said the BLM is the owner
20 and then they list the land as part of what is to be
21 charged and that's why it's void and that's why it
22 can't be fixed. They could amen- -- served a new one
23 on us. They did ultimately serve a new -- new one on
24 us, but the old one cannot be revived.

25 THE COURT: But you also just said, and, you

1 know, I -- I understand this to be the case, that --
2 that, uh, Tonopah Solar Energy was also listed as an
3 owner.

4 MR. ROBERTS: Yes. They liened the land and they
5 liened the improvements. We own the improvements, the
6 BLM owned the land. They liened both.

7 THE COURT: And -- and Tonopah Solar Energy also
8 had something equivalent to a lease, uh, in order to
9 do this improvement?

10 MR. ROBERTS: Correct. But they don't say they're
11 lienning the leasehold interest. They specifically
12 tried to lien the BLM land. There's no getting around
13 it and it was intentional.

14 And if The Court looks in the public record,
15 you'll see when they did work for Cobra, they liened
16 the BLM land then too, because it applies pressure. It
17 gets people stirred up. It was done intentionally to
18 add pressure and it was improper.

19 And all they had to do was refile a new lien
20 taken out to BLM, but they chose not to do that until
21 July and that would still survive this motion as to
22 whether or not that's a proper lien. We're just trying
23 to --

24 THE COURT: But -- but --

25 MR. ROBERTS: -- get rid of the -- the ones --

1 THE COURT: -- but I take it you're -- you're
2 agreeing that Tonopah Solar Energy did, in essence,
3 own or, you know, have all rights to the -- the
4 improvements, had a lawful right to go enter on the
5 property with something equivalent to a lease and that
6 they could lien you, you know, as Tonopah Solar
7 Energy. So that part you're not disputing; are you?

8 MR. ROBERTS: I'm not disputing in the first
9 section, I am disputing in the second section and that
10 is the thing that distinguishes this from basic
11 refractory and that is that prior to Brahma beginning
12 work on the project we did convey 100 percent of our
13 interest in trust to the department of energy as
14 security for this loan.

15 And -- and I understand they want to argue that,
16 oh, there's no proof the government's interest would
17 be impaired.

18 Your -- Your -- Your Honor, what is before you is
19 the security interest filed as a matter of public
20 record to put them on constructive notice before they
21 give work that the DOE claimed all right, title and
22 interest in this land as security for this loan.

23 Now, uh, if you look at the case law and the
24 remand in that second circuit decision, on remand, the
25 fundamental rule stood, regardless of what the

1 findings of fact were in that situation.

2 The rule remained that it is a suit against the
3 United States if it would impair an interest of the
4 United States and the government hasn't given its
5 consent to have that interest compared.

6 So the face of the record before you is they're
7 trying to perfect their interest in the lien so that
8 they can foreclose upon it. What happens if they
9 foreclose upon it? They put the land up for judicial
10 sale, they take the interest away from us.

11 What -- what -- what happens? There is a prior
12 security interest. How do you sell the land without
13 impairing the prior security interest? You can't do
14 it.

15 So they can't foreclose on the lien without
16 impairing the interest of the United States. How can
17 they have a lien? You have to take this case to its
18 ultimate conclusion, because it's pointless to have a
19 lien if you can't foreclose on it.

20 And in this case, they simply cannot foreclose on
21 the lien without impairing the prior security interest
22 of the United States and therefore, under the case
23 law, that fundamental rule that -- you just have to
24 look at every case based on the facts, is does this
25 case implicate the substantial interest of the United

1 States?

2 You know, it obviously does, because they loaned
3 100 percent of the money for the construction of this
4 project and it hasn't been paid back yet, uh, and --

5 THE COURT: Well, still I'm, you know, kind of
6 thinking it's a security interest. Can't there be
7 multiple, you know, creditors, uh, coming after
8 somebody and -- and having a claim against, uh, a
9 certain tangible piece of property --

