

IN THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY
STATE OF UTAH

HEAL UTAH, et al.,

Plaintiffs,

Case No. 120700009

vs.

KANE COUNTY WATER CONSERVANCY

DISTRICT, et al.,

Defendants.

~~~~~

TRANSCRIPT OF TRIAL - DAY FIVE

~~~~~

BEFORE THE HONORABLE GEORGE M. HARMOND

SEPTEMBER 27, 2013

50 West Broadway, Suite 900, Salt Lake City, UT 84101
801-983-2180

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

FOR THE PLAINTIFFS:

John S. Flitton, Jr.
Lara A. Swensen
FLITTON & SWENSEN, P.C.
1840 Sun Peak Drive, Suite B-102
Park City, Utah 84098

FOR THE DEFENDANTS:

Julie I. Valdes
UTAH ATTORNEY GENERAL'S OFFICE
Natural Resources Division
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116

-and-

David C. Wright
John H. Mabey, Jr.
MABEY WRIGHT & JAMES, LLC
175 South Main Street, Suite 1330
Salt Lake City, Utah 84111



1 PRICE, UTAH; FRIDAY, SEPTEMBER 27, 2013; 9:30 A.M.

2 BAILIFF: Seventh District Court in and for Carbon
3 County, State of Utah, is now in session, the Honorable
4 Judge George M. Harmond presiding.

5 THE COURT: Please be seated, ladies and
6 gentlemen. We'll be on the record this morning in Heal
7 Utah, et al. v. Blue Castle, et al., Case 1207009.
8 Counsel for all parties are present. We're here today
9 for closing arguments. Mr. Wright, do you wish to
10 begin?

11 MR. WRIGHT: Yes, Your Honor, thank you. Your
12 Honor, I expect to be walking around and looking at
13 exhibits and talking about some blow-ups. How much
14 danger am I of not being recorded?

15 THE COURT: I think we have microphones all the
16 way around. If it becomes problematic, we'll let you
17 know.

18 MR. WRIGHT: You'll be able to tell? Okay.

19 THE COURT: You've got a good, strong voice. So,
20 I don't think it will be a problem.

21 MR. WRIGHT: Thank you. Your Honor, about a year
22 or so ago, I read a biography of John D. Rockefeller,
23 Jr. It's called Titan, by Ron Chernow and something I
24 came to appreciate when I finished that book was just
25 how significant this country's development of its

1 natural resources has been and Rockefeller, Carnegie,
2 Vanderbilt, those guys were all part of that and the
3 development of those fossil fuels helped build the most
4 prosperous, powerful nation the world has ever known,
5 but this country, this generation of Americans has come
6 to realize that those fuels have come at a cost and,
7 so, the applicants are not coming here to the heart of
8 Utah coal country to bad-mouth coal or any other fossil
9 fuel.

10 What we've done, and you've heard some testimony
11 in this case about portfolio theory, Utah has the vast
12 majority, north of ninety-five percent or so, of its
13 energy eggs in, essentially, a single basket, the
14 fossil fuel basket. What this case is about,
15 ultimately, is an attempt, an effort, to create another
16 basket where Utah can put some of its energy eggs to
17 create another resource for base load power so that
18 we're not so dependent on just one. You don't have to
19 be a tree-hugging environmentalist to understand that
20 the fossil fuel industry has come at a cost and, so,
21 that's in the big picture, what this case is about.

22 I want to start with what our burden of proof is.
23 So, I just started with some definitions. The Court
24 understands, from our trial brief, that we have a
25 reason to believe standard that we must meet. So, I

1 tried to come up with an understanding of what that
2 means. How is that applied and, so, I got some
3 definitions, the definition of reasonable, fair,
4 proper, just, moderate, suitable under the
5 circumstances, fit and appropriate to the end in view,
6 not immoderate or excessive, being synonymous with
7 rational, honest, equitable, fair, suitable, moderate,
8 tolerable.

9 The words reasonably believes are used through the
10 Restatement 2d of Tort to denote the fact that the
11 actor believes that a given fact or a combination of
12 facts exists and that the circumstances which he knows
13 or should know are such as to cause a reasonable man so
14 to believe. We all remember from our first year torts
15 classes about the reasonable man standard. That's from
16 Black's Law Dictionary.

17 Reasonable from Oxford American Dictionary: not
18 absurd; not greatly less or more than might be
19 expected.

20 Feasible, a very important term in this case. The
21 Court understands when we apply statutes and interpret
22 statutes in this case, we look to the common, ordinary
23 meaning of words unless they have some technical
24 definition. Feasible: capable of being done;
25 executed, effected or accomplished; reasonable

1 assurance of success. See possible. That's from
2 Black's Law Dictionary.

3 Feasible from the Oxford American Dictionary:
4 practicable, possible. If the correct meaning of
5 feasible is practical or possible, it should not be
6 used to mean likely or probable.

7 Economically feasible has been defined, in one
8 circumstance by our Utah Supreme Court, to mean that
9 there is sufficient demand for the potential use.
10 That's from the Cook case cited in our trial brief and,
11 finally, the word plausible has been used in this case
12 as well. Plausible means concerning an argument,
13 statement, etc.; seeming reasonable or probable, from
14 the Oxford American Dictionary.

15 So, what I noticed, when I looked at these
16 definitions, is how consistent these definitions are
17 among these various terms and how consistently they are
18 used. That's the standard we have to meet.

19 It is not our burden to come here today and prove
20 to you that a nuclear power plant can be built today or
21 will be built ten, fifteen years from now. Our burden
22 is to come here and demonstrate that it is feasible,
23 that it can be done.

24 The Searle v. Milburn case, cited also in our
25 trial brief, explains why a low burden, relatively low

1 burden, has been imposed on applicants seeking to
2 change the use or purpose of use or place of use of
3 water. The Court, there, says the procedure actually
4 provides a balance between the two policy goals of
5 putting water to the most beneficial use possible while
6 simultaneously guarding vested rights. The procedure
7 accomplishes this by placing a fairly low burden on a
8 party seeking approval of a change application thereby
9 allowing the party to attempt to perfect the right to
10 use the water in the manner contemplated by the
11 application. If such use can be accomplished, without
12 interfering with vested rights, the policy of putting
13 water to the best use possible is furthered without
14 causing injury to anyone.

15 In other words, Utah has a vital interest in using
16 the water resources it has. It is undisputed, public
17 known, we are the second driest state in this country
18 and we've got to use the water we've got and we've got
19 to use it wisely and we've got to use it beneficially
20 and it certainly goes without saying, really, that
21 producing electric power is a beneficial use. There
22 are power plants all up and down the state and they all
23 use water.

24 So, then, with that burden understood and in mind,
25 the next thing we do is look at the statutory criteria

1 that we have to meet. This is a summarized version of
2 73-3-8 that identifies, kind of, a checklist that we
3 have to go through under the reason to believe
4 standard. Unappropriated water, proposed use will not
5 impair or interfere with other, more beneficial use.
6 Physical and economic feasibility. Would not prove
7 detrimental to the public welfare. Financial ability.
8 Good faith. No speculation or monopoly and no
9 unreasonable impact on the stream environment or public
10 recreation.

11 We'll start with, it seems to me, the most
12 important fact or issue. Is there water available in
13 the Green River for this project, for this plan?
14 Understanding that these water rights are already
15 approved, this is not an application to appropriate new
16 water out of the Green River. These water rights are
17 already in the water budget for the Colorado River
18 Basin. They are already approved or were approved for
19 coal-fired power generation for a project that didn't
20 happen, but notice what happened when that project
21 didn't happen.

22 Nothing happened to the water. It's there. It's
23 available to be used and the districts are looking for
24 a way to put it to use. Hence, the leases to Blue
25 Castle Holdings by San Juan and Kane in order to find a

1 use for that water.

2 Now, if we talk about available water, we can
3 start with an undisputed fact and I'll just look to the
4 existing decision by State Engineer Kent Jones. No one
5 disputes this. It can't be disputed. To date, the
6 Upper Basin states have met all of their downstream—I'm
7 sorry. I'm reading from Exhibit 6, page 4. To date,
8 the Upper Basin states have met all of their downstream
9 obligations under the compact and law of the river. It
10 is estimated that Utah water users currently deplete
11 approximately one million acre feet annually which
12 represents an underutilization of Utah's share of the
13 Colorado River allocation.

14 You recall Kent Jones and Jerry Olds both
15 testified that we've got the right to use about 1.4
16 million acre feet. We're using about a million and the
17 estimates seem to be there's around 360 or so thousand
18 acre feet, because we're rounding off, of unused,
19 available water.

20 Now, there was some testimony about the Basin,
21 overall, being over appropriated, but you heard
22 perfectly reasonable explanations for how that works in
23 the State of Utah. On paper, yes. The Basin is over
24 appropriated, but actual wet water is not being used.
25 So, there's a difference between appropriated water and

1 developed water. That is at the heart of the issue of
2 whether there is available water. Again, this is not
3 seeking to appropriate new water.

4 Exhibit 12 is an item I used with Jerry Olds and I
5 asked him to explain how the water budget for the Basin
6 is, sort of, compiled and understood and Mr. Olds
7 explained--sorry. I don't have blow-ups of everything--

8 THE COURT: That's okay. I can deal with that.

9 MR. WRIGHT: --but he identified the potential
10 depletion of the approved applications but, yet,
11 undeveloped in the Basin and it totals-up to 574,600
12 acre feet. The important part of this Exhibit 12 is
13 that the San Juan and Kane rights are included in that.
14 As I said, they're already in the water budget.
15 They're approved water rights. The water, itself, is
16 just not being used.

17 The next undisputed fact concerning water
18 availability--you'll recall I asked Mr. Norris about
19 this--is some figures identified in both of the existing
20 State Engineer orders. I use that because that's where
21 we find these figures. It's Exhibit 6 at page 5 and
22 there's similar language in the--this is the Kane--same
23 language in the San Juan; and that is the mean flow at
24 the Green River, and that's the issue here. Is there
25 water in the Green River. The mean flow, based on the

1 gauge records, 6,048 C.F.S. with an annual mean
2 average, meaning volume, of 4.381 million acre feet.

3 Mr. Jones explained that, based on the historical
4 flow records at this station, meaning the Green River
5 Gauge, there has always been sufficient water for this
6 application to be diverted at the defined points of
7 diversion. No one has challenged that. No one has
8 challenged those figures. No one has come forward with
9 any evidence that there is not available water and
10 we'll get further to Mr. Norris in a moment.

11 Exhibit 16. Mr. Olds was asked to evaluate
12 availability of water and Exhibit 16 is one of the
13 graphs that he prepared to identify the flows in the
14 Green River. He chose 1978, as he testified, because
15 that's an average year and he looked at the flows, and
16 you can see it's the entire year, starting in October
17 through September, and it shows the lower flows during
18 the winter months and, then, starting in spring, in
19 May, it really spikes as the snow melt hits and, then,
20 drops off, dramatically, back down and those average
21 daily flows, in an average year, 1,800 to 2,500 C.F.S..
22 Undisputed and we're talking about a withdrawal of 70
23 C.F.S..

24 Now, the next, and perhaps one of the most
25 important exhibits in this case, most important pieces

1 of evidence in this case, is Exhibit 20. This is the
2 record of decision for the Bureau of Reclamation
3 concerning the operation—or, I should say re-operation—
4 of Flaming Gorge Dam and what we mean by re-operation
5 is that, when the dam was built, it was built with
6 certain functions and features that, in 2006, a
7 decision was made, a very critical decision, critical
8 for fish and critical for this case.

9 The decision was we're going to re-operate the
10 reservoir because we've got some endangered fish and
11 we've got water uses. We've got demands on the river
12 and Exhibit 20 demonstrates that the Bureau of
13 Reclamation has agreed to operate the reservoir in such
14 a manner as to keep the flows at a level to help take
15 care of the critters and the water uses and, on page
16 one, it states: the purpose of the proposed action,
17 which is the re-operation, is to operate Flaming Gorge
18 Dam to protect and assist in recovery of the
19 populations in designated critical habitat of the four
20 endangered fishes while maintaining all authorized
21 purposes of the Flaming Gorge Unit of the Colorado
22 River Storage Project, including those related to the
23 development of water resources in accordance with the
24 Colorado River Compact.

25 Utah gets twenty-three percent of the Upper Basin

1 share of the Compact water. So, in other words, the
2 Bureau, the states got together and said we're going to
3 try to do it all. We're going to try to save the fish,
4 preserve their habitat and we're going to try to make
5 that water available for use and you heard the
6 undisputed testimony that, since 2006, the effort has
7 been more or less successful to stay at those
8 recommended 1,300 C.F.S. flows. We're not hitting them
9 all the time. There's been fluctuation that, basically,
10 within that 25 percent margin of error that you heard
11 about. Kent Jones testified, and no one disputed it,
12 that, since 2006, those flows have been reasonably
13 stable. They've been reliable.

14 Now, concerning Mr. Norris. This was the
15 protestant's expert witness brought here to tell you
16 that there is not available water. There is just no
17 water there to pull out of the Green River and his
18 theory was. There's not available water if you
19 subtract the tributaries. Two of the biggest
20 tributaries to the Green River, just take them out of
21 the equation because, under his understanding, that's
22 how you evaluate available water under the Compact.

23 Well, you know, I had one of those moments, on
24 cross-examination, that you wonder if they—I mean, they
25 don't happen often, but I asked him, Mr. Norris, you're

1 aware that the Yampa River, out of Colorado, under the
2 Compact, Utah is guaranteed a half a million acre feet,
3 on average, of water out of the Yampa. He didn't know
4 that. He just didn't know that.

5 So, with that testimony completely dismissed,
6 there is no evidence that undermines our case that
7 there is available water in the Green River. It is
8 available. It's there and it needs to be put to
9 beneficial use.

10 Jerry Olds testified that, in his opinion, the
11 water is there and is available and, in fact, you'll
12 recall references to the Colorado River Basin Supply
13 and Demand Study. The actual document is not in
14 evidence, but the experts referred to it and Jerry Olds
15 explained that, under that study, even under a rapid
16 growth scenario, all the way out to 2060, Utah is
17 expected to be still underutilizing its Colorado River
18 water by 100,000 acre feet. Undisputed.

19 Now, I realize that's a projection and it's
20 relatively far into the future, but the point is, even
21 under that study, which concludes, by the way, that,
22 eventually, the demand on the Colorado River may exceed
23 what it can deliver. Well, everybody who has talked
24 about that study realizes, well, yeah. Of course. The
25 population is going to grow and the river can only

1 supply so much, but even under a rapid growth scenario,
2 we're still not going to hit that by 2060.

3 I asked Mr. Norris about the availability of that
4 half a million acre feet, on average, out of the Yampa,
5 whether that affected his opinion and he said it
6 didn't. That's just not credible. It's just not
7 credible.

8 Finally, on this point, there was some confusion,
9 I think, about the expected demands of the power
10 facility that we're talking about building, whether
11 it's 3,000 megawatts, or something less than that. If
12 you'll look at—or, you can at your convenience, look at
13 Exhibit 1 and both of them say exactly the same thing,
14 while I only talked about one. Exhibit 1 is the San
15 Juan application.

16 In the explanatory section where the project is
17 explained: the District, now, proposes that the water
18 be used for a nuclear power plant in Emery County with
19 a rated capacity of 1,500 to 3,000 megawatts and you
20 heard undisputed testimony that the design, the
21 ultimate design of the plant has not been selected.
22 We're a long way from that.

