

STATE OF CALIFORNIA
WATER RESOURCES CONTROL BOARD
PUBLIC HEARING

In the Matter of:

Byron Bethany Irrigation District
(BBID) and The West Side Irrigation
District (WSID) Joint Hearing

_____ /

VOLUME 1

JOE SERNA, JR./CALEPA BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
1001 I STREET, SECOND FLOOR
COASTAL HEARING ROOM
SACRAMENTO, CALIFORNIA
MONDAY, MARCH 21, 2016
9:00 A.M.

Reported by:
PETER PETTY

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Ms. Tam Doduc, Chair

Ms. Frances Spivy-Weber, Vice Chair

WATER BOARD STAFF:

Ms. Nicole Kuenzi, Counsel

Mr. Ernie Mona, Water Resource Control Engineer

Ms. Jane Farwell-Jensen, Environmental Scientist

Mr. Rich Satkowski, Senior Water Resource Control Engineer

Mr. Michael Buckman, Hearing Unit Chief

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Ms. Kathy Mrowka

Mr. Brian Coats

Mr. Jeffrey Yeazell

Mr. Paul Wells

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Mr. Tim Maggiore, BBID Board Vice President

Mr. Mark Maggiore, BBID Board Member

Ms. Kelly Geyer, BBID Director of Administration

Mr. Seth Harris, BBID General Manager

Mr. Bob Elliott, San Joaquin County Supervisor

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PUBLIC COMMENT/POLICY STATEMENTS

Ms. Gail Delihant, Western Growers Association

Mr. Dennis Lopez, Rancher

Mr. Greg Gartrell

Ms. Jill Duerig, Manager, Zone 7 Water Agency

Mr. Mario Arnaudo, Farm Owner

Mr. Jason Peltier, Executive Director, San Luis and Delta
Mendota Water Authority

I N D E X

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DIVISION OF WATER RIGHTS PROSECUTION TEAM

DIRECT CROSS REDIRECT REBUTTAL

Mr. Steven E. Nemeth	96-T	144-S 193-Z	
Ms. Kathy Mrowka	97-T	152-K 183-S 248-O 268-A 272-AK	286-T
Mr. Brian Coats	102-T	200-S 215-F 248-O 272-AK	
Mr. Jeffrey Yeazell	133-T	222-S 233-F 248-O	
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LEGEND: T = Mr. Tauriainen
 S = Ms. Spaletta
 Z = Ms. Zolezzi
 K = Mr. Kelly
 O = Mr. O'Laughlin
 F = Mr. Ferguson
 A = Ms. Ansley
 AK = Ms. Akroyd

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P R O C E E D I N G S

1
2 March 21, 2016

9:00 a.m.

3 CO-HEARING OFFICER DODUC: Please take a seat and
4 we'll go ahead and get started. So, good morning,
5 everyone. I am State Water Board Member Tam Doduc, Hearing
6 Officer for the Byron Bethany Irrigation District
7 Administrative Civil Liability Complaint.

8 On my left is State Water Board Vice Chair,
9 Frances Spivey-Weber, Hearing Officer for the West Side
10 Irrigation District Draft Cease and Desist Order.

11 And assisting us today are, to my right, Staff
12 Counsel Nicole Kuenzi, to my left, Senior Engineer Rich
13 Satkowski, and Staff Engineer Ernie Mona. And also up here
14 is Staff Environmental Scientist Jane Farwell-Jensen. And
15 Mr. Michael Buckman, Hearing Unit Chief, is on the side
16 table over there.

17 So, welcome to Phase 1 of the hearings regarding
18 the ACL for BBID and the Draft CDO for West Side
19 Irrigation District.

20 The Administrative Civil Liability Complaint
21 against BBID was issued on July 20th, 2015, and a Draft CDO
22 against West Side was issued on July 16, 2015, by the
23 Assistant Deputy Director for Water Rights.

24 Okay, let me go over some general announcements.
25 Please take a look around, now, and identify the exits

1 closest to you. Should an alarm sound, we are required to
2 vacate this room immediately. Please take your valuables
3 with you. And use the stairways, not the elevators, to
4 exit the building to the relocation site across the street,
5 in Cesar Chavez Park.

6 If you cannot use the stairs, you will be
7 directed to a protective vestibule inside a stairwell.

8 The second announcement is that these hearings
9 are being webcasted on the internet and both the audio and
10 video are being recorded. So, please speak into the
11 microphone and begin by stating your name and affiliation.

12 A court reporter, actually two court reporters
13 are present today. The transcript, at least for one of the
14 court reporters, will be available on the State Water
15 Board's Hearing website for you, or you may make separate
16 arrangement with the court reporting service.

17 And then, most importantly, please take a moment
18 right now to turn off or mute your cell phones. Even if
19 you think it's already off or muted, please take a moment
20 and double check. We will pause while you do that.

21 Nothing annoys the Hearing Officer more than
22 hearing that little sound. Unless it's a really, really
23 good sound, and then I will ask for it.

24 All right, more information on conduct of the
25 hearings. The hearings are being held in concordance with

1 the Notice of Revised Schedule for Public Hearings, dated
2 January 8th, 2016. As stated in the Notice, these hearings
3 have been consolidated, in part, and will be held in two
4 phases.