10 MR. ROBERTS: Uh, there --

11 THE COURT: -- you know, whether it's an
12 improvement or real estate or automobile, you know,
13 they're -- uh, isn't that to be determined at a later
14 proceeding, you know, who really has the first right
15 to this -- this property --

16 MR. ROBERTS: -- well, no.

17 THE COURT: -- when you have multiple claimants?

18 MR. ROBERTS: No. No, Your Honor, because there
19 can be no credible dispute, this has first right.

20 Thi- -- this is like a preexisting mortgage, uh,
21 and you know, it used to be you try to get mortgages
22 afterwards, and then the owner would try to get
23 subordination agreements from the contractors that
24 started work, and that caused problems, and that's
25 forcing waiver of lien rights, and you can't do that.

1 But if there's a mortgage interest that's
2 recorded prior to the contractor starting work, it
3 does have priority. There's no good faith dispute as a
4 matter of law. So if the government interest has
5 priority, how can they foreclose on this interest?

6 THE COURT: Well, won't the -- won't the BLM have
7 a priority over, you know, by reason of a first in
8 time, uh, lien, in essence?

9 Wouldn't they then have priority if, uh -- uh,
10 the Brahma Group tries to foreclose? Well, is- --
11 isn't that really a concern something -- somewhere
12 else -- some other court, not my problem?

13 MR. ROBERTS: If This Court finds that the
14 interest of the government would be impaired by
15 foreclosure, then The Court cannot allow the lien to
16 stand, because you're impairing an interest to the
17 United States without the consent of the United
18 States.

19 THE COURT: I -- I'm not to determine if, uh --

20 MR. ROBERTS: But --

21 THE COURT: -- the United States government will
22 default on its bonds in general nationwide if, uh,
23 they -- they foreclose and they -- they -- they lose
24 the security. I -- I don't have to determine that;
25 right?

1 MR. ROBERTS: -- uh, I don't think you have to go
2 further --

3 THE COURT: It's something else?

4 MR. ROBERTS: -- you don't have to determine how
5 much money they'd lose, you don't have to determine
6 how much money we couldn't pay them back. You have to
7 look at whether their interest is impaired.

8 And how could their interest not be impaired by
9 the foreclosure on the plant when the -- when they get
10 payments out of the revenue from that plant as long as
11 we operated?

12 They want to take the plant away from us. How can
13 that not impair their interest? But again, that only
14 goes to the fallback argument. The void argument is
15 they expressly liened the land, Your Honor, of the
16 BLM.

17 They expressly did it and they did it
18 intentionally. There's no mistake -- there's no
19 argument that they made a mistake here. The name of
20 the owner of the property is Bureau of Land
21 Management.

22 And then they have two sections and one is the
23 land and the parcel to solar energy project is the
24 description of the land that they can see is BLM land.

25 And they knew it was BLM land, because they named

1 the BLM as the owner, and they knew it was BLM land,
2 because the BLM had fined the -- had filed this, uh,
3 right to use, this lease agreement, uh, as a matter of
4 public record, and they knew about it, and they
5 attached it to one of their pleadings as Exhibit 3.

6 THE COURT: But you're not -- you're not
7 representing the interest of the BLM here; are you?

8 MR. ROBERTS: I'm not and that goes to another
9 point I wanted to make, there is no expressed
10 permission for them to file a lien, uh, if, uh, we
11 wrongfully failed to pay them. The provision that
12 they're citing from is titled no liens and it
13 prohibits the filing of liens. Now, there's no express
14 prohibition on filing a lien if there's, uh, wrongful
15 withholding of payment, but we -- we don't say you can
16 do it.

17 But the point is I don't represent the BLM, I
18 don't represent the department of energy, I don't
19 represent the United States in any fashion and the
20 United States is not a party to that contract between
21 Tonopah Solar Energy and Brahma Group.

22 And nothing we did in that contract could provide
23 the consent of the federal government to have their
24 interest impaired. Our contract can't waive their
25 right to claim sovereign immunity.