23 So, the testimony about—I don't remember if it was
24 Cooper or Gundersen—that there just isn't enough water
25 to do 3,000 megawatts, well, that decision hasn't been

1 made yet. The applications provide for a range and
2 they both say exactly the same thing.

3 Let's talk about stream environment. As I said,
4 Exhibit 20, the record of decision, demonstrates a kind
5 of can-do attitude that we're going to take care of the
6 critters and I really appreciated Dr. Tyus' testimony
7 on this. This guy cares about the critters, you know?
8 He wants to see the river protected, the environment,
9 the habitat protected. We all do. Nobody is here to
10 hurt the fish and, so, Flaming Gorge Dam is going to be
11 operated so that we try to do both things and Dr. Tyus
12 had no problem with that. He understands that process.
13 He understands you've got to use water. He just wants
14 us to be good stewards of the river.

15 Well, the State has already made that
16 determination in cooperation with Wyoming, Colorado and
17 the Bureau of Reclamation, U.S. Fish and Wildlife.
18 They're all on the same team on this one and so was
19 Kent Jones when he originally approved these
20 applications. He imposed what has been discussed in
21 this case as a Section 7 consultation on this project
22 and that's triggered because this is an NRC licensed
23 project.

24 So, the Endangered Species Act isn't going
25 anywhere and you'll notice that Blue Castle or the

1 applicants did not appeal that. In other words, when
2 the applications were approved, we had a right to
3 appeal if we didn't like the conditions that were
4 attached. We didn't appeal that. We're not
5 challenging that. We have recognized, if we're going
6 to use water in that river, we've got to take care of
7 the river. It's in our interest to take care of the
8 river. That's the source of the water without which
9 there is no power plant.

10 I asked Jerry Olds questions about water
11 availability. You may recall this exhibit. Impact on
12 the stream environment is what we're talking about.
13 Jerry Olds, I think he testified this was, like—2002
14 was the second lowest year in some very long length of
15 time, and I don't remember the magnitude, but 2002 was
16 a bad year. We saw extremely low flows on the river
17 and he did an analysis which, by the way, Mr. Norris
18 did not do and Dr. Tyus did not do, of let's look at
19 the impact on the river of pulling out 70 C.F.S. and he
20 did a graph and plotted the flows and he inserts the
21 impact of the 70 C.F.S. and you've heard the testimony.

22 The green line represents the flows. The red line
23 which, to a large degree—this is how these graphs work—
24 overlaps with the green line. There's just a narrow
25 edge of red. We're not saying, of course, that if you

1 pull 70 C.F.S. out of the river, it's not going to have
2 some impact. Of course it will. The impact, though,
3 depends on the flows.

4 Here, we're talking about, especially starting in
5 June, July, August, September—especially July, the
6 flows really got low. Yes, it's going to have an
7 impact, but here's why the record of decision of the
8 Bureau of Reclamation is so important. These were
9 extraordinarily low flows. We have not seen those
10 since 2006. There's a good reason to believe in this
11 case because of the re-operation of Flaming Gorge Dam
12 that we will never see these extraordinarily low flows
13 again. That's the whole point of re-operating Flaming
14 Gorge is to keep the flows up and you heard Kent Jones
15 testify the flows since that time have been relatively
16 consistent, in the 1,100-1,200 C.F.S., trying to get to
17 that 1,300. So, it's working. Dr. Tyus would like it
18 to work better. We all would.

19 Quickly, on impairment. There was no evidence
20 presented of any impairment. None of the protestants
21 took the stand or nobody put on any evidence that they
22 have a water right that's going to be impaired by this
23 withdrawal.

24 Exhibit 56. I asked Jerry Olds to prepare
25 something to identify the relative locations of some of

1 the larger diversions on the Green River near our
2 proposed diversion point and he did that. This is an
3 aerial shot and he identified our point of diversion,
4 down here, and above it, you have Green River Companies
5 pulling water for agricultural use, up here. That's
6 about three or four miles, approximately, upstream.
7 Then, you have the Green River Canal Company, the Thane
8 Ranches, East Side Ditch and the Adamses.

9 The Adamses are among the protestants that have
10 brought this case. The Adamses are almost eight miles
11 upstream, upstream. There is no physical possibility,
12 if you take water below, that it's going to impair
13 somebody above and, as I said, there's been no claim of
14 impairment.

15 The other part of impairment under the statute is
16 that the proposed use will not impair existing rights
17 or interfere with the more beneficial use of water--the
18 more beneficial use of water. I didn't hear any
19 testimony about more beneficial use. I think I heard
20 Dr. Cooper attempt to stray into that area. He has
21 used the phrase--when we're talking about risk and
22 options and our whole business plan, which I'll get to,
23 he said but that risk is being paid for with water.

24 You know, experts get in trouble when they stray
25 outside their area of expertise and Dr. Cooper stepped

1 right into it. He doesn't know anything about Utah
2 water. He doesn't have any concept of how we
3 administer water in the State of Utah. He's from
4 Maryland. They're under a riparian system back there.

5 No evidence was presented that there's a more
6 beneficial use and, then, Cooper, he tried to give us a
7 hierarchy. In his opinion, he thinks it ought to be—
8 power generation is third on the list, he said. Well,
9 we appreciate Dr. Cooper's advice on that, but I think
10 that's a decision this Court can make.

11 Power is a beneficial use of water. He admits
12 that and I don't see any competing applications. I
13 don't see anyone coming into Court, as part of this
14 case, saying hold on. I've got a proposed use of water
15 out of the Green River and my use is more beneficial
16 than generating electricity. No one did that. So,
17 there's nothing more to talk about.

18 Excuse me. On the next issue of—you know, I need
19 to say one more thing about water availability. We
20 heard testimony on cross-examination, I think, of Kent
21 Jones and, maybe, of Jerry Olds. Mr. Flitton asked
22 questions about whether the State of Utah or the
23 applicants have any call on the water from Flaming
24 Gorge Reservoir. That's a perfectly legitimate inquiry
25 and, of course, the answer is no, but call, call is an

1 important legal concept in water rights and I know my
2 colleague, Mr. Flitton, knows this. He knows water
3 law.

4 When you have a call, what that means is a call on
5 water to come down to you. It can be storage and, in
6 this case, that's, kind of, what we're talking about.
7 Flaming Gorge is a storage reservoir. You have a
8 right, a legal, enforceable property right to require
9 that body of water to release water to you. That's
10 what a water right is.

11 Well, no one is claiming that we have that here.
12 We've got almost the equivalent. We have the Bureau of
13 Reclamation agreeing to release the water. So, while
14 we have no legal call, we've got an agreed operation of
15 the reservoir by the Bureau, by the entity that
16 controls that water, to let flows go for use and fish.

17 Now, on the question of financial ability to
18 complete the proposed works. Dr. Cooper was the
19 witness on that question and it was Dr. Cooper's
20 opinion that Blue Castle was not even close to having
21 the 15 or so-whatever the number is-billion dollars to
22 build a nuclear power plant. Stipulated. Stipulated
23 we don't have 15 billion dollars, but that's not how
24 you analyze a project like this. It's not how you
25 build a nuclear project in the United States under Code

1 of Federal Regulation Section 10, Part 52. You heard
2 Dr. Diaz testify. Undisputed about how that works.
3 Dr. Glen George also addressed Part 52.

4 The whole point of Part 52 is to say to an
5 applicant it's okay not to have 15 billion dollars in
6 your pocket today. Spend some money. Do it in a
7 phase, risk-managed approach, eliminate questions. Get
8 your ESP first. Yes, it's expensive. You heard Bob
9 Evans testify, undisputed, 40 or so million dollars to
10 get the ESP application in place, 40, 45 million
11 dollars, I think he said. Not the 100 million. The
12 100 million you heard about is all the way to the COL.

13 So, the plan is get the ESP done and, by doing
14 that, you eliminate enormous unknowns, enormous
15 uncertainty because that's the environmental piece, is
16 the site even suitable for a plant. If it isn't,
17 you're done and who is taking that risk? Not the State
18 of Utah. Not Emery County. Not the City of Green
19 River. Blue Castle Holdings is the only one. They're
20 the ones writing the checks.

21 The districts aren't even really at risk. They
22 leased this water. If this doesn't happen, this
23 doesn't work, the water goes right back to the
24 districts and they'll go find another use and an
25 additional factor on that point is the water can still

1 be used in the interim. This plant, we're looking at a
2 target range of somewhere, 2022, 2025 time frame for
3 the possible deployment of power out of a plant in
4 Green River. In the interim, that water is available
5 to be used, on a temporary basis, by anyone who wants
6 to come and pay the districts to use it.

7 So, the proposed works, yes, a nuclear power
8 plant, but financial ability has to be based on what is
9 the nature of the project. How is it built in this
10 country and we cited the Idaho case, Shokal v. Dunn.
11 Shokal is a case where—Idaho has a slightly different
12 analysis on this question about financial ability, but
13 not terribly different and, there, you have to show
14 that you have the financial ability to complete the
15 project and the Court, in that case, was asked, well,
16 when do you have to have that money? And the Court
17 used the phrase then and there. The Court said you
18 don't have to have the money then and there, when you
19 file the application.

20 And you heard Kent Jones testify. I asked him how
21 do you look at this issue. I walked him through all of
22 these tests and I asked him how do you look at this
23 question and he said we don't expect an applicant to
24 walk in with a pocket of money to complete the work at
25 that instant. What he said is we want them to have a

1 viable, feasible plan to get there and that's what
2 we've presented.

3 If you recall Exhibit 42, this Exhibit serves a
4 couple of purposes. This is the exhibit I used with
5 Tom Retson and Bob Evans from Intercon. Remember,
6 they're the contractor doing the site work.

7 THE COURT: Right.

8 MR. WRIGHT: And I asked about money spent and
9 where we are in the ESP process and this graph just
10 illustrates what the evidence was. It demonstrates the
11 work we've completed and how much money we've spent.
12 Over here, you'll see project cost in thousands of
13 dollars and, you know, percentage of completion. On
14 some areas, like site work, we're almost done. Project
15 management, halfway. Geography, a little more than
16 halfway. Meteorology, still more to go. You know, all
17 these areas, right? All of them show work actually
18 being done, money actually being spent. The total
19 project's expenditures are a little over 17 million,
20 ten of it just on Intercon work, on site development,
21 data collection. That's what we're doing and, under
22 the law, that's what we must do and we're the ones
23 bearing that risk and not one penny of the million
24 spent, to date, is borrowed. This is a debt-free
25 project.

1 Do we have the ability to build a nuclear power
2 plant tomorrow? No. What we are doing is creating
3 options by minimizing risk, answering questions,
4 resolving uncertainty, we're moving forward in the
5 process according to the law and you heard Dr. Diaz
6 repeat it, it must have been a dozen times. We're
7 doing this according to the law. That's all we can do.
8 That's all we're expected to do. It's expensive, but
9 it's our risk. It's a risk these guys are willing to
10 take.

11 And remember. The whole point—and I asked Kent
12 Jones this question about experimentation. Is there an
13 element of experimentation, you know, to encourage some
14 risk and get our water to beneficial use? Yes and I
15 read you that section from Searle v. Milburn. That's
16 the whole point. Encourage a little risk-taking to get
17 that water to use.

18 If you think of it in terms of a housing
19 development analogy, you know, it could be a farmer who
20 has got a hundred acres. He's tired of farming. Says
21 you know what? I'm going to retire. I'm going to
22 convert this ground. Subdivide it and build some
23 houses. Well, he's got to go through a process, too.
24 He doesn't have the money to build 100 houses on his
25 100 acres. What he does have is land rich and cash

1 poor.

2 The first thing he has got to do? Water. You
3 can't go to the City of Salt Lake and say I want to
4 build 100 houses and hook on. No. You've got to bring
5 some water and, so, you go through the same process to
6 build a housing development, in essence, that we're
7 doing here. Is the ground sufficient? If you're
8 building 100 houses out in the Wasatch Front, the first
9 question you ask is am I in a flood plane? Can I get
10 water to it? And, then, once you start developing your
11 ground, what do you do? Curb and gutter, sewer. You
12 lay your—they're called horizontals in the development
13 business.

14 You get all that stuff done before you turn a
15 shovel of dirt to build a house. Then, you've got to
16 go to the bank and hope you get a construction loan
17 and, then, you hope you sell some houses. There's
18 always a little bit of speculation as we saw in the
19 2008 housing crash. Sometimes, they go bad, but the
20 point is you encourage that risk-taking.

21 There's a Utah Supreme Court decision that's quite
22 helpful in this issue. Actually, it addresses a couple
23 of issues. Your Honor, a copy of the case for your
24 reading pleasure.

25 THE COURT: Thank you.

1 MR. WRIGHT: This is Bullock v. Hanks. It's a
2 decision, Utah Supreme Court 1969. In that case, there
3 was a change application being requested to build a
4 dam, store some water, and it, really, provides some
5 useful analysis on how you look at these questions,
6 first of all, of physical feasibility—I'm sorry, of
7 financial ability. This is, basically, a cut and paste
8 from the case.

9 The State Engineer testified that he really
10 determines if there be a reasonable probability that a
11 dam can be built, that water can be impounded and that
12 water will be available to be impounded, diverted and
13 placed on the lands. If these requirements be met, the
14 project is considered feasible.

15 The State Engineer stated that, on this project,
16 he determined whether it could, not would, be feasible
17 and the defendants argue—and the defendants in this
18 case were the applicants. Their applications were
19 approved. They got sued in District Court challenging
20 the approval. That's exactly what has happened in this
21 case. So, the applicants argued that no applicant
22 should be required, at the approval stage, to expend
23 the money to design, completely, a dam, spillway and
24 other works and to dig test holes and expend other
25 substantial amounts of money to assure he has a

1 reservoir site. Such an expenditure is unmerited since
2 the application may be disapproved on some other ground
3 such as non-availability of water.

4 We agree, the Court says. The standard applied—
5 and it refers to U.S. v. District Court. The object of
6 the Engineer's Office, now-of course, that applies to
7 you on de novo review—is to maintain order and
8 efficiency in the appropriation, distribution and
9 conservation of water and to allow as much water to be
10 beneficially used as possible. So construed, the law
11 provides a period of experimentation during which ways
12 and means may be sought to make beneficial use of warm
13 water under the application before the rights of the
14 parties are finally adjudicated.

15 If we were to finally adjudicate applicant's right
16 to change or appropriate at the time that such
17 application were rejected or approved, he would only
18 get such rights as he could establish by preponderance
19 of the evidence. Such a system would cut-off the
20 possibility of establishing many valuable rights
21 without a chance to demonstrate what could be done.
22 So, the Court affirmed the approvals.

23 The applicants have given you, Your Honor, reason
24 to believe that they have the financial ability to
25 complete the proposed works because they met every

1 obligation. You heard Intercon testify. They've paid
2 us timely. We bill them. They pay us a lot of money.
3 Compared to 15 billion? No, but that's not the test.
4 That's not the test. They want to hold us to a
5 standard that not even the Nuclear Regulatory
6 Commission holds us to.

7 The NRC doesn't expect Blue Castle, at this stage,
8 to have 15 billion dollars to build a power plant. You
9 heard Bob Evans and Tom Retson testify they've had a
10 number of contacts, meetings with the NRC. The NRC has
11 been here, three times, to visit the site. No one has
12 ever said show us your balance sheet and prove you've
13 got 15 million dollars.