5 In Phase 1, we will receive testimony and
6 evidence regarding water availability. And in Phase 2 of
7 both hearings we will receive evidence relevant to
8 determining all issues, not addressed during Phase 1, that
9 are within the scope of the key issues in the August 19th
10 and September 1st hearing notices for BBID ACL and the West
11 Side Draft CDO, respectively.

12 Like I said before, today we will begin Phase 1
13 of the consolidated hearing. Following Phase 1, Phase 2 of
14 the BBID hearing will immediately commence. And after
15 that, Phase 2 of the West Side Hearing will commence.

16 The purpose of these hearings is to afford the
17 parties an opportunity to present relevant oral testimony
18 and other evidence which addressed the noticed key issues.

19 Unless any party objects, I'm going to skip
20 reading those phase three key issues specified in the
21 notice. Sorry, Phase 1. See, I'm getting ahead of myself
22 already. Phase 1.

23 Does anyone object to my skipping reading those
24 key issues? Seeing no objection, let's move on.

25 Before I discuss the order of proceeding, I would

1 like to note that we have received motions from the
2 parties, objecting to the admissibility of some of the
3 evidence that have been submitted to us.

4 As we stated in our response to these motions, we
5 will consider the objections in weighing the evidence based
6 on the whole record. The parties should not raise the same
7 objections, orally, during these proceedings. Those
8 objections have been noted and will be considered.

9 All right, moving on to the order of proceedings.
10 We will begin, first, with Policy Statements. So, before
11 the evidentiary portion we will hear from speakers who did
12 not submit a Notice of Intent to Appear, but wish to make a
13 Policy Statement.

14 A Policy Statement is a non-evidentiary
15 statement. It is subject to the limitations identified in
16 the Hearing Notice. Persons making Policy Statements must
17 not attempt to use their statements to present factual
18 evidence, either orally or by introduction of written
19 exhibits.

20 Please note that we will allow all of the parties
21 to make an Opening Statement before presentation of
22 testimony. So, we will only allow oral Policy Statements
23 at this time. No additional oral or written Policy
24 Statements will be allowed prior to other phases of the
25 hearing.

1 So, I do have some comment cards, already, for
2 people who wish to provide non-evidentiary Policy
3 Statement. If there are others in the room, who wish to
4 make this policy statement, please fill out a blue card and
5 hand it to the staff, if you have not already done so.
6 Your blue card must be received by staff before we begin
7 the time for Policy Statement, if you wish to speak today.

8 MR. VERGARA: Board Member Doduc, may I interrupt
9 you for just one moment?

10 CO-HEARING OFFICER DODUC: Yes, please raise your
11 hand when you do that.

12 MR. VERGARA: All right. This is Mike Vergara,
13 Somach Simmons & Dunn, on behalf of BBID.

14 I want to first state and objection to these
15 proceedings, the commencement of these proceedings. We
16 have a number of motions pending, Motions to Dismiss,
17 Motions to Disqualify the Hearing Team, Motions to Strike
18 Certain Declarations.

19 The Hearing Team has not ruled on those motions
20 and several of those motions go to the jurisdiction, the
21 very jurisdiction of this court to commence this
22 proceeding.

23 It's my opinion that to proceed without a ruling
24 on those motions is tantamount to a de facto denial and we
25 have no understanding, at this point, why the Hearing Team

1 has denied those motions.

2 CO-HEARING OFFICER DODUC: Thank you, your
3 objections are noted. They have been received in writing,
4 as well. And so, with that notice, we will continue.

5 MR. O'LAUGHLIN: Tam?

6 CO-HEARING OFFICER DODUC: Mr. O'Laughlin.

7 MR. O'LAUGHLIN: Just for the record, Tim
8 O'Laughlin, representing San Joaquin Tributaries Authority.
9 I would like to join in that objection, please. Thanks.

10 CO-HEARING OFFICER DODUC: Noted. Before I'm
11 further interrupted, does anyone else wish to join in on
12 those objections? Thank you.

13 All right, so, resuming my little spiel. If you
14 wish to provide a Policy Statement, please fill out a blue
15 card and submit it. When we begin with the Policy
16 Statement, we will not be accepting any further blue cards.
17 So, if you wish to provide those Policy Statements, please
18 do provide those blue cards right now.

19 Okay, after the Policy Statements, let's talk
20 about the party presentation order. As stated in our
21 February 18th, 2016 procedural ruling, addressing
22 procedural issues raised during the Pre-Hearing Conference,
23 the parties' presentations will proceed in the following
24 order, and within the specified time limits, except for the
25 cross-examination and rebuttal of BBID, West Side, South

1 Delta Water Agency, Central Delta Water Agency, Banta-
2 Carbona Irrigation District, and Patterson Irrigation
3 District, who have elected to combine their allotted time.

4 We will begin the evidentiary portion, first,
5 with Opening Statements by the parties. We will allow all
6 the parties to make a single Opening Statement before the
7 Prosecution Team's testimony in Phase 1.

8 We will not be allowing time for additional
9 Opening Statements prior to Phase 2 of either hearing.

10 Opening Statements should briefly summarize the
11 parties' objectives in the case, the major points they
12 intend to establish, and the relationship between the major
13 points and the key issues. Policy-