1 They have to give permission to be sued. The
2 United States has to give permission to be sued, we
3 can't give permission for them to impair and foreclose
4 on the interest of the United States.

5 So -- so that -- that -- that's a no-starter when
6 it comes to our first argument with regard to the
7 voidness of the agreement. And then I just want to,
8 again, touch briefly on the property that's subject to
9 the lien, if The Court finds it survives.

10 THE COURT: Okay. Sure.

11 MR. ROBERTS: Uh, as they conceded in questioning
12 from The Court, you could look all over that contract,
13 this legal description of the contract of the project
14 is nowhere in the contract between Brahma and Tonopah
15 Solar Energy. It's not there.

16 So where does Exhibit A comes -- come from?
17 Exhibit A, that they've attached to their lien, comes
18 from the deed of trust granted to the department of
19 energy as security for the loan.

20 And if The Court will look on Page 3 of 30,
21 Exhibit A is a description of the mortgage property.
22 It's a description of everything we conveyed to them
23 as security for the loan, it's not a description of
24 the project.

25 If you want to look -- find a description of the

1 project, you go to Exhibit 3 attached to their
2 opposition, which is the right-of-way grant and the
3 permission to build and operate the plant and that
4 applies to only two parcels.

5 And it's on the first page, APN 012-151-1 and APN
6 012-141-1, that's it and that's where it has the
7 diagram showing that the entire project that they
8 worked on, the Tonopah Solar Energy project, is
9 located on those two parcels belonging to the BLM.

10 And even Exhibit A from the deed agreement has
11 subtitles and parcel two is defined as the solar
12 energy project. That's what they said they worked on.

13 That's only parcel two from Exhibit A from the
14 deed of trust and that matches up with the two parcels
15 that are on the right-of-way grant from the BLM.

16 So you -- you can't -- can't amend a lien to
17 change something that you intentionally did. We
18 believe that therefore, NRS 108.229 does not apply.
19 Uh, and we agree with the discussion, Your Honor,
20 about the perfection of a lien.

21 As soon as they started working, they had a lien,
22 but it was what's called inchoate. They have inchoate
23 lien rights and those inchoate lien rights never
24 turned into something you can enforce and foreclose
25 upon unless they're perfected.

1 The notice of lien, which they talked about, does
2 specifically require -- there's a form of notice of
3 lien in NRS 108.245 and the form requires that you
4 list who your contract is with.

5 And they said their contract was with someone
6 else, Solar Reserve, not Tonopah Solar Energy. So it
7 doesn't meet the plain terms of the statute. In --

8 THE COURT: But -- but isn't, uh, Solar Reserve
9 your parent company? Uh, I'm not --

10 MR. ROBERTS: Par- -- pardon?

11 THE COURT: -- quite sure, but, you know, uh, I -
12 - I gather -- I mean, Solar Reserve is the -- an
13 entity that I was familiar with before getting
14 involved in this case and --

15 MR. ROBERTS: And -- and --

16 THE COURT: -- and I take it it's some kind of
17 parent operator of -- of the plant.

18 MR. ROBERTS: -- it is some type of affiliate,
19 Your Honor --

20 THE COURT: Okay.

21 MR. ROBERTS: -- but if you look at our right-of-
22 way agreement with the BLM and you look at our
23 agreement with -- with the department of energy, it's
24 Tonopah Solar Energy, LLC.

25 So whatever the -- that notice was -- may have

1 done or may have been intended to do it didn't put the
2 DOE on notice. They were working for Tonopah Solar
3 Energy and they ultimately filed claim for a lien
4 against BLM land if they didn't get paid.

5 And that also goes to intent of, because if you
6 look at the notice of lien, it just lists the two
7 parcels that are in the right-of-way agreement and it
8 lists the owner is the BLM.