14 All right, on the issue of physical feasibility,
15 the first question is, of course, we've got to have the
16 water and the water is available. So, without that,
17 there's no going forward. We've proven that. Exhibit
18 43 is a satellite photo that shows the overall site in
19 relation to other very important infrastructure. It
20 shows the plant site in the green dotted-dashed circle.
21 We're near an interstate highway. We're next to a
22 transmission line. Pretty important if you want to
23 distribute power. Next to a rail line. Close to a
24 city that's going to provide things like schools and
25 hospitals and things like that for people to come here

1 and work and live and you heard lots of testimony about
2 the impact that will have or could have.

3 We're at the very beginning of the project, but
4 you'll recall Exhibit 44 and Exhibit 45 were both
5 preliminary reports as to site feasibility and both of
6 them were favorable. Forty-four was about are there
7 any paleontological resources or things that we might
8 disturb that shouldn't be disturbed. No, nothing
9 there. Exhibit 45, preliminary site report, concluded:
10 based on the analysis described above, the Blue Castle
11 site appears to be feasible as a nuclear power plant
12 site. Based on this initial screening, feasibility
13 analysis of Earthquake ground motions and potential
14 tectonic fault rupture. So, we're doing the work we've
15 got to do to establish physical feasibility. So far,
16 so good.

17 You heard Bob Evans testify that, in his opinion,
18 so far, there's no indication that the site is not
19 suitable for the proposed project.

20 Let's talk about economic feasibility. This was,
21 probably, the thrust of the protestant's case, but
22 things didn't go too well to try to undermine the
23 reason to believe. First of all, let's look at the
24 test. The test for economic feasibility is is the
25 proposed plan economically feasible, the plan? What's

1 the plan? Well, the plan is given to us under Part 52
2 of 10 C.F.R. That was what we asked Dr. Glen George to
3 evaluate. That's what Robert Graber evaluated and they
4 offered you their opinions based on an actual analysis
5 of the Blue Castle plan.

6 What is it you guys intend to do? Show me your
7 numbers. I think it's Exhibit 60 is What Glen George
8 looked at. It was just a business case that we
9 presented to him and said, look. This is what we
10 expect. These are some of the assumptions we are
11 making to get us down the road to actually build a
12 power plant. Dr. George testified, undisputed, you
13 guys have made valid assumptions. You're within the
14 norm of what you do when you're evaluating and
15 building—repairing and, then, building a nuclear power
16 plant. No one contradicted that. Dr. Cooper didn't
17 even look. He doesn't even know what our plan is. He
18 thinks—I think he thinks we're going to try to build a
19 power plant in the next few years. He doesn't know
20 what our plan is.

21 Now, Exhibit—economic feasibility. Well, it
22 starts with, but it doesn't end with, demand. It's
23 undisputed, in this case—and this is what Dr. George
24 looked at. It's what Robert Graber looked at—third
25 fastest growing state in the nation. In Utah, we have

1 big families and it's a great place to live and people
2 move here from other places to live here and there's no
3 reason to think it's not going to continue to grow.

4 What else are the fastest growing states? Nevada,
5 number one. Arizona, number two. Colorado, in the top
6 ten. That's right in our wheel house. The fastest
7 growing states in the country are exactly where we want
8 to sell power. The demand is there and the demand is
9 expected to be there.

10 Dr. George talked about risk options and the Utah
11 portfolio. You recall that testimony. I think the
12 figure he used was 98 percent fossil fuels. I could be
13 wrong, but I know it's 95, anyway, and he said, you
14 know, that's trouble. He talked about your eggs in one
15 basket and that whole thing.

16 Utah needs to diversify. That, alone, adds to the
17 feasibility because we are so dependent on one resource
18 that any faltering, any volatility created by the
19 unknowns that are out there, what does the United
20 States—I asked Dr. Grouper, what is the United States
21 Congress going to do? It was a bit of a rhetorical
22 question because he doesn't know. I don't know. Blue
23 Castle doesn't know. What are we going to do about
24 emissions and greenhouse gases? We don't know. There
25 are powerful lobbies on all sides of this question.

1 So, Utah needs to protect itself from those
2 fluctuations.

3 Exhibits 64 and 65 are where Mr. Graber talked
4 about expected electricity demand, going forward, and
5 in the WECC area of NERC, you heard him talk about what
6 those regions are, WECC, Western Electric Coordinating
7 Council. The western states are looking at annual
8 electric demand growth. Utah is over a point and a
9 half percent, a point and a half percent yearly.
10 Yearly, as well as others.

11 So, the demand is growing in terms of population.
12 Electricity demand, itself, is growing. You know, 50
13 years ago, we didn't charge cell phones and iPads and
14 computers and, you know, we're so much more
15 electrically dependent, today, than we were when we
16 were young and people want their electric power and
17 somebody has got to provide it.

18 I asked Reed Searle to explain what's been going
19 on in Utah in the last several years, and in the near
20 future, about coal and coal generated electricity in
21 this country and he described a coal hole. He
22 described not only new generation that has been
23 cancelled, three plants I think he said, two of them
24 are recited in our trial brief where they just could
25 not meet clean air emissions standards. No new

1 generation capacity is going to get built using coal
2 and he also talked about existing plants that are
3 shutting down either because of air problems or they're
4 just aging, you know? These plants don't last very
5 long.

6 So, now, you've got a double-whammy, don't we?
7 We've got growing demand and we've got decreasing
8 capacity to meet it.

9 Dr. Diaz was very important on this point. He
10 explained to you, contrary to what Dr. Cooper testified
11 about, that nuclear energy, the nuclear industry in
12 this country is not dead. Dr. Cooper would like you to
13 believe that. Dr. Diaz described all of the
14 applications that are in process, the power uprates,
15 the license renewals, the billions of dollars being
16 spent to modernize and improve and uprate existing
17 nuclear facilities, facilities being built in Georgia,
18 in South Carolina, other applications working their way
19 through the NRC process. Nuclear, in this country, is
20 alive and well.

21 Remember all those project cancellations that Dr.
22 Cooper talked about? Can't dispute that. Yeah, lots of
23 them have been cancelled. We've had cost overruns.
24 We've had—but what has happened? Nuclear has managed
25 to maintain, despite the fact that new plants haven't

1 been built in a while, it's managed to maintain its
2 percentage of overall energy in this country at about
3 twenty percent.

4 Well, power uprates. These things produce a lot
5 of electricity. You heard the testimony. Sixty
6 million times more energy potential than coal. That's
7 just—it's unbelievable and another reason why, as I've
8 already said, nuclear is hardly dead is that Part 52
9 encourages the very kind of plan, indeed invites the
10 Blue Castle plan. It lays out the plan for Blue Castle
11 and we're following it.

12 Cooper agreed with us on issues like real options.
13 He agreed with me about, with real options, what you
14 do is minimize risk. The more information you get, you
15 can make decisions. You keep taking steps forward.
16 You realize—you get to a point where it's a dead-end.
17 You're done, but he agreed that what you do in a plan
18 like that is you reduce uncertainty. That's Rob
19 Graber. That's all Rob Graber was talking about is
20 minimizing uncertainty, reducing uncertainty, answering
21 questions, getting information.

22 The test is, Your Honor, is this capable of being
23 done. Well, of course it is. It's being done. Isn't
24 there a scientific principal, something like, if it is
25 being done, it can be done, or, anyway, I read

1 something like that.

2 Very quickly on public welfare. Obviously,
3 electricity is a beneficial use of water. Utah needs
4 to use its water beneficially. Nuclear emits no carbon
5 gases. Exhibits 48, 49 and 50 are the resolutions.
6 First, 48 is the resolution of Emery County which they
7 state, for example, whereas, United States nuclear
8 industry has accumulated almost 3,400 reactor years of
9 operation since the first plant started, without injury
10 or death to a single member of the public. A lot of
11 people don't really think about that.

12 The United States produces more nuclear energy
13 than any other country in the world and, yet, it's only
14 twenty percent of our capacity. What does that tell
15 you about energy demand in this country? Nobody has
16 been hurt.

17 The City of Green River, Exhibit 49, resolution of
18 the City of Green River supporting this project. They
19 want this. This isn't just an economic shot in the
20 arm. This is, like, nine more lives of economic punch
21 and, finally, Exhibit 50 is the Joint Resolution
22 Supporting Nuclear Power, General Session, Utah State
23 Legislature 2009.

24 The City, the County and the State have said,
25 unequivocally, as well as in other statutes which I

1 cited in the brief, we want nuclear in this state.
2 We're willing to give it a try. Yes, it's expensive.
3 Yes, there's risk, but we've got a fossil fuel problem
4 here. We're willing to do this. So, the decision
5 about public welfare has really, at least from a policy
6 level, has been made.

7 Dr. Diaz testified, at great length, about the
8 public involvement in the NRC process. You know, this
9 idea that the State can't veto an NRC license, of
10 course. The State can't veto a license once it's been
11 granted. There's a little thing in the Constitution
12 called the supremacy clause. Federal law trumps, but
13 to say that the State is left out of the process if
14 this Court approves this application is just complete,
15 complete fabrication. The State is involved every step
16 of the way.

17 Dr. Diaz testified they won't even issue the EIS
18 without state involvement and, for the Court's
19 reference, Dr. Diaz talked about Exhibit 54. That's
20 the diagram that shows how the process works. Public
21 involvement every step of the way, as it should be.

22 Concerning the issue of environment, which is a
23 public welfare concern, this is Exhibit 50, at page
24 5.2.1-5, concerning the review procedures under the NRC
25 process and the environmental impact statement that Dr.

1 Diaz described. This section of the environmental
2 impact statement concerning review procedures should be
3 planned to accomplish the following objectives: public
4 disclosure of the hydrologic alterations resulting from
5 plant operation and the comparison of plant water needs
6 with water availability, a discussion of the effects of
7 these alterations and water supply need comparisons,
8 presentation of staff conclusions regarding adequacy of
9 plant water supply to meet plant water needs. So, this
10 isn't the last look at water. It's surely not the last
11 look at the environment.

12 And on that question—well, sorry. I failed to
13 mention a reference on the natural stream environment.
14 You know what? I haven't got there yet. That's why.
15 Is that right? Yeah, I haven't got there. Quickly on
16 stream environment. Dr. Hardy looked at the withdrawal
17 of 70 C.F.S. from the river and you heard his work
18 severely criticized by Mr. Norris and Dr. Tyus. What I
19 didn't see, from either of them, was an analysis of
20 their own about the impact on the environment.

21 All Dr. Hardy did was say, all right. Let's look
22 at what happens when you take 70 C.F.S. out of the
23 river at various flow regimes and this happens to be in
24 Exhibit 27. This happens to be the depth, but there is
25 also a velocity and width of the river as well, same

1 exact kind of exhibit. What this diagram or this chart
2 shows, even at low flows, how you read this exceedence
3 notion. Ninety-nine percent of the time, the river is
4 at this flow or higher.

5 So, this is an extremely low flow, as we've
6 already discussed, historically low, well, at least for
7 our purposes. The river has had far more severe
8 droughts, as you've heard, but even at a low flow,
9 you're talking about an inch-and-a-half or so and Dr.
10 Hardy's work was criticized because he only looked at a
11 U-shaped channel, they thought, but that's not what
12 happened.

13 If you'll look at Exhibit 39, Dr. Hardy took a
14 shot of the river, a cross-section, and what this
15 exhibit shows is the effect on the river at low flows.
16 This is 709 C.F.S.. This is as low as it gets and it
17 shows a side channel and it shows the bottom of the
18 river and the impact. You take that down an inch and a
19 half, it leaves you several inches left. Sure, it's
20 going to have an impact, but all he was trying to show
21 is, if it's just about withdrawing water, what is that
22 going to do to the environment? Well, not much. Not
23 much.

24 Dr. Tyus talked about, yes. It's hard on the fish
25 but, as I said before, since the re-operation of

1 Flaming Gorge, that's no longer, at least foreseeably,
2 going to be an issue. They're looking at hitting those
3 targets and there's nothing the applicants can do about
4 that.

5 Gundersen. Mr. Gundersen talked about drift and
6 blow-down and you recall all that. One of the points I
7 wanted to make about that was, you know, this drift he
8 talks about. The stuff that constitutes that drift was
9 already—some of it was already in the river. It's the
10 particles. It's the little things that are in the
11 water that get stranded and they get blown out of the
12 tower and they fall. Well, some of that was already in
13 the river. That's where the water came from and he
14 adds these fungicides and algaecides and things that
15 are used to prevent moss from growing. Have you heard
16 that?

17 Well, is there any doubt that the EPA and Utah's
18 water quality personnel aren't going to be all over
19 that? And all he did was describe a phenomenon
20 consistent with any cooling tower technology. The coal
21 plants right around here do the same thing and we've
22 just heard no evidence about, well, what does that do?
23 He just says it's there. Stipulated, it's there.

24 You recall Dr. Diaz, I asked him about that on
25 rebuttal and he turned us to Exhibit 52, which is the

1 analysis under the NRC EIS process about discharges,
2 thermal and other discharges to the environment and to
3 the water. All of that is accounted for. All of that
4 is considered as part of the environmental analysis.

5 So, Your Honor, we have provided more than reason
6 to believe that this project can be done. No question
7 that water is there. It's not going to interfere or
8 impair with anyone. It's physically and economically
9 feasible. The plan. Remember, that's a really
10 important distinction here. The plan is economically
11 feasible. There's no detriment to the public welfare.
12 To say that—I want to be clear here. We're not
13 suggesting there isn't risk. Sure. Nuclear power
14 plants, as Dr. Cooper testified, they contain and deal
15 with an enormous energy, an enormous power, but it
16 seems, to me, the United States has figured it out.
17 That's part of the reason these things are so expensive
18 is because we make them very, very safe in this country
19 and it's a price, probably, worth paying given the
20 alternative.

21 So, Your Honor, we've met our burden. We've
22 established reason to believe on all of these tests and
23 our request, then, is that the applications be
24 approved, as submitted. That's all I've got for now.
25 I expect, under our agreement, I've got 30 minutes for

1 rebuttal.

2 THE COURT: Okay. Thank you, Mr. Wright. Mr.
3 Flitton or Ms. Swensen?

4 MR. FLITTON: Good morning, Your Honor.

5 THE COURT: How are you.

6 MR. FLITTON: I think [inaudible] to speak to you.

7 THE COURT: Excuse me one second.

8 [Inaudible discussion.]

9 THE COURT: Okay, thank you. I'm sorry, Mr.
10 Flitton.

11 MR. FLITTON: Oh, that's okay.

12 THE COURT: Housekeeping. Go ahead. Take your
13 time.

14 MR. FLITTON: I appreciate the opportunity to be
15 able to speak today. Listening to the applicant's
16 closing statements, I think that, you know, which is,
17 probably, common in most of these proceedings, there's
18 a real difference of opinion and I think one of the
19 primary differences that we have with the applicants is
20 that this is a process not just to promote development
21 of the resource. I hear, over and over again, that we
22 should have the chance to go and build this new nuclear
23 power plant, use this resource.

24 So, that's what the State wants us to do, but
25 there's another side to that coin and that other side

1 is to protect valuable public resource and the statutes
2 are written in such a way that there's an analysis that
3 has to be undertaken, that there's investigation that
4 must be made in order to assure the public and other
5 water users that there is not going to be unreasonable
6 detrimental impacts by virtue of the approval of an
7 application, whether it's to appropriate or to change
8 the nature or place of use of water and that's the
9 criteria that we've been focusing on throughout this
10 trial, the various factors that the State Engineer must
11 take into consideration in approving an application and
12 we've also talked a little bit about what the burden
13 is, what the burden of proof is on the applicant.

14 The Searle case speaks to this burden and says
15 that that burden remains on the applicant throughout
16 the proceeding. It is the applicant's burden to show
17 that there is no reason to believe, but there's reason
18 to believe some of the things could be made and not
19 reason to believe that some of the impacts will occur
20 under the application.

21 Let me just read a portion of that statute because
22 I think that it also speaks to this burden and what the
23 evaluations are that the Court, in this case, must be
24 looking at. I'm referring to Title 73, Chapter 3,
25 Section 8 and, then, I'm reading from subsection (b) (1)

1 and it's listed out, the criteria, in subsection (a),
2 and in (b) (1), what the statute reads is if the State
3 Engineer, because of information in the State
4 Engineer's possession, obtained either by the State
5 Engineer's own investigation or otherwise, has reason
6 to believe that an application to appropriate water
7 will interfere with its more beneficial use for
8 irrigation, domestic or culinary, stock watering, power
9 or mining development or manufacturing or will
10 unreasonably affect public recreation or the natural
11 stream environment or will prove detrimental to the
12 public welfare, it is the State Engineer's duty to hold
13 approval or rejection of the application until the
14 State Engineer has investigated the matter and I think
15 that that speaks to that burden, that it's not just
16 information being brought in and being told that this
17 is how it's going to go and, then, approving an
18 application based on that information. It requires an
19 investigation. It requires the State Engineer, under
20 certain criteria, including the natural stream
21 environment, for example, to make an investigation and
22 he has a duty to withhold that application if he thinks
23 that there may be reason to believe that there will be
24 detriment to impact.

25 And one of the things that concerns us about these

1 applications is that they are speculative. They're
2 speculative in every respect. You know, we've sat
3 through trial. We've heard evidence presented about
4 economics and about, you know, the availability of
5 water, financial ability to complete the project,
6 natural stream environment, etc., but what we've also
7 heard is that this is a plan that, if it were to be
8 completed, will cost in the range of 16 to 18 billion
9 dollars. That's a pretty massive undertaking. It's a
10 massive development. It comes with a massive cost and
11 what we've heard from the applicants is that they want
12 to have this embedded optionality. They want to have
13 the ability to not have to make decisions, to not
14 commit resources, immediately, but to be able to keep
15 holding this water in perpetuity.

16 Some of the testimony that was presented said that
17 they could bank this early site permit for 40 years and
18 I think that, you know, that pushes it way out down the
19 road and, yet, on the other side of that coin, you have
20 a valuable public resource that is not being developed
21 and it is not being used and it is foreclosing others
22 from being able to appropriate it or to obtain it and
23 to put it to some beneficial use and, at the same time,
24 what I've heard from the applicants is that this is a
25 financial investment that they're making. They don't

1 have any plans to put the water to use themselves.

2 \What they want to do is create this package that
3 has leased property, that has some property that
4 they've purchased, that has water rights that they have
5 leased and, then, use that to get an early site permit
6 which would make that package of items more valuable
7 and that is an investment that they've chosen to make
8 and, so, when you hear about all of the money that they
9 have spent, all of that money has been spent on putting
10 together this package. It hasn't necessarily been
11 spent on placing the water for beneficial use. That's
12 way down the road and, frankly, it is speculative
13 whether or not that would ever take place and we'll
14 talk about some of those issues more.

15 When the State Engineer, Kent Jones, was on the
16 stand, his testimony was that the State wants the water
17 to be put to use. That is one of the things that is
18 also embedded in the statutory framework is that
19 beneficial use is the nature and the basis for all
20 water rights in the State of Utah and what we've heard
21 at this trial is that there's not any immediate plan to
22 put that water to beneficial use under these two
23 applications and, in my view, what it boils down to is,
24 essentially, what Blue Castle is asking the State to do
25 is to invest in its project by allowing this water to

1 sit out there and to allow them to hold that and
2 there's no return that comes back to the State for
3 that.

4 You know, there isn't the diligence that's
5 required of any other water user to move forward
6 diligently to put that water to beneficial use. By
7 their own admission, they said, you know, we may hold
8 onto this. It may be 20/40, you know? Or, maybe, even
9 20/60 before this water is put to beneficial use and I
10 just don't think that that's consistent with the
11 requirements of diligence under Utah water law.

12 Let me talk, a little bit, about the legal
13 standard as well. In *Searle v. Milburn*, the Court
14 found that, in looking at whether an application should
15 be approved or not, it said, however, before
16 application approval is warranted, it must be clear,
17 that in the decision-makers' determination, that there
18 is reason to believe is grounded in evidence sufficient
19 to make that belief reasonable.

20 So, when we're talking about the standard, it is
21 based on evidence and it requires this Court, standing
22 in the State Engineer's shoes, to weigh that evidence
23 and to determine whether or not it, in fact, is
24 reasonable. So, in looking at all of these various
25 factors and looking at economic feasibility or physical

1 feasibility or any of those criteria, I think the
2 Court's obligation here is to weigh that evidence and
3 determine whether it is reasonable or is not reasonable
4 and, quite honestly, there are some factors where I
5 think that, you know, there's a dispute of facts.

6 I heard opposing counsel talk about facts that
7 were undisputed and many of them, which I'm sure you
8 can understand, you know, I don't agree with that, but
9 I think that is precisely the Court's job in this case
10 is to weigh those facts and make that determination.

11 So, let me—hopefully, this will help the Court
12 track. I think what I'd like to do is just, kind of,
13 go through each one of these criteria, individually,
14 and just talk about what was presented at trial and
15 what I think the standards are and the first one is
16 economic feasibility. The overall theme that was
17 presented by applicants is that this venture is all
18 about de-risking. I heard that term used by a number
19 of witnesses, that they were de-risking this whole
20 process. That, somehow, that they've got this formula
21 that will allow them to do something that, really, no
22 private entity has done before and that, somehow,
23 they've got this magic formula that says we can take
24 all the risk out of this and, then, that's going to
25 give us this attractive product that investors are

1 going to come in and want to purchase or want to take
2 over, whatever the case may be.

3 And what they do, you know, the market that they
4 look at is they look at, you know, the issues with
5 utilities changing their focus from coal. I mean,
6 that's clearly something that has been throughout this
7 trial is that, you know, coal is becoming more and more
8 pressured because of environmental regulations and air
9 quality regulations and, so, all of the utilities, and
10 we've heard ample evidence on that, are shifting away
11 from that. New coal plants are not being build and,
12 so, what they're looking at is they're looking at what
13 they perceive—applicants are looking at what they
14 perceive to be a hole in the market.

15 They see that there is going to be—we heard
16 testimony from their side that there will be closures
17 of some of these plants. We heard about IPP, for
18 example, but what they ignore is that every one of
19 these utilities is already planning to meet that gap in
20 the market. You know, I think the impression is that
21 they would have you believe that, somehow, they're the
22 only ones that see this and that they're the saviors
23 and they're going to come in and fill that void in the
24 market, but that's just not the case.

25 If you look at the alternatives, every one of the

1 utilities that we talk about, UAMPS and we looked at
2 the IRP for PacifiCorp, they are all looking at these
3 alternative resources as part of their ten year
4 resource plan and, you know, those alternatives include
5 efficiency. Dr. Cooper testified about how much
6 efficiency can make up the market. He read a portion
7 of PacifiCorp's IRP that says that is a major priority
8 with PacifiCorp because they feel like they can make up
9 for any new demand from just increased efficiencies in
10 the system.

11 We had considerable testimony regarding natural
12 gas and the price of natural gas. I think it's Exhibit
13 79 is in, sort of, a percentile-

14 MS. SWENSEN: Eighty-one.

15 MR. FLITTON: What is it? Eighty-one?

16 MS. SWENSEN: Eighty-one.

17 MR. FLITTON: Oh, excuse me, 81 is a percentile
18 calculation of the price of natural gas from 1985 that
19 shows that natural gas prices are much more stable than
20 you and me would like to believe and that is the reason
21 that most utilities are building natural gas plants, at
22 this point, because it is economically feasible and
23 it's much quicker to bring to market than is a
24 technology like nuclear energy, for example and, then,
25 Dr. Cooper also testified with respect to other

1 renewable alternatives. What numbers were those, 79
2 and-

3 MS. SWENSEN: Seventy-nine and eighty.

4 MR. FLITTON: Seventy-nine and eighty were graphs
5 showing the declining cost of both those resources and
6 those are resources that are being looked at by every
7 one of these utilities. So, in essence, what the
8 applicants would have you believe is that there's no
9 other alternative. When Reed Searle was on the stand,
10 his testimony was, well, you can't do wind. You can't
11 do solar. They didn't talk about efficiency. You
12 know, you can't do coal and it was just, kind of,
13 process of elimination that, well, the only thing
14 that's left is nuclear and that's just not the case.

15 All of these alternatives are viable and there are
16 a number of utilities—and the thing about these
17 utilities, and what even their experts testified to, is
18 that you can deploy these alternatives much quicker
19 than trying to build a nuclear power plant and going
20 through this process and the long lead time that it's
21 going to take to even get anything done and, you know,
22 there was conflicting testimony about when this power
23 plant could come online, but I think that the earliest
24 that this would come online, at this point, was,
25 probably, 2023 and that, in my view, that's an

1 optimistic date.

2 Let me talk, a little bit, about the Blue Castle
3 IRP—I mean, the PacifiCorp IRP. What number is that?

4 MS. SWENSEN: Sixty-eight.

5 MR. FLITTON: Okay. Just for your reference, it's
6 Exhibit 68. In the IRP, PacifiCorp, which is, really,
7 probably, the largest power provider in Utah,
8 explicitly states that nuclear is not a viable option
9 between 2030 and does not include it as an option in
10 its preferred portfolio in the forecasted future and
11 that forecasted future actually extends to 2032.

12 So, in terms of looking at the market and looking
13 at what kind of investors are going to be attracted to
14 this nuclear power plant, the IRP at PacifiCorp says
15 they're not interested in it. In fact, PacifiCorp has
16 made statements saying that they don't, you know—number
17 one, they've said that they don't have a need for
18 additional power for ten years, that they've taken care
19 of those things and, then, this was just a recent
20 statement by Randy Eskelson and what he said is, based
21 on—

22 MR. WRIGHT: Objection. If this is not in
23 evidence, this can't be used in closing argument.

24 MR. FLITTON: Well, it's much like your reference
25 to Titan and talking about the importance. I'm not

1 using—

2 MR. WRIGHT: That's not the same thing. He's
3 using this as evidence.

4 THE COURT: And I don't know who Randy Eskelson
5 is. So—

6 MR. WRIGHT: He's the spokesman for PacifiCorp.

7 THE COURT: Yeah.

8 MR. FLITTON: Okay. I'll move on.

9 THE COURT: Let's just, kind of, stick with what's
10 in the evidence as far as that goes.

11 MR. FLITTON: Okay and the testimony that you
12 heard relating to market is that nuclear power has all
13 but ceased to move forward. You were provided with an
14 exhibit, which is Exhibit 77, that gave a history of
15 the nuclear power industry from 2008 to present and
16 what it shows is that, with the exception of the four
17 reactors, two power plants being built in Georgia and
18 North Carolina, that there is no new development of
19 power and that there's a long list—I can't remember how
20 many pages it is, but it's, you know, four, five pages
21 long of all of these events that show that the orders
22 are being withdrawn, plans for building new nuclear are
23 being cancelled and that's the market that they would
24 want us to think that we're entering into at this
25 point; that, somehow, there's going to be a demand for

1 their power and that they're going to be able to
2 accomplish something that no one else has accomplished
3 and they keep referencing this Part 52

4 In fact, I heard opposing counsel, in his
5 arguments, say that that's their plan, that they're
6 following this Part 52 process. Well, a lot of these
7 entities that are on that list have done the exact same
8 thing. That's the same process that they're going
9 through and there is no, you know, there is no magic
10 formula there. You still have to analyze whether
11 you're going to be able to get financing for this
12 project, whether it's competitive, on a rate basis, in
13 the marketplace and the evidence that was provided at
14 this trial shows that that price is not competitive,
15 that there are much cheaper alternatives and that
16 really makes nuclear power, you know, the least
17 attractive option currently. You know, there may be a
18 few others that looking at, sort of, the main stream
19 power resources, it's the least attractive option.

20 Financial ability to complete is also one of the
21 factors and there's some overlap, a little bit, between
22 economic feasibility and financial ability to compete
23 because the massive cost of nuclear power is one of the
24 reasons that the price of the product is higher. You
25 have a substantial investment. It's a long, lengthy

1 investment and it drives the price of the power up, but
2 one of the things that I wanted to point out is that
3 what the statute requires is that you have the
4 financial ability to complete the proposed works. It's
5 not to complete the ESP process. It's not financial
6 ability to conduct studies.

7 It's the financial ability to complete the
8 proposed works because, as we said, earlier, the basis
9 of water law is that you put the water to beneficial
10 use. In fact, if you acquire a water right and you
11 don't continue to put it to beneficial use, you're
12 subject to forfeiting that right. It reverts back to
13 the public and, so, you know, that's an underlying
14 thing and what we've heard at this trial is, well,
15 we're raising the money. We only have 17 million of,
16 you know, let's say a 17 billion dollar project, which
17 is .01 percent of the money that's necessary, but we're
18 working towards that goal, but it's the 17 billion
19 dollar number that's the number the statute is talking
20 about.

21 That's completing the proposed works. Without
22 that infrastructure, you can't put the water to
23 beneficial use. Until that reactor is completed, which
24 is the nature of use under the application, the water
25 under these applications can't be put to beneficial

1 use. So, you have to look at that 17 billion dollar
2 number and I recognize that they talk about the stair-
3 step process, you know? Well, they've got to get the
4 ESP, first, and, then, they've got to get the COL and,
5 then, they've got to find investors and, you know,
6 however that works, but that's a long way down the road
7 and, to me, that's very speculative and I think that
8 sits on the margins of do they really have the
9 financial ability to complete this project.

10 You've heard evidence that, because the product is
11 so expensive, there's not financing available for
12 nuclear power. No private financing is available. The
13 State of Utah does not have an advanced cost recovery
14 statute. There aren't the avenues to be able to do
15 this and you couple that with the fact that the local
16 power utilities, the regional power utilities, are all
17 looking at alternatives, other than nuclear, and
18 they're all developing those alternatives. It becomes
19 a pretty dire situation in terms of really thinking
20 that they're going to get the financing they need to
21 build this massive project.

22 One of the other things that concerns me is that,
23 when Kent Jones was on the stand, he was, you know-I
24 went through his decision with him and part of the
25 basis for his decision is he felt comfortable because

1 they said they had 50 million dollars from, you know,
2 private funding. They had 72 million dollars in
3 commitments from utilities and they had 30 million
4 dollars from this Lead Dog Capital.

5 Not one of those things was true. They have none
6 of that money and, in fact, when I asked the State
7 Engineer did they represent that—was that their
8 representation that they had that financing, he said
9 yes. To me, it causes great concern that, already in
10 this process, they've represented that they have
11 something that they did not have and they do not have.
12 In fact, when we went through the financials, most of
13 the money that has come into this company has come by
14 way of Willow Creek, which we heard has, you know, has
15 a commitment, I guess, to put seven or eight million
16 dollars a year, out of the 12 million dollar net profit
17 that company has.