9 So even their notice of right to lien indicated
10 their intention to lien the land to the BLM if they
11 weren't paid. So then that applies to this contract.
12 So to perfect the lien, you have to file the notice
13 and you have to do it within a certain period of time.

14 And under NRS 108.2261- -- excuse me, uh, 2E, the
15 -- the notice of lien ha- -- in order to be valid to
16 perfect the lien, has to provide a description of the
17 property to be charged.

18 So that notice of lien said, the property we're
19 charging includes property owned by the BLM and here's
20 a legal description of the land that belongs to the
21 BLM. That's why we're saying it was void.

22 You can't perfect a lien with a void notice. The
23 final point that I -- I'd like to address is there --
24 there was another indication about the unfairness of
25 doing this without discovery.

1 There was a request made last night in the form
2 of an affidavit that they be allowed discovery prior
3 to The Court conducting the hearing.

4 Under the, uh -- actually, under the case that I
5 passed up earlier, JD Construction v. IBEX, uh, The
6 Court said that we conclude, in making these factual
7 determinations, the district court is not required to
8 hold a full evidentiary hearing, but may base its
9 decision on affidavits and documentary evidence
10 submitted by the parties and that this procedure meets
11 due process.

12 In that case, they said, oh, and the court did
13 grant two depositions. So that went to satisfy due
14 process.

15 So I think under the JD Construction, they
16 could've made a timely request for discovery and the
17 court could've ordered and probably shoul- -- would've
18 properly granted a timely request for limited
19 discovery, but it's too late the evening after 5:00
20 p.m., before the hearing, to seek discovery.

21 Under 108.2275, which is the statute we're
22 proceeding under, the court shall conduct the hearing
23 not less than 15 days after serving the order setting
24 the hearing, no more than 30 days after the court
25 issues the order for a hearing.

1 So in this case, the court issued the order for
2 this hearing back in Au- -- August 10th, set the
3 hearing for now 30 days later. They had 30 days to
4 request discovery before this hearing.

5 The court has no discretion to continue the
6 hearing, uh, or discovery, because the court has to
7 conduct the hearing within 30 days after issuing that
8 order.

9 A timely request, they might've had argument for,
10 but if you don't request it until the night before the
11 hearing, you can't get more time, because the statute
12 gives you that 15 to 30-day window and we don't
13 consent to another continuance after 3 continuances of
14 hearing, Your Honor.

15 And as long as we're on this case, the burden of
16 proof issue, uh, Brahma attempts to somehow
17 distinguish between the burden of proof where you
18 claim a lien is excessive versus one where you claim
19 that it's frivolous and void, uh, and there is no --
20 there is no difference. The JD Construction case told
21 you exactly what they were doing. Second paragraph is
22 a decision by Justice Douglas [ph].

23 "In this opinion, we address the proper scope and
24 nature of NRS 108.2275 proceedings where a property
25 owner seeks to expunge a frivolous or excessive lien."

1 In this case, it was excessive, but there's only
2 one statute, which governs both and the burden of
3 proof is the same, regardless of whether you're
4 seeking to expunge a frivolous lien, which was filed
5 without reasonable cause or an excessive lien.

6 So the -- the case clearly applies to this
7 proceeding as well as a proceeding if we had simply
8 claimed that the lien was excessive, Your Honor. Uh,
9 does The Court have any questions?

10 THE COURT: Uh, I do not.

11 MR. PEEL: Can I make a few final points?

12 THE COURT: Bear -- okay. A few final -- final
13 points, but --

14 MR. PEEL: All right.

15 THE COURT: -- I'm -- I'm ready to issue a
16 ruling.

17 MR. PEEL: Okay. So the Las Vegas, uh, plywood
18 case that was a Nevada Supreme Court decision, the
19 Nevada Supreme Court made it very clear that this
20 court has repeatedly held that the mechanics lien
21 statutes are remedial in character and should be
22 liberally construed at substantial compliance with the
23 statutory re- -- requirements is sufficient to perfect
24 a lien if the property owner is not prejudiced.