18 That doesn't take you very far and that's a long
19 way off from 17 billion dollars if they are unable to
20 get these outside investors to come in and going back
21 to the PacifiCorp IRP. That IRP makes it absolutely
22 clear that, at least until 2030, PacifiCorp has no
23 interest in nuclear power.

24 One of the things that I just want to point out as
25 well is there seems to be—and it's from witnesses on

1 the applicant's side, there's a discrepancy between
2 what's required to even get to the ESP point. We've
3 heard a number of a hundred million dollars, and that's
4 the number that's referenced in the State Engineer
5 decision and, now, we're hearing a number of 40 to 50
6 million dollars and I'm not sure what that is and, I
7 guess, that's your job to sort that out, but I just
8 wanted to point that out, that there is that
9 inconsistency there.

10 One of the other things, too, on this financial
11 ability to complete and, also, on the economic
12 feasibility, and it's something that actually, you
13 know, I hadn't considered before trial, but it's this
14 idea of brown field site versus the green field site.
15 You know, it's a pretty massive undertaking and Dr.
16 Cooper testified that, you know, he agreed with their
17 numbers. In fact, I think he even used a little bit
18 lower number on building these reactors at a brown
19 field site, but at a green field site, his estimate was
20 that it would cost 22 to 23 billion dollars. So, those
21 numbers, as well, go up.

22 And the other thing I would like to point out,
23 talking about this financial ability and economic
24 feasibility, that the only plants that are under
25 construction, the only nuclear plants that are under

1 construction are being built by major public utilities
2 and those public utilities have advanced cost recovery
3 statutes and, I think, if you look at that and, then,
4 you look at all the ones that failed, you know, many of
5 those were in areas just like the State of Utah where
6 there aren't those advantages and there aren't those
7 resources to back this and I think that there's, you
8 know, if you step back and you look at it, and you look
9 at the funding that this company has, which we know
10 about, and a funding of a major public utility, you
11 know, it's not comparing apples to apples and that's
12 not to say that, you know, somehow, they might pull
13 this money out, but the possibility is so remote that I
14 don't think that it meets the burden of reason to
15 believe.

16 I think that the evidence that has been presented
17 at this trial does not demonstrate—and the burden is on
18 the applicant. It does not demonstrate that there is
19 actually a reason to believe that they will be able to
20 accomplish this given the history of what has happened
21 with nuclear power at least since 2008 and going back
22 as early as 2001.

23 Dr. Diaz testified that, during his tenure from
24 1996 to 2006, not one application was approved. There
25 was an application for—I can't remember whether it was

1 an upgrade or something else, but it was an existing
2 plant, but there was not one new nuclear plant that was
3 licensed during that entire tenure and, since then, the
4 only ones that have gone forward are these ones that,
5 as I said earlier, have the advantages of advanced cost
6 recovery and are being backed by major utilities.

7 One of the more contested issues in these cases is
8 the availability of water supply. The statute requires
9 that the State Engineer make a finding that there is
10 unappropriated water in the source and the State
11 Engineer's testimony, and the testimony of Jerry Olds,
12 is that, to make that determination, what you have to
13 look at is you have to look at Utah's allocation under
14 the Colorado River Compact and they've made a big deal
15 about that, that Utah's allocation is 1.4 million acre
16 feet per year and that we're using a million acre feet
17 per year of that, roughly.

18 You know, but I don't think that answers the whole
19 question and the State Engineer and Mr. Olds, also,
20 they agree, that you also have to look at what the
21 water situation is at the Green River at the proposed
22 point of diversion and that's a pretty complicated and
23 daunting process because there are a lot of factors
24 that go into making that determination and one of the
25 things that the applicants have relied upon, though, is

1 the availability of physical water and that's not the
2 same thing as unappropriated water in the source.
3 That's a legal determination.

4 We talked about the Western Water case where, when
5 Mr. Olds was State Engineer, the State rejected the
6 application because they found that there was no
7 unappropriated water in the source and what Mr. Jones
8 testified to is that they looked at the water rights in
9 the Salt Lake Basin-Valley and determined that all
10 those waters have been appropriated and I asked the
11 question was there water physically flowing in the
12 Jordan River down near the Great Salt Lake and he said
13 yes, there was. There was physical water available
14 and, yet, that application was still denied and that's
15 because the issue that has to be addressed is is there
16 the legal availability of water in the proposed source
17 and there are two things that constrain the water
18 availability on the Green River at the proposed point
19 of diversion.

20 One of those is the releases that are made at
21 Flaming Gorge Reservoir for the natural stream
22 environment, for the fisheries, under the Flaming Gorge
23 Operating Plan and those releases have minimum
24 recommended flows of 1,300 second feet. That's what
25 was determined based on the studies that were done

1 preceding it was necessary to be able to at least, you
2 know, sustain the fish and there's the hope that we can
3 also recover some of those species, but that's water
4 that's mandated in there and, if you go back through
5 the history of the Flaming Gorge Dam, you know, all of
6 this came out and the operating plan is the ultimate
7 result of a jeopardy opinion that was issued by the
8 Fish and Wildlife Service and the Fish and Wildlife
9 Service basically said, look. You don't have the right
10 to do anything on this river because these fish are
11 being jeopardized and this reservoir is interfering
12 with the natural stream environment and habitat of
13 these fish and, as Dr. Tyus testified, there are also
14 critical habitat areas that have been established that
15 are absolutely crucial for the fish.

16 And, so, when we're really looking at the flows,
17 there's, kind of, this baseline of 1,300 second feet
18 that, if we're below that line, we start running the
19 risk of having a jeopardy opinion issued by the Fish
20 and Wildlife Service again and Exhibit 58 was that
21 model that was prepared by the State Engineer's Office
22 and what that model attempted to do was determine how
23 much water is there when using the base line flow of
24 1,300 second feet. It presumed that that was, kind of,
25 the floor, you know? Because, you know, if you recall,

1 the first column talked about how many days the flows
2 in the river dropped below that and, then, there was
3 the calculations that were made about how many acre
4 feet were necessary to make up for that difference and
5 there was the blue and the green columns and, you know,
6 under the green side, it was an average deficit of
7 3,500 acre feet per year, which tells me that there
8 isn't water available in that source.

9 If there's a deficit that you still have to make
10 up, an average of 3,500, that tells me that there's not
11 unappropriated water in that source and, on the blue
12 side, which I'm not sure—and Kent Jones wasn't exactly
13 sure what that meant. He thought it may be at full
14 development or whatever, but that deficit grew to
15 15,500 acre feet per year on average.

16 So, in looking at it from that standpoint, the
17 State risks losing everything under a jeopardy opinion.
18 We wouldn't, you know—the federal government would
19 come in and regulate diversions and tell people what
20 they can use in that scenario which the State, clearly,
21 doesn't want because water rights are a state right.
22 They're sovereign.

23 There is not unappropriated water in the source
24 and, so, when you start looking at the historical, and
25 we provided exhibits, as did applicants, regarding what

1 those historical flows look like, and there are several
2 periods where those flows drop below that 1,300 second
3 foot threshold, which creates a real question. You
4 know, if these applications were approved, what do you
5 do when that happens? Does Blue Castle continue to
6 take water and make the problem worse? Does it even
7 have the legal right to do that? I'm not sure that it
8 does.

9 The other side of the equation, though, is looking
10 at the balancing of the Colorado River Compact waters.
11 You know, in examination, Mr. Wright had some of the
12 witnesses read from portions of the Upper Colorado
13 River Compact—Upper Basin Compact and, you know,
14 talking about how this is all made and there was a big
15 point that was made that said, look. You know, there's
16 a commission here and they decide how to do it and
17 there's factors that need to be considered.

18 Well, what he didn't read to you were what those
19 factors are and how that curtailment is calculated and
20 this was the point of Mr. Norris' testimony. Let me
21 just point you to the section. It's codified under 73-
22 13-10 and I'm reading from Article 4 and it says in the
23 event curtailment of use of water by the United States
24 and by the [inaudible] at any time shall become
25 necessary in order that the flow at Lee Ferry shall not

1 be depleted below that required by Article 3 of the
2 Colorado River Compact, the extent of curtailment by
3 each state of the consumptive use of water apportioned
4 to it by Article 3 of this compact shall be in such
5 quantities and at such times as shall be determined by
6 the Commission upon the application of the following
7 principles and, then, I'm skipping down to (c).

8 The extent of curtailment by each state of the
9 upper division of the consumptive use of water
10 apportioned to it by Article 3 of this compact shall be
11 such as to result in the delivery at Lee Ferry of a
12 quantity of water which bears the same relation to the
13 total required curtailment of use by the states of the
14 upper division as a consumptive use of Upper Colorado
15 River system water which was made by each such state
16 during the water year immediately preceding the year in
17 which the curtailment becomes necessary compares to the
18 total consumptive use of such water in the State of the
19 upper division during that same water year. That's a
20 real mouthful. That's a run-on sentence if I've ever
21 seen one.

22 THE COURT: I was going to say, yeah.

23 MR. FLITTON: But what that's saying is, if
24 there's a shortfall at Lee Ferry, if the states aren't
25 delivering the water, then, each state is really

1 responsible for his proportionate share in proportion
2 to the amount of water that they diverted under the
3 allocation the year prior.

4 THE COURT: The prior year.

5 MR. FLITTON: Okay? So, what Dr. Norris'
6 testimony was that he looked at what the flows were
7 that were coming and he testified that he looked at
8 different gauges. He looked at gauges on the rivers
9 coming in from the Colorado side. He looked at the in-
10 flow at Flaming Gorge. He looked at the out-flow at
11 Flaming Gorge and he looked at the gauge at Lee's Ferry
12 and at the Green River Gauging Station and one of the
13 things that he testified to was Wyoming has an
14 approximately eleven percent allocation under this. If
15 you calculate that out, it's pretty equal, and he
16 testified it's pretty equal, if not a little bit
17 higher, than what is being released at Flaming Gorge
18 Reservoir.

19 So, under the Upper Basin Compact, each state is
20 responsible and it talks about the water coming out of
21 the states and that's how Wyoming delivers its water
22 down to Lee Ferry. You know, it has an obligation to
23 by-pass a certain quantity of water that, then, makes
24 up that lower delivery obligation, Lower Basin delivery
25 obligation.

1 Well, if you take that into consideration, that
2 number equals about 1,300 second feet coming past the
3 Green River Gauge and, so, you've got two things.
4 You've got the operating plan and the minimum
5 recommended flows that are under that operating plan,
6 but you also have to take into consideration what the
7 obligations are in the states above us because, as
8 Mr. Norris said, the Green River is a pretty major
9 conduit to deliver the waters from those states down to
10 Lee's Ferry under the Colorado River Compact and one of
11 the things I wanted to point, too.

12 Mr. Wright, in his closing arguments, made
13 reference to this half a million acre feet of water
14 that's guaranteed from the Yampa River to Utah. Well,
15 he's right in noting that Mr. Norris wasn't aware of
16 that and hadn't taken that into consideration, but in
17 testimony of Mr. Norris on re-direct was it didn't
18 matter to his conclusion because what he had looked at
19 is he looked at the gauging station at Jensen and he
20 looked at the gauging station at Flaming Gorge and the
21 gauging station at Green River and what he found is,
22 yes. There was more water coming in, up above, which
23 would represent the water that's coming from the Yampa
24 River, but the water users that are between that
25 location and the Green River Gauging Station are using

1 that water.

2 That water, that half a million acre feet makes up
3 a portion, at least, a large portion of those water
4 rights that are between the in-flow of that river and
5 the Green River Gauging Station because the Green River
6 Gauging Station was significantly lower and, in fact,
7 that number—at least he looked at numbers from this
8 summer, that number correlates—the Green River Gauge
9 number correlates, fairly closely, to the release
10 number at Flaming Gorge Reservoir. So, you can make
11 that assumption that that water is being used up before
12 it gets down to the Green River.

13 So, in terms of that testimony, I don't think it
14 changes anything. I think Mr. Norris was right in
15 saying, just because there's a piece of paper that says
16 we were guaranteed 500,000 acre feet, anyway, out of
17 the Yampa, that's not having an impact on the Green
18 River Gauge and the water availability under this
19 diversion.

20 This is a fairly short point, but one of the
21 criteria is more beneficial use of water and Mr. Wright
22 talked about Dr. Cooper's testimony, that Dr. Cooper
23 was asked, you know, what is the more beneficial use
24 and Dr. Cooper replied that I think it goes domestic
25 irrigation and power and a big deal was made about

1 that, that he didn't know anything about water rights
2 in Utah.

3 Let me just read for you, again, from the Upper
4 Colorado River Compact and this is Article 15 and what
5 it says is, subject to the provisions of the Colorado
6 River Compact, and of this compact, water of the Upper
7 Colorado River System may be impounded and used for
8 generation of electric power, but such impounding and
9 use shall be subservient to the use and consumption of
10 such water for agricultural and domestic purposes and
11 shall not interfere with, or prevent use of, such
12 dominant purposes. That's right out of the Colorado
13 River Compact and that governs the water that these
14 water rights are based upon. So, if there's a-

15 THE COURT: Do you think he read that, or was that
16 just his understanding of Utah law?

17 MR. FLITTON: That was his understanding.

18 THE COURT: That's the impression I got, was he
19 was trying to remember what he-

20 MR. FLITTON: You're exactly right. He wasn't
21 aware of this but what he said was, in fact, true.

22 THE COURT: Right.

23 MR. FLITTON: It was based on a general
24 understanding. That's what the Upper Basin Compact
25 says and I think, you know, this plays into this whole

1 idea that we heard throughout trial. The priority
2 system just, kind of, takes care of these things.
3 Well, under the priority system, first of all, this
4 water right is subservient to agricultural and domestic
5 uses and that plays directly into this idea of is there
6 unappropriated water to support these applications and
7 I think there is not.

8 I think that, if you look at all the obligations
9 that are on this water flowing through the river,
10 there's just not any water that's available to make
11 these appropriations and this is a brand new water
12 right being moved up into the Green River.

13 One more point, too; and that is on this
14 unappropriated water in the source. This idea that,
15 somehow, the Bureau of Reclamation is going to make it
16 up. Everything that we've heard in this case is
17 contrary to that assertion. The Bureau of Reclamation
18 protested these applications and, in that protest, they
19 said if any reliance is going to be made on storage
20 waters coming out of Flaming Gorge Reservoir, that the
21 applicants have to subscribe to that water, that they
22 have to enter into a contract with the Bureau of
23 Reclamation and pay for that water and there is no such
24 contract. They have not done that. They're not
25 relying upon that.

1 So, any notion that—I mean, first of all, there
2 was testimony that there are no storage rights
3 associated with these water rights. So, any notion
4 that, somehow, water is just going to appear from
5 Flaming Gorge Reservoir through these and be able to
6 satisfy, you know, their requirements downstream is
7 just not true. They have no legal right and, when Mr.
8 Wright talked about they have no call on the reservoir,
9 it's, basically, the same thing. I mean, he described
10 that correctly that, if you have a call on water, you
11 have a legal right, somehow. You can force them to do
12 that.

13 These applications don't have that right, period,
14 and, so, to suggest that there's unappropriated water,
15 based on the fact that it's going to, somehow, come
16 from Flaming Gorge Reservoir, is just not correct. The
17 Bureau decides how that reservoir is operating and when
18 those releases are made, but that doesn't give you a
19 right.