25 So that's the Las Vegas plywood case. Now, I want

1 to walk you quickly through 108.226. And again, the
2 legislature was the voice that described the form that
3 had to be used for notices of lien. In Subsection 5 of
4 that section, it says, "A notice of lien must be, uh,
5 substantially in the following form." And they set
6 forth the form.

7 And I wish at the time, back in 2003 and 2005,
8 when I was involved that I made, uh -- uh, changes to
9 the form such that we identified a leasehold tenant,
10 but we didn't. At the time, nobody thought that this
11 was that big of a deal or would be an issue.

12 And so the form was the form that the legislature
13 said, this is what you've got to use. Well, in that
14 form, the form is set forth in the statute, it
15 specifically requires certain things to be identified.

16 One of them is the name of the owner, if known,
17 of the property. So you don't have to identify the
18 owner, but if you know it, you should. Then it goes on
19 and it talks about, in Subsection 8 -- or item number
20 8, a description of the property to be charged with a
21 lien.

22 So unfortunately, legislature didn't say a
23 description of the property or the improvement to be
24 charged with a lien, it just said property.

25 And so in item number eight, as a lien claimant,

1 you've got to put -- use your best efforts to try to
2 identify exactly what your lien is intended to attach
3 to.

4 Brahma did that in its original notice of lien
5 and they have that as Exhibit 2 to their moving paper
6 and in that document, if you look at Exhibit A to
7 Exhibit 2, it says, improvement, that Crescent Dunes
8 Solar Energy project is a 110-milliwatt plant
9 constructed on the land into and upon the back.

10 And then it describes what the land is, because
11 you have to say where the project is being
12 constructed, because the statute in the form says you
13 have to describe what the property is. So we said it's
14 the improvement that's being constructed on the land.

15 Well, Mr. Roberts wants to turn that into because
16 we identified the land somehow, somehow, we have in
17 fact attempted to lien the BLM's fee simple interest.

18 Not true. But even if it were true, under
19 108.229, we have the right to amend. He then went on
20 and talked about intentional. There was no intentional
21 act on the part of Brahma, they were just trying to
22 comply with the statute.

23 Going back to the Las Vegas plywood case, which
24 says that you have to interpret the lien statutes
25 liberally in favor of the lien claimant. That's

1 exactly where we are.

2 Final point that I want to talk about is in
3 108.245. He's made a lot of hay out of the fact that
4 we did not identify the person with whom we contracted
5 and yet, in 108.245, there is a form of a notice of
6 right to lien set forth.

7 And in here, you're supposed to fill in the
8 owner's name and address and then it says, the ow- --
9 the undersigned notifies you that he or she has
10 supplied materials, equipment or performed work or
11 services as follows and you give a general description
12 of what you've done.

13 It then says, "For the improvement of property
14 identified as," and you insert the property
15 description under contract with whoever you contracted
16 with.

17 And it says, "This is not a notice that the
18 undersigned has not been or does not expect to be paid
19 by the notice required by law that the undersigned
20 made at some future date, record a notice of lien as
21 provided by law against the property if the
22 undersigned has not paid."

23 But importantly, what it says -- it says that --
24 it just simply says that you can't perfect your lien
25 rights, and this is under Subsection, uh, 3, "No lien

1 for materials or equipment furnished or for work or
2 services performed, except for labor may perfected or
3 enforced inclusive unless the notice is to be given."
4 We gave the notice and we gave it to the person that
5 it had to be given to, which was the ownership, which
6 was the BLM and TSE.

7 And again, I go back to this point, they want to
8 make a lot of hay out of it, but Solar Reserve, by Mr.
9 Roberts' own admission, is an affiliate of the party
10 with whom we contracted.

11 So there's a clerical error there, but they
12 certainly got our notice of right to lien. It was
13 served on the BLM. We've given you proof of that,
14 certified mailing return receipt requested, that was
15 provided, and it was served on TSE.

16 And so they got that. And there's other case law
17 out there in Nevada that stands for the proposition
18 that where a owner is also controlled by -- or also
19 controls a general contractor, in other words, they're
20 affiliated parties, who then subcontract with a
21 subcontractor the notice or knowledge of the general
22 contractor of the existence of that sub on that
23 project is sufficient to bind the owner.

24 That was a U.S. Bankruptcy court, uh, case that
25 interpreted our statute. So it is our position that

1 our -- our lien -- our notice of right to lien was
2 properly given, our notice of lien was intended to
3 affect the improvements, but out of an abundance of
4 caution, we went in and we clarified it, as we were
5 allowed to do. It was not void from its inception and
6 it's binding today. Thank you, Your Honor.

7 THE COURT: If -- if you, uh, want to respond to
8 that --

9 MR. ROBERTS: I --

10 THE COURT: -- I think you should have the last
11 argument and this will end it.

12 MR. ROBERTS: Thank you. And -- and I'm going to
13 be very brief, Your Honor. And I just want to be clear
14 and -- and move to strike Mr. Peel's comments to the
15 extent that he intended to testify what the original
16 intent was of Brahma when they filed the lien.

17 Mr. Peel's firm did not file the original notice
18 of lien that is at issue here. It was filed by Jones
19 Lovelock, Nicole Lovelock of Jones Lovelock, a
20 different law firm. They got fired after they did it
21 wrong.

22 He cannot tell you what This Court -- tell This
23 Court what their intent was. Their intent is clearly
24 stated that they didn't have to say the property to be
25 charged is the land that BLM owned.

1 They said the property to be charged is attached
2 as Exhibit A and it included the improvements and the
3 property. They could've limited this, they clearly
4 intended to lien the BLM.

5 It's a void lien and it can't be amended. The one
6 Mr. Peel properly filed in the third amended lien to
7 the extent it's a new lien that only attaches
8 improvements, that was something done later that was -
9 - because he understands what the rules are. This
10 original lien tried to do it wrong, Your Honor, and it
11 should be held void. Thank you.

12 THE COURT: Well, I do appreciate having, you
13 know, such high-quality, uh, lawyers here. It -- you
14 know, every -- every time one of you speaks I think,
15 oh, God, this guy is great; you know? This is absolute
16 material.

17 It becomes di- -- becomes very, very difficult,
18 but, uh, as -- as I sit here, and I'm thinking about,
19 you know, the cases, and the facts, and, you know,
20 what makes the most sense to me, uh, ultimately, I --
21 uh, I am going to rule against TSE.

22 I -- I -- I feel that the lien stands, uh, and I
23 guess, the reason for it is that TSE did receive it
24 even if, uh, you know, Solar Reserve, uh -- it -- it -
25 - it's certainly affiliated and -- and I don't think

1 that, uh -- that you're really coming in here saying
2 you truly didn't get notice.

3 They -- they just kind of had an affiliate in
4 there, uh -- uh, somewhere, but -- but you -- you
5 received the notice as TSE.

6 I mean, look, you were the lawyer, you're --
7 you're not TSE, but you represent them. Uh, and maybe
8 it wasn't the greatest thing to list the BLM as, you
9 know, the land to be liened, however, TSE, you're --
10 uh, I -- I think you're somewhat estopped from saying,
11 well, the whole thing, you know, against us is void,
12 because another party shouldn't have been, uh, joined
13 in.

14 That doesn't, you know, seem right to me, uh,
15 that you can claim somebody else's issue as your issue
16 to get out of the lien.

17 Uh, I don't -- there's so many issues here to
18 cover. Uh, it seems to me that -- that they can -- uh,
19 in my opinion, based on all I've heard, I -- I don't
20 think that they're prohibited once they validly go
21 after and, you know, get the notice to TSE and file
22 the lien against TSE properly.