20 Let me go back to—I won't read it again, but the
21 section of the statute, 73-3-8, that I read at the very
22 beginning of my arguments, one of the things that I
23 think is really important in this case is the State
24 Engineer had a duty to investigate the effects on the
25 natural stream environment. Instead, what he did, in

1 his decision, is he didn't have any real findings. You
2 know, he looked at Dr. Hardy's, you know, information
3 and said, well, you know, it's going to be a small drop
4 in the level of the water, but there were no
5 correlative findings with respect to how that might
6 affect the fish populations.

7 It was just this diminimus, sort of, this
8 diminimus argument and what he did, instead, is he
9 punted. He kicked that whole issue to the Fish and
10 Wildlife Service and I don't think he has the authority
11 or the right to do that. He is the person that is
12 charged with regulating the waters of the State of Utah
13 and deciding on these applications based on state law
14 and what he has done, in effect, is said, well, you
15 know what? This is, kind of, just a sticky issue.
16 Let's let the Fish and Wildlife Service take over on a
17 Section 7 consultation and, you know, Dr. Tyus'
18 testimony was that that doesn't even apply to a private
19 entity, that Section 7 of the Endangered Species Act
20 is-

21 THE COURT: It would apply here because the
22 Nuclear Regulatory-

23 MR. FLITTON: Well, yes. It would at that point
24 but, at that point in the process-I mean, that's way
25 down the road and there are a lot of issues that are

1 there. They don't have a design selected. They don't
2 have any of these intake structures done.

3 THE COURT: Right.

4 MR. FLITTON: That's all part of that process,
5 right? So, that's pushed out even further to that
6 second step that Dr. Diaz testified about and, so, you
7 know, we've really taken what is something that the
8 State should be concerned with and the State making
9 sure that it doesn't unreasonably affect the natural
10 stream environment and said, well, we'll just let the
11 federal government deal with that down the road.

12 At that point, they already had a water right. I
13 mean, it's not the exact same evaluation as when you're
14 coming fresh and they have no right, when you're
15 saying, okay. Let's look at this and let's see what
16 this is going to do. They go to the federal government
17 and say, well, we have this water right, you know, and
18 we can mitigate or do some of these things but that's
19 so far down the road and they've already gone through
20 this process. It's the same thing you heard here.
21 Look. We've spent this money on these studies for our
22 permit. You should give us this application because
23 we've done these things.

24 Well, I don't think that's a justification for
25 giving someone, especially when the statute prescribes

1 that you have to evaluate things otherwise.

2 THE COURT: We're dealing with a statute that was
3 written about a time when apportionment and
4 appropriation was dealing with people who are
5 appropriating water for their orchard, for their small
6 dam, for irrigation, for homes. Nothing on this scale.
7 I don't think, at that point, the statute could
8 contemplate NEPA and, I guess, my question is, isn't
9 the State Engineer just recognizing reality that,
10 regardless of what he does, NEPA is going to proceed in
11 any event with people who have much more expertise than
12 the State Engineer?

13 MR. FLITTON: Except for the statute says—

14 THE COURT: Do you see what I'm saying?

15 MR. FLITTON: Yeah, I do, except for this is that
16 area of the statute where it says he has a duty to
17 investigate and, if he has reason to believe, right?
18 He also has the duty to withhold approval or denial of
19 the application. You know, he didn't have a timeframe.
20 There's not a statute that says—

21 THE COURT: Uh-huh [affirmative]. Right.

22 MR. FLITTON: You have to approve an application
23 within two years, you know? I mean, as Mr. Wright
24 noted, I have—you know, I'm a water lawyer. I have
25 applications that have been out there for ten years

1 that we still keep trying to get—and that's not
2 [inaudible], right, but this one seemed to move through
3 pretty quickly and, yet, there's very significant
4 concerns about some of these issues and he actually had
5 a duty to withhold that.

6 That tells me two things. One is that this is
7 something that is important to the State. The
8 Legislature was careful in saying, you know, if you
9 have reason to believe that there may be an issue, you
10 have to withhold approval or denial of this application
11 and investigate it further and flush that out and
12 figure it out, not just let someone else take over
13 that.

14 You know, he could have gone to the Fish and
15 Wildlife Service and say, okay, look. This isn't
16 exactly my experience. He could have gone to the State
17 Division of Wildlife Resources and said let's work
18 together and figure out what's really going on here.
19 To me, that's, kind of, the duty to investigate and I
20 just don't think that took place here and, you know,
21 turning to Dr. Tyus' testimony, I mean, that
22 information is all out there. It's not like it's all
23 just contained in Dr. Tyus' head, but this is going to
24 happen. I mean, his opinion was this is going to have
25 a detrimental impact on these fish species, you know?

1 And Mr. Wright, in his closing arguments, made
2 reference to, well, you know, Dr. Tyus recognizes that
3 there's water use and there's fisheries and we would
4 like to have a balance and, you know, actually, when
5 that question was asked, Dr. Tyus, kind of, made a
6 little joke about it, you know?

7 But the point is that there's also appoint where
8 you have to say, you know, is it enough? You know, his
9 testimony was that we've lost all of these backwater
10 areas. We're down to very few now and this, you know--
11 particularly the Colorado Pipe Minnow is completely
12 dependent on those areas in order to survive.

13 Well, do we let this application go forward and
14 say, well, you know, we're destroying more of that but,
15 you know, maybe there's a chance that they will still
16 be able to survive or is there a point where you say,
17 you know, this is, kind of, unreasonable, that there's
18 this balancing?

19 I am a water lawyer. I totally support
20 development of water rights, but I also think that it
21 has to be done responsibly and I don't see that
22 happening here and I don't see the investigation as to
23 make sure that's what's happening and I think that's
24 the burden here. I think the burden is that you have
25 to be able to reasonably show that this isn't going to

1 happen, that you're not going to unreasonably affect
2 the natural stream environment and I've seen nothing in
3 this trial, from their side, that says that that won't
4 happen.

5 You know, you've got a table that shows, you know,
6 what the difference in elevation of the river may be at
7 the Green River Gauging Station. It doesn't address
8 the backwater, specifically, in that way. It doesn't
9 look at the morphology of the stream downstream and
10 those affect can be different, you know? And this idea
11 that you'll still have a few inches of water left, you
12 know, in places or whatever just isn't satisfactory
13 because, as you heard Dr. Tyus' testimony, that's not
14 going to keep these fish alive. They're not going to
15 survive under those circumstances.

16 And, so, you know, I think that that is an area
17 where these applications should have been at least
18 withheld and they should have been rejected based on
19 the fact that, look. There is that information out
20 there. These are endangered species. There's critical
21 habitat. They are listed. This isn't some small
22 thing. We're not talking about guppies in the pond or
23 something. These are endangered species that are
24 federally protected and, to me, that raises that level,
25 that threshold to say I better make sure that this is

1 what's going on before I approve these applications.

2 Do I have time?

3 THE COURT: We've got time. I don't want the
4 lawyers to think they have to rush. So, take your
5 time.

6 MR. FLITTON: Okay. Thank you. You know, one of
7 the things, too--this is just a--because I agree with
8 applicants on this point; and that is, you know, a lot
9 of the protests talked about we don't know what the
10 diversion facilities look like. We don't know what the
11 structure is going to be like, you know, and one of the
12 conditions in the State Engineer's memorandum decision
13 was, look. That's something that we looked at under
14 stream alteration permit and let me just talk about
15 that, a little bit, too, this idea of passing it off to
16 the federal government on Section 7 and, then,
17 suggesting that the State still retains control
18 because, you know, I've heard that argument that the
19 State still has to approve it as stream alteration
20 permit, for example. That's a whole different thing.

21 You know, when you take a stream alteration permit
22 application at this stage, there's a whole different
23 set of criteria they look at economic--I mean, they do
24 look at is this going to, you know, are you going to
25 have fish kills and things like that, but as Dr. Tyus

1 testified, you know, these larvae from, like, the Pipe
2 Minnow that float down the river, they will get trapped
3 on that screen, you know? They don't live. They're
4 dead once that happens, you know? It's not like a
5 full-sized fish where, you know, it can swim off.

6 I mean, there's tremendous pressure on that and,
7 so, that's something the State is going to have to
8 wrestle with, but this idea that, somehow, that
9 substitutes for the analysis that needs to take place
10 under this change application, I just think, is
11 incorrect because it's a whole different set of
12 criteria and this idea that there's all these
13 protections down the road, you know, similarly fails to
14 me because these applications become more dynamic.
15 They change. You know, every time you get some sort of
16 approval, it becomes a little bit stronger and a little
17 harder to say no.

18 Let me just point out a couple of key points of
19 Dr. Tyus' testimony, too. One of the things that was
20 undisputed, that no evidence was offered to counter
21 this, was that a 1.5 inch change, based on Dr. Hardy's
22 numbers, in stage height at the gauge could eradicate
23 fifty percent of an average downstream backwater. So,
24 we're talking about pretty significant losses and the
25 evidence on the record is that that's what will occur.

1 Switching to public welfare. The applicants' case
2 on this point is that, oh, this will be great for the
3 economy. It will be great for the economy of Green
4 River and I think he said nine-hole punch to the
5 economy or nine lives or something like that. No
6 evidence has been presented, though, that there will
7 actually be an economic benefit to Green River. In
8 fact, you know, speaking without evidence on either
9 side, you can infer, however, that there may be a
10 devastating economic impact on the Town of Green River.

11 Nuclear plants require certified workers. I'm not
12 sure, and I don't know the answer, whether Green River
13 residents that live there now have those skills, have
14 those certifications, have those things. I would
15 assume that there will be a substantial influx of
16 people into that area and that's going to put a burden
17 on schools. I mean, we heard Mr. Evans testify that
18 that's part of the socio-economic analysis that they're
19 doing, that they don't have any analysis on yet.
20 They've just been collecting data, but there may be
21 tremendous impacts to infrastructure, to schools,
22 having to build homes, whatever those impacts are.

23 I'm not so sure that you can say that, on the one
24 hand, there's going to be this tremendous benefit
25 while, at the same time, ignoring there may be

1 tremendous impact as well and, maybe, also
2 environmental impact and, so, then, you turn to the
3 State. Well, you know, what the senate said, in its
4 resolution, was we support the study of nuclear power.
5 It didn't say we support the development of nuclear
6 power and, so, relying upon that as some sort of public
7 welfare statement, I think, you know, shoots a little
8 bit over the mark.

9 The other issue that was raised, though, and this
10 was raised and I think it falls in this category
11 because it was raised in the section of the State
12 Engineer's memorandum decision, says that there were
13 several protestants that were concerned about air
14 quality issues, air pollution issues as a result of
15 this plant and, you know, there wasn't much there. The
16 State Engineer assumed, well, this is just going to be
17 steam. So, what are the impacts?

18 The testimony we've heard here is that there's
19 about 53 acre feet of impact that comes from the drift
20 and that's a pretty substantial quantity of water and
21 Mr. Wright said, well, you know, it's the same stuff
22 that was in the river. Well, it is, but it also has
23 pesticides and fungicides and biocides and all those
24 things in it and, you know, that's an agricultural
25 community. I mean, you have your melon farmers there.

1 You've got people living. I mean, who knows? It
2 depends on wind and those kinds of things, but I think
3 that's something that is a great concern and, you know,
4 he—Mr. Wright also said, well, you know do you believe,
5 for a minute, that the State won't regulate that?

6 Well, what's the State going to do? Technology
7 hasn't fixed that problem. There's drift no matter
8 what. You can't solve that problem and, so, that
9 concern is still there. What you're saying is, well,
10 do we want to have that detrimental impact? I mean, I
11 think you have to weigh that saying, well, you've got
12 the big plant and there's these benefits, but I think
13 that that's something that has to be considered and I
14 don't think that it was sufficient considered. So, we
15 would ask the Court to do that.

16 Let me just talk, for a minute, about the steam in
17 it because it's contained in several places in the
18 State Engineer's decision; that, somehow, we can pass
19 this off to the federal government and everything will
20 take care of itself and the review will be done. To
21 me, I don't see how that complies, at all, with the
22 statutory requirements that need to be discharged by
23 the State Engineer.

24 The Legislature said you need to review these
25 things and this is something that you need to consider

1 and let me point something out, too. You asked me the
2 question about, you know, what about the fact that NEPA
3 wasn't contemplated when the statute was written? You
4 know, this statute has evolved over time and its
5 application has evolved and, on that point, I want to
6 point you to Bonham v. Morgan because, prior to Bonham,
7 the State Engineer, in looking at change applications,
8 only had to look at is there unappropriated water. Is
9 it going to interfere with more beneficial use, will it
10 impair existing water rights, etc., right? Sort of the
11 heavy water side of things which still apply to change
12 applications, but the court in Bonham said no. You
13 have to look at these things and that was the whole
14 point of the case, you know? It was looking at these
15 impacts that weren't necessarily part of a water right
16 and the court said no. That is what we have to look at
17 in approving these change applications.

18 In that Bullock case that counsel cited to you,
19 Bullock v. Hanes, one of the things I wanted to point
20 on that case is that was pre-Bonham. Well, the court
21 wasn't looking at economic feasibility or financial
22 ability. Those weren't considerations for the State
23 Engineer at the time of that decision.

24 THE COURT: It was at the time of that. That's
25 one case I've looked at in terms of the economic

1 conditions, but it was more of the financial abilities
2 where they were looking.

3 MR. FLITTON: Yeah. I would agree with you, the
4 language he quoted.

5 THE COURT: And I understand your point about the
6 other part of it.

7 MR. FLITTON: But, you know, but I think what
8 Bonham shows us and, you know, there is a recognition
9 of the natural stream environment, one of the big
10 things, but that's something that needs to be taken
11 into consideration because the argument by the advocate
12 in that case is it's not part of the criteria. We
13 don't have to look at that. The State Engineer didn't
14 look at that and that's why the Supreme Court
15 overturned it and said no. You do have to consider
16 those things and I think, when you have an application
17 the size of this application, that that scrutiny has to
18 be a little bit higher.

19 You heard the State Engineer say, you know, well,
20 we've got somebody coming in. They want, you know, a
21 quarter acre of irrigation for their lawn. We don't
22 really get into a lot of these factors, but when you
23 have 53,000 acre feet and 75 second feet of water from
24 the river, I think that it merits pretty considerable
25 consideration of these various elements and I think all

1 of them are relevant and all of them are important and
2 I don't think that you can just pass that off to the
3 federal government and I think that that's, kind of,
4 offensive to the principle that's long guided water
5 law; and that is that this is a state right, you know?
6 The U.S. Supreme Court has confirmed—

7 THE COURT: State issue.

8 MR. FLITTON: Yeah, the states have that right
9 and, in fact, what you're saying is we're going to let
10 the federal government take over that, you know? We're
11 not going to look at that. We're going to let the
12 federal government make these important determinations
13 about what goes on here in the state and I think that
14 the more appropriate thing is for the State Engineer to
15 say, look. I've got a problem with the natural stream
16 environment or I don't think there's unappropriated
17 water or whatever the issue is and retain control of
18 that and make that decision and, if he doesn't have the
19 information, I think the statute requires him to
20 withhold making that decision and, in this case, that
21 decision was just made.

22 So, I think, with that view, I don't put a lot of
23 stock in this fact that the NRC is going to look at it
24 because the other testimony that we heard from Mr.
25 Evans is, on many of these issues, they compile the

1 data. They do an analysis and, then, they write a
2 conclusion and they give that to the NRC. Well, you
3 know, that goes a long way to influencing what that NRC
4 decision is and, if they feel like Intercon, which is
5 why you would hire them, has a relationship and are
6 trusted by the NRC, that goes a long way and, so, in
7 effect, the person that's taking the first step, the
8 first stab at these documents, is, actually, someone
9 that's being paid by the applicant.

10 You know, we had that discussion about the
11 environmental assessment portion. Well, they're being
12 paid by the applicant. The NRC takes that data and
13 looks at it and may choose, or may not choose, to look
14 behind some of those things and, so, with respect to
15 the water right, Dr. Diaz testified that they don't
16 look at priority issues, for example. They don't get
17 behind that.

18 So, you walk into the NRC and say here's our water
19 right. It says we have 75 second feet and 53,600 acre
20 feet. We're good to go. Well, that's not really the
21 whole story is it and that's not that further review
22 that they keep assuring us that they have and I always
23 get a little bit nervous when someone says take our
24 word for it. This is going to be taken care of in the
25 future. Someone is going to look at that. You know,

1 someone will do it.

2 Well, the time to look at that is now, you know?
3 The statute says the time to look at that is now and I
4 think that that's something we need to keep in mind,
5 that these are decisions, on each one of these
6 criteria, that have to be made based on the evidence
7 that's been presented, here, in this trial.

8 Let me just make sure I didn't skip anything.

9 [Inaudible discussion.]

10 MR. FLITTON: Okay. Yeah, let me—okay. I just
11 wanted to point out a few things on the record just so
12 the Judge has that. You know, at trial, they were
13 talking about the natural stream environment. There
14 have been admissions that were made by the other side.
15 Mr. Jones admitted that the diversions will exacerbate
16 the low flow periods. He also said that he's very
17 concerned about the new withdrawals and that he was
18 aware that Fish and Wildlife protested and that is why
19 he put in the Section 7 consultation.

20 THE COURT: Where am I supposed to go with that?
21 Now you've told me three or four people have protested,
22 but nobody showed up at the trial and told me about
23 this.

24 MR. FLITTON: What do you mean? The protest?

25 THE COURT: Yeah.

1 MR. FLITTON: Well, they're part of the record.
2 They're part of the administrative record.

3 THE COURT: I don't have the administrative
4 record.

5 MR. FLITTON: Okay. Well, I'll make sure I
6 forward those protests to you, then.

7 THE COURT: So, how do I know what's going on.

8 MR. WRIGHT: It's too late for that.

9 THE COURT: Huh? I mean, I don't see how the
10 Court can—I mean, I understand what the State
11 Engineer's decisions is--

12 MR. FLITTON: Well--

13 THE COURT: Let me finish. That's not evidence to
14 me as what went on at the State Engineer's hearing.
15 That's not part of my record.

16 MR. FLITTON: Okay.

17 THE COURT: At least not yet. So—and I'm not like
18 the State Engineer. I can't hold the record open while
19 people submit things.

20 MR. FLITTON: No, but first of all, that record
21 does exist and--

22 THE COURT: I know it exists, but the point of the
23 matter is nobody from the U.S. Fish and Wildlife
24 service showed up and said we think this is a bad idea
25 and here's why. I just have to take it for granted

1 that they protested it. I don't know what they said.

2 MR. FLITTON: Well, one of the things you do have
3 is the administrative hearing transcript.

4 THE COURT: I don't have that in my record.

5 MR. FLITTON: Isn't that in evidence?

6 THE COURT: If I do, it's unbeknownst to me
7 because I didn't see it.

8 MR. WRIGHT: I think they attached excerpts to the
9 trial brief.

10 THE COURT: There may be excerpts in the trial
11 brief, but that's not evidence.

12 MS. SWENSEN: What you do have is the State
13 Engineer's testimony about what he considered from
14 them.

15 MR. FLITTON: Yes. This is what the State
16 Engineer said, though, I mean there's no hearsay
17 objection, I guess, on the State Engineer testifying.
18 I asked him whether the Fish and Wildlife Service
19 protested. I said did they threaten--

20 THE COURT: That doesn't tell me anything about
21 their basis or their scientific necessity.

22 MR. FLITTON: Well, I asked did they threaten a
23 jeopardy opinion--

24 THE COURT: Yeah.

25 MR. FLITTON: --if these applications are approved

1 and he said yes. I mean, I don't know how that
2 doesn't—

3 MS. VALDES: Well, I don't know that he testified
4 to that.

5 THE COURT: I don't think that's what he testified
6 to. He didn't say that. My recollection is not that
7 he said that he was threatened with a jeopardy opinion.

8 MR. FLITTON: No. I asked him did they threaten a
9 jeopardy opinion and he said yes. Is that not right?

10 THE COURT: I don't think that's what his
11 testimony was.

12 MS. VALDES: I actually don't recall, but I am
13 extremely reluctant to believe his—

14 THE COURT: That would have brought me up for
15 error, let me tell you.

16 MR. FLITTON: Okay. All right. Well, I mean, the
17 bottom line is they didn't and you're right about that
18 but, you know, I guess you'll just have to look at the
19 record.

20 THE COURT: And I don't mean to take it out—I'm
21 not trying to be—

22 MR. FLITTON: No. No. No. I—

23 THE COURT: Don't take me wrong. It's just I'm
24 just trying to get a grasp on what I should be
25 considering.

1 MR. FLITTON: I appreciate you being—and I agree.
2 I don't want to misstate something. I mean,
3 obviously, you're going to have to look at, maybe, what
4 Mr. Jones said on that issue and figure that out.

5 THE COURT: Sure and I will.

6 MR. FLITTON: And that's all I wanted to do is
7 point to those portions where the State Engineer did
8 say they protested. The Bureau of Reclamation
9 protested. I mean, those were things that we brought
10 in that way.

11 MS. SWENSEN: And specifically on the question.

12 THE COURT: Go ahead. Take your time. It's okay.

13 [Inaudible discussion.]

14 MR. FLITTON: She wants me to get one more thing
15 in.

16 THE COURT: That's fine.

17 MR. FLITTON: No. We talked about—

18 THE COURT: This is your time and I want you to
19 take—

20 MR. FLITTON: No and I appreciate it and I
21 apologize for having to, sort of—

22 THE COURT: That's all right.

23 MR. FLITTON: No. We talked, a little bit. This
24 is going back to the idea of the storage rights, you
25 know, and one of the things that the State Engineer was

1 asked was whether the Bureau protested and what his
2 testimony was is that they had taken the position that
3 you had to have contracts—

4 THE COURT: Right. I remember that.

5 MR. FLITTON: --to be able to have some storage.
6 So, just, kind of housekeeping. Okay, I think that's
7 all I have. Thank you so much.

8 THE COURT: Thank you very much. I appreciate it.

9 MR. FLITTON: Thank you.

10 THE COURT: Ms. Valdes?

11 MS. VALDES: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MS. VALDES: Just actually last evening, a
14 colleague and I were discussing how pleased we were
15 that this case was focusing on water issues and was not
16 becoming an attack on the State Engineer and it seems I
17 spoke maybe slightly too soon and I'd like to reiterate
18 a point from the State Engineer's trial brief that
19 pointed out that this Court stands in the shoes of the
20 State Engineer. This is not an attack on the State
21 Engineer, on his decision, and what happened below, at
22 the administrative level, happens all over again in
23 this Court.

24 So, this Court, on de novo review, makes its
25 decision and has the same effect as the State Engineer

1 decision, but the State Engineer, although he has no
2 burden of proof, does defend and explain his orders and
3 the associated water principles.

4 So, basically, the summary of all of this is that
5 the State Engineer approved the applications because
6 they met the criteria for approval and, importantly, he
7 imposed conditions that each has a purpose and each one
8 of those conditions is important in the approval.

9 In light of the criteria that's already been
10 outlined by the parties, I would like to emphasize,
11 kind of, two major points and, then, three minor points
12 and, then, actually, just briefly look at the
13 conditions of the State Engineer's approval.

14 So, first of all, the first major point, the
15 change application process. First of all, they use our
16 existing water rights and a change application is kind
17 of like a—I've heard it described kind of like a
18 hunting license. You can get whatever water you can
19 prove-up on and they can succeed or they can fail. If
20 they succeed, then, they get a water right that has
21 changed attributes and a new water right certificate.

22 Now, to get that certificate, they actually have
23 to submit proof and that proof that they submit can be
24 less than the amount that they applied for. So, they
25 can prove-up on only part of what the approved

1 application might be for, but they can also fail. If
2 they do, the water rights are still in the hands of the
3 Kane County Water Conservancy District and the San Juan
4 County Conservancy District. Both of those entities
5 who own those water rights are public entities and can
6 hold water, without beneficial use, for the next 40
7 years and that actually is in the statute at 73-1-
8 4(2)(f).

9 The second major point I would like to make is
10 that Utah is firmly committed to the Recovery
11 Implementation Program Recovery Action Plan and,
12 obviously, that's kind of a long title. So, it's
13 called RIPRAP and Utah's a partner in that and it's
14 committed to both protecting the endangered species, as
15 well as developing Utah's full allocation of the
16 Colorado River Compact. You know, the point of an
17 agreement is between the State, the Bureau of
18 Reclamation who controls Flaming Gorge Reservoir, and
19 the Fish and Wildlife Service, who wants to protect the
20 fish, is to do that by operating Flaming Gorge
21 Reservoir to accomplish both.

22 I'd like to refer to Exhibit 6. This is the State
23 Engineer's order on Kane County Water Conservancy
24 District's application and, in the second full
25 paragraph, just to take in a couple of excerpts. In

1 that very long middle paragraph it says, in 1988, the
2 Upper Colorado River endangered fishes Recovery
3 Implementation Program Recovery Action Plan, RIPRAP, a
4 partnership created to recover the endangered Colorado
5 Pipe Minnow, Razorback Sucker, Humpback Chub and
6 Bonytail fishes was implemented as a cooperative effort
7 to recover the endangered fish in the Upper Basin,
8 Green and Colorado Rivers only, while providing for
9 water development to proceed under state water law and
10 applicable federal laws and, then, dropping down a
11 little bit. Utah is a partner in this program and
12 then, dropping down some more, the goal of the recovery
13 program is to achieve naturally self-sustaining
14 populations and protect the habitat and the water
15 flows.

16 So, the State Engineer, as well as other state
17 agencies—this is not just the State Engineer. It's
18 Utah State that's committed to this, but the State
19 Engineer, himself—well, actually, his office and other
20 agencies are fully, actively well-represented. They
21 have been actively participating and a lot of progress
22 is being made.

23 There's another quote, if I could—I think in page
24 19 of the State Engineer's order, Exhibit 6. The
25 purpose of the proposed action—and this is from the

1 2006 record of decision. The purpose of the proposed
2 action is to operate Flaming Gorge Dam to protect and
3 assist in recovery of the populations in designated
4 critical habitat of the four endangered fishes while
5 maintaining all authorized purposes of the Flaming
6 Gorge unit of the Colorado River Storage Project,
7 including those related to the development of water
8 resources in accordance with the Colorado River
9 Compact.

10 Four point four million acre feet flows annually,
11 on average, past the Green River Gauge and there is
12 sufficient water and, if the Flaming Gorge Reservoir is
13 operated as this partnership and agreement anticipates,
14 they learn, each year, how to release the waters. They
15 have learned to watch for larval drift and time their
16 releases accordingly and each year gets better. This
17 has only been operating since 2006, but great strides
18 have been made.

19 Three minor points I'd like to make is, first of
20 all, the Green River has never been cut by priority.
21 That's the 4.4 million acre feet of water that flows
22 past the gauge and one other thing I'd like to actually
23 point out is, in 73-3-8, there is a term that uses the
24 more beneficial use of water. There actually used to
25 be another statute in the Code and it's actually cited

1 to in Tanner v. Bacon. It's a case that Heal Utah
2 attorneys cited to. It's 136 P.2d 958 and that case
3 discusses relative priorities. I think they cited to
4 it for public welfare purposes, but it discusses
5 relative priorities in sites to Utah Code Ann. 100-3-
6 21, which is the old numeration for the Utah State
7 Engineer Water Code and that actually—that statute has
8 been repealed for a number of years and, so, it's no
9 longer operative.

10 It has, actually—there is a statute that, in
11 essence, could be thought of, perhaps, as replacing
12 that statute and that is 73-3-21.1 and it, basically,
13 recognizes the priority system and sets-up a system for
14 in times of emergency, when there's an emergency
15 shortage of water.

16 So, second minor point, economic feasibility. The
17 only case that I know of is Bullock v. Hanks. If
18 there are any other cases that apply directly to the
19 State Engineer, I'm not aware of them. However, there
20 may be others. I just haven't been able to find them.
21 If there are, I would actually love to hear about them
22 because the State Engineer, of course, is interested in
23 each of the criteria.

24 The third minor point is just on the financial
25 ability and I would like to quote from the State

1 Engineer's decision, Exhibit 6, again, on page 13.
2 It's the last part of the 1(a)(4) section conclusions
3 and it says the applicant, through the lessee, has
4 demonstrated, to the satisfaction of the State
5 Engineer, an ability to secure funding, as needed, on a
6 step-by-step basis and a plan to continue to capitalize
7 the project sufficient to establish a reason to believe
8 that the applicant has the financial ability to
9 complete the works.

10 Now, that's important to the State Engineer
11 because, if all of the financing needed to be
12 demonstrated up front, most change applications and
13 most applications to appropriate, for that matter,
14 would not be able to be approved. So, the State
15 Engineer has to be able to look at, kind of, this stage
16 of the development to be able to evaluate those
17 correctly.

18 And, just lastly, the conditions for the State
19 Engineer's approval are each important and have a
20 purpose. So, if this Court, on de novo review, does
21 approve the applications, we would ask that you insert
22 each one of the conditions that the State Engineer
23 enumerated and those are on pages 21 and 22 of the
24 State Engineers order. The second condition, request
25 measuring in total, I'm just going to highlight a

1 couple of these, not each of them. There are nine
2 total, at least for this order.

3 So, measurizing and totalizing recording devices.
4 That allows the State Engineer to monitor use. The
5 third condition is sufficient reservoir storage must be
6 maintained to provide for the safe shut-down of plant
7 operations and provide for emergency operations at the
8 plant during periods of curtailment in the event of
9 future compact calls or physical shortages of water.
10 So, that—right now, the application contemplates a
11 2,000 acre foot reservoir, but where their application
12 would one hundred percent consume, it would be a
13 hundred percent depletion for all of the water that
14 they divert.

15 They would, probably, be able to expand that if
16 they wanted to. Of course, the State Engineer can't
17 decide applications ahead of time, but it's very likely
18 that such an application would be approved and that is
19 a condition that the State Engineer does anticipate
20 sufficient reservoir storage.

21 The fourth one is Section 7 consultation and as,
22 actually, Your Honor just pointed out moments ago,
23 because the Nuclear Regulatory Commission is involved,
24 they will be required to go through the Section 7
25 consultations and that is a condition of this approval.

1 If they don't, then, the change applications are based
2 on these conditions.

3 So, the fifth condition is basically continuing
4 jurisdiction for a stream alteration permit for--
5 actually number 6 anticipates licensing for any dam
6 safety inspection that might need to be done if they
7 decide to build a dam and, lastly--and this is a
8 distinction between the two orders. For only Kane
9 County Water Conservancy District's application, back
10 in the 1960's, that water right was coordinated to the
11 CUP, the Central Utah Project and that is reiterated in
12 this order for Kane County. It's not included of the
13 San Juan County Water Conservancy District's
14 application because it is not required and just, at the
15 last part, there is notifications of other laws that
16 may apply to the application and we would encourage the
17 State Engineer--or, I'm sorry, we would encourage the
18 Court to look at those closely as well.

19 On de novo review, we--I'm sorry. May I start
20 over? This Court, in its de novo review decision,
21 should reach the same decision as the State Engineer,
22 but it is your decision and because that decision, the
23 State Engineer's decision was made fairly and with
24 respect to water law and, with all the conditions, his
25 order is appropriate in all respects and, if Your Honor

1 would like it, we are happy to submit supplemental
2 briefs, if needed, and just thank you so much to the
3 Court for your ability to focus for such long periods
4 of time and to the other parties for focus.

5 THE COURT: Thank you, Ms. Valdes. I appreciate
6 your time.

7 MS. VALDES: Thank you.

8 THE COURT: Mr. Wright?

9 MR. WRIGHT: Your Honor, could I take 10 or 15
10 minutes to, kind of, think about rebuttal?

11 THE COURT: Sure. Any objection?

12 MR. FLITTON: No, Your Honor.

13 THE COURT: Let's take a break. Why don't we come
14 back about quarter after 12:00. Would that work okay?

15 MR. WRIGHT: Yes. Thank you.

16 [Recess.]

17 THE COURT: Please be seated ladies and gentlemen.
18 We're back on the record in Emery County case of Heal
19 Utah, et al. v. Kane County, et al., Case 1207009.
20 Counsel for the parties are present. Mr. Wright has
21 some rebuttal.

22 MR. WRIGHT: Yes, Your Honor, a little bit of
23 rebuttal. Let's start with the economic feasibility
24 issue and Dr. Cooper's opinions. You'll recall that,
25 when I had Dr. Cooper on cross-examination, this

1 exhibit, Exhibit 82, had not been offered at that
2 point. I offered this on cross and I did this because
3 this is something that was in his report and we wanted
4 to understand what he was doing in his analysis, trying
5 to understand why his numbers, in terms of economic
6 feasibility of nuclear power, differed so drastically
7 from our own. I mean, Rob Graber is an NYU educated
8 economist and we weren't seeing things the same way.
9 The same with Dr. Glen George and, so, I asked Cooper a
10 few questions about this just to understand his data
11 points and how he accumulated the data to create that
12 graph and he gave his answers.

13 Well, as you heard Rob Graber testify on rebuttal
14 that he sharpened his pencil and went to work that
15 night to figure out what Cooper had done and that
16 resulted in Exhibits 91 through 93 on rebuttal and what
17 you saw, Your Honor, concerning Dr. Cooper is peer
18 review analysis in action. Peer review is all about
19 testing each other and it's about somebody stakes out a
20 position, makes an analysis and, then, others in the
21 same field have an opportunity to attack, to expose
22 error, to expose weakness and I think you saw, I
23 certainly hope you saw, in really vivid detail, just
24 how flawed Dr. Cooper's analysis was, starting with he
25 represents that this levelized cost analysis was in

1 2011 dollars.

2 You heard Rob Graber explain that the California
3 Energy Commission data, which is the outlier because
4 its cost analyses were so much higher than everything
5 else, was in 2018 dollars; In other words, inflated
6 dollars. He didn't normalize his data. He wasn't
7 comparing apples to apples. He also didn't use the CEC
8 data in some of these other points.

9 So, an additional flaw and, of course, you have
10 this outlier problem with this data and how it affects
11 everything else and Exhibits 91 through 93 demonstrate
12 the significance of that error and, when you take out
13 these analytical flaws, you have nuclear competitive
14 and that was the testimony.

15 Mr. Flitton talked about the issue of the
16 alternatives that Dr. Cooper talked about: wind, solar
17 and efficiency and, then, there was this testimony
18 about battery storage. He admitted that none of those
19 have any history. These are small wind farms and solar
20 farms. This is not anything we're doing on a
21 significant scale in this country. Even Dr. George
22 agreed we should. We should be trying this. We need
23 to be doing this.

24 No one doesn't like wind power. No one doesn't
25 like solar. It's a wonderful source of energy, very

1 clean, but it is nowhere near able to meet base load
2 demand so that I can walk over to that wall and know,
3 when I flip the switch, it's going to come on.

4 The point is Dr. Cooper was extremely optimistic
5 about those resources and extremely pessimistic about
6 nuclear. They don't have a track record. Nuclear
7 does. It actually works. Yes, it's expensive. Yes,
8 it's had its problems. America is still working on it,
9 but America hasn't given up on it. The point is you
10 can dismiss the opinions of Dr. Mark Cooper concerning
11 economic feasibility of nuclear power. His analysis
12 was severely flawed.

13 When Mr. Graber was cross-examined on that issue,
14 he was cross-examined with capital cost data which no
15 one really disputes. We know how much these things
16 cost. Yes, to build one is very expensive. He wasn't
17 cross-examined on rebuttal on that.

18 I knew, when I started looking at this case and
19 really digging into it as far back as, really, a year
20 ago, when we, really, were—when the case was beginning,
21 that I had a—there was going to be some irony here.
22 We've got environmental groups who are, kind of, tied-
23 up in knots on this one because they hate fossil fuels
24 and, yet, they're using them, their efficiency, their
25 cost, their availability, all of these factors to argue

1 against something that emits no carbon emissions.
2 That's a little uncomfortable for them, I suspect, and
3 my cross-examination of Cooper pushed him into an area
4 where I think he really wanted to go; which was this
5 whole alternative energy analysis. You heard Dr.
6 George testify everybody should pursue that to the
7 extent that they can.

8 Utah doesn't have a lot of wind resources. So,
9 you're not going to see a lot of wind power coming out
10 of Utah. Solar? Possibly, sure, and Utah, hopefully,
11 will continue to do that. Another basket for Utah to
12 put its energy eggs into.

13 Another aspect on Dr. Cooper's analysis was this
14 technological revolution, those are his words, in terms
15 of our ability to produce natural gas. Well, he
16 admitted that's fracking and we all know, and he
17 admitted, that's not an easy one. That's controversial
18 and, I guess, you support it depending on whether it's
19 happening in your back yard or not and, finally, Dr.
20 Cooper kind of scolded us, a little bit, here in Utah.
21 We're not trying hard enough on efficiency and we need
22 to do more. Well, maybe we do. Building codes,
23 perhaps, should include those kinds of things, but
24 that's going to be expensive and there's a cost and
25 that's the point, isn't it? That there's a cost to all

1 of these things and it can't be avoided.

2 Now, concerning the operation of Flaming Gorge and
3 the issue of available water and impact on the natural
4 environment, I just want to return, for a moment, to
5 the record of decision. This is from—well, it doesn't
6 have a page number on it, but this is just a blow-up
7 from Exhibit 20. The Upper Colorado River Endangered
8 Fish Recovery Program was developed in response to the
9 request of Colorado, Wyoming and Utah to facilitate the
10 continued development of their compact apportionments
11 in light of Endangered Species Act concerns. The goal
12 of the recovery program, therefore, is to recover the
13 listed species of the Upper Colorado River to the point
14 of de-listing while allowing for the continued
15 operation and development of the water resources in the
16 Colorado River Basin.

17 My colleague referred to the decision on this
18 point, and a couple of others, that Kent Jones made as
19 punting, just punted this down the road to the feds and
20 let them figure it out. Well, we live in a federal
21 system. We have a system of federal law and state law
22 and our ability to do things ends at the border in Utah
23 and concerning endangered fish issues and the operation
24 of Flaming Gorge Dam, that's the Bureau of Reclamation.

25 That's federal government and, so, there's only so

1 much Mr. Jones can do on those issues and you now,
2 standing in those same shoes, there's only so much you
3 can do. The feds have something to say about this and
4 they've said that in two ways. We enacted, in this
5 country, the Endangered Species Act. We've identified
6 some fish that are in trouble and, with Flaming Gorge
7 and the cooperation of the affected states, we're going
8 to try to save them, but we're not going to stop
9 developing water and I think what I hear the
10 protestants saying is, well, we better stop. We've got
11 to stop even though it's undisputed we're not using all
12 of our Colorado River Water, our apportionment, we just
13 need to stop.

14 Well, not even Dr. Tyus thinks that and I suspect
15 you would get some serious push-back from the Utah
16 State Legislature if you were to tell them we just
17 better stop developing water that's there, and ours, to
18 be developed.

19 Again, on this issue of punting in terms of the
20 NRC and its role in the environmental impact statement
21 and the NEPA process and the whole licensing process
22 which Dr. Diaz described, in detail, about just how
23 searching it is and, you know, again, a federal system
24 means that, when you're developing a project like this,
25 I mean, this isn't a developer who wants to build some

1 houses.

2 I use that analogy to demonstrate that sort of
3 phased approach that you do, but that's something
4 entirely that the State Engineer and this Court can
5 deal with because all of that is local, state law
6 matters, but when you're talking about the development
7 of a nuclear power plant, or a coal plant, for that
8 matter, the feds have something to say about that and,
9 so, to say Kent Jones punted, or that his Court may,
10 somehow, punt, it's just not fair.

11 The Nuclear Regulatory Commission, by act of
12 Congress, decides these questions about licensing, but
13 that doesn't end Utah's involvement in how those
14 decisions are made and that's what Dr. Diaz
15 established.

16 On the issue of demand and PacifiCorp and
17 available power, even Dr. Cooper, on cross-examination,
18 admitted, when I showed him that PacifiCorp anticipates
19 a short-fall in resources to generate power. It's
20 Exhibit 66. I wish I had blown it up now, but what it
21 shows is, out to the year 2022, an increasing short-
22 fall in resources to generate electricity to meet
23 demand and, so, a lot has been said about what
24 PacifiCorp sees and wants to do and Mr. Flitton pointed
25 out that PacifiCorp doesn't think nuclear is going to

1 be really viable for some time. Well, PacifiCorp said
2 that, but that's not all PacifiCorp said.

3 Exhibit 68 is the PacifiCorp integrated resources
4 plan and it has some triggering events and an
5 acquisition path that it looks at in terms of thinking,
6 all right. Looking down the road, what are some of the
7 factors that could cause us to have to make decisions
8 about resources to generate power and, on page 264 of
9 the IRP, there's some criteria about how PacifiCorp
10 makes this decision and, then, the IRP, at page 268,
11 contains a table that describes a triggering event,
12 planning scenarios, near-term resource acquisition
13 strategy and, then, the last one is long-term resource
14 acquisition strategy and the time frame there is 2023
15 to 2032. So, about a decade or so, which starts about
16 a decade from now. So, they're looking 20 years out.

17 Here's what PacifiCorp says. The triggering event
18 is the strengthening of the natural gas market combined
19 with greenhouse gas policies that increase the cost of
20 coal unit operation. We've talked a lot about that in
21 this case. Dr. George and Mr. Graber talked a lot
22 about those unknowns, the uncertainties that are out
23 there and Cooper concedes them and, then, there's some
24 planning scenarios, but PacifiCorp's long-term strategy
25 is pursue strategic, low-cost gas conversion of

1 existing coal units, retire high-cost coal units and
2 pursue acquisition of low emission replacement thermal
3 resources, such as nuclear, and generating technologies
4 with carbon capture and sequestration and it goes on
5 with a couple of others.

6 PacifiCorp has not rejected nuclear power as a
7 resource. It's simply saying they're not going to
8 build it now. They're not ready to take that step.
9 It's an expensive, significant step, but they have in
10 no way dismissed nuclear as a resource.

11 As to stream environment, and reference to Dr.
12 Tyus, you know, no one disputes that, if you take water
13 out of a river, it's going to have an impact. The
14 question here is what is the impact of a 70 C.F.S.
15 withdrawal from a river that's got 6,000 average C.F.S.
16 of flow? Well, it's a little bit of water, but
17 remember what Dr. Tyus also stated on cross. It's the
18 non-native fishes that have been introduced into the
19 Green River that have posed the most significant
20 threat. I think his words were I know several highly-
21 qualified fish biologists who will say that the non-
22 natives are the real problem for the endangered fish
23 and they are. No one disputes that, but to blame their
24 endangerment on strictly the withdrawal of water that
25 we're absolutely entitled to use in this state, that's

1 not fair. That's only half of the picture. Those fish
2 are in trouble.

3 Unfortunately—remember I asked him about rotenone
4 and the poisoning of the Green River to kill a bunch of
5 fish and he said yeah. It killed them. Well, we did
6 that back in the '60's, when we weren't as smart as we
7 are today, to put in game fish so people could go catch
8 trout and I suspect there's a lot of people who regret
9 that decision.

10 MS. SWENSEN: Objection. Mischaracterizes what
11 Dr. Tyus testified on cross as to that. I'll let him
12 continue, but as to that scenario, he did not say that
13 it was introduced to allow game fish and he did not say
14 that it was the reason that they are in the endangered
15 species.

16 THE COURT: Well, he didn't say that was the
17 reason they were endangered, but there was discussion
18 regarding the purpose for doing that.

19 MS. SWENSEN: Yes.

20 THE COURT: And whether Dr. Tyus actually
21 testified or responded to a question, I do remember
22 that discussion. So, okay.

23 MS. SWENSEN: That's fine.

24 MR. WRIGHT: And as to the stream alteration
25 permit and those issues, those are still issues to come

1 and those are decisions that will be made at a time
2 when we've got a diversion structure designed and
3 that's a process we'll have to go through with the
4 State Engineer's Office before we can withdraw a single
5 drop of water.

6 Nothing further, Your Honor. Thank you.

7 THE COURT: Thank you, Mr. Wright.

8 MR. WRIGHT: Oh, may I say this?

9 THE COURT: Sure.

10 MR. WRIGHT: I would like to say, first of all,
11 thanks to the Court for letting us try the case in
12 Price. I think it really worked out well with the
13 number of people we had coming and going. I would also
14 like to acknowledge my colleagues. We were able to
15 disagree in this case without ever once being
16 disagreeable. Thanks.

17 THE COURT: I want to compliment counsel in this
18 case. It's not often I see a case filed in one year
19 and tried the next year. Normally, there's lots of,
20 sometimes, silly discovery disputes. There was none of
21 that here. Counsel cooperated in getting the discovery
22 material done. They were extremely cooperative with
23 each other during this trial and I want you to know I
24 appreciate it very much. It's a pleasure to be able to
25 concentrate on the evidence and not silly problems that

1 people can raise and the presentation was excellent. I
2 enjoyed this very much. Well, I wouldn't say enjoyed
3 is the right word, but I've learned a lot and I want to
4 tell everybody thank you very much for your efforts to
5 make this trial go well.

6 I will take it under advisement. There are some
7 serious things I have to think about in this case.
8 Because I don't have any investigative authority as the
9 State Engineer, my time frame is much reduced. The
10 Court has to have a decision out within 60 days of
11 submission, which is today. So, I will try to have it
12 out sooner, but I can't guarantee that that will happen
13 because it's a very important case and I think it
14 deserves consideration.

15 So, anything else we need to take care of or any
16 questions anybody has?

17 MR. FLITTON: No. Thank you, Your Honor.

18 MR. WRIGHT: All the exhibits are accounted for.
19 Oh, except this one.

20 THE COURT: If that's all, then, the Court is in
21 recess with my thanks. Court will be in recess.

22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Ruby Rudisill, do hereby certify that the foregoing pages contain a true and accurate transcript of the electronically recorded proceedings and was transcribed by me to the best of my ability.

Ruby Rudisill

I, Kelly Thacker, do certify this transcription was prepared under my supervision and direction.

Kelly Thacker