23 Uh, they can amend it, you know, as to TSE and
24 certainly clarify that their issue about, uh, the
25 improvements, uh, being the focus of the lien on the

1 BLM property and not the BLM property itself.

2 Uh, so I, you know, come down on the side of, uh,
3 the Brahma Group. On this issue of the sovereign
4 immunity, I guess I already said, you know,
5 fundamentally, the federal government, uh, basically -
6 -

7 You know, it's my understanding that more or less
8 they -- they made a promise to cover others who would
9 do the lending, but maybe the government in fact did
10 the lending.

11 I've kind of heard both stories here, uh, and I'm
12 not sure what it was, but, uh, in any event, these
13 improvements and any land that was put up as well, uh,
14 this is just security and secured property, uh, isn't
15 really the property of the United States government in
16 this -- this case and I don't think any sovereign
17 immunity applies to it. I mean, sovereign immunity is
18 simply that you can't sue the government without it
19 approving it.

20 So we have lots of exceptions to sovereign
21 immunity, uh, that have been created, and -- and
22 nobody is really suing the government here, and I
23 don't feel that, uh, the government -- United States
24 government is impaired by reason of, you know, lien
25 claimants coming in, and wanting some rights into the

1 -- into the security. You can always have that; you
2 know?

3 I mean, just because you have the first, you
4 know, deed of trust on a house, others are going to
5 come in with their liens against the property for
6 various things. Uh, so, you know, that -- that can be
7 worked out in another court. And, uh, there's
8 something else.

9 With regard to the -- the issue of, uh, what
10 property is subject to the lien, I come down on the --
11 the side that, you know, when you look at the work of
12 improvement, it's described as the, uh -- the Tonopah
13 Solar project or the Crescent Dunes, uh, Solar Energy
14 project located outside of Tonopah and I -- I think
15 whatever problem there would -- you know, that -- that
16 is the project.

17 So they had the right, in my opinion, to go after
18 the project and they clarified in their subsequent
19 filings that they're not trying to foreclose the BLM's
20 property.

21 Uh, so I -- I don't buy the, uh, you know, sky-
22 is-falling affidavit that's been submitted. I forget
23 the -- the guy's name, but, uh, it seems to be a
24 management company, uh, for the solar project.

25 You know, I -- I -- I just don't -- don't see the

1 legitimate claims that are subject to a lien get
2 thwarted, uh, simply because, you know, the federal
3 government may have a security interest in -- in the
4 project.

5 You know, I -- I don't see that, uh, the federal
6 government is not going to get paid on this, uh,
7 because, you know, even if there is some sort of
8 foreclosure of the -- of the -- the assets, if it ever
9 comes to that, uh, which frankly, I doubt, but, uh --
10 uh, it's still going to be operated as a solar plant,
11 you know and make money and, uh, the federal
12 government is going to get paid.

13 So anyway, I rule in favor of the, uh, defense
14 here and -- and deny the motion to expunge the lien.

15 MR. ROBERTS: May we prepare the form of order?

16 THE COURT: Yes. I would certainly --

17 MR. ROBERTS: We will submit it to counsel --

18 THE COURT: -- expect you to do that and --

19 MR. ROBERTS: -- for their -- their review, of
20 course. So --

21 THE COURT: Well, you've -- you've articulated
22 the -- the reasons that, uh, I came down in your
23 favor.

24 MR. ROBERTS: Uh, thank you, Your Honor.

25 THE COURT: All right. Thank you very much. The

1 Court will stand in recess.

2 MR. ZIMBELMAN: Thank you for your time and
3 patience, Your Honor.

4 BAILIFF: All rise, Your Honor.

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I, Chris Naaden, a transcriber, hereby declare under penalty of perjury that to the best of my ability the above 90 pages contain a full, true and correct transcription of the tape-recording that I received regarding the event listed on the caption on page 1.

I further declare that I have no interest in the event of the action.



October 11, 2018

Chris Naaden

(Hearing in re Tonopah Solar Energy, LLC. vs. Brahma Group, Inc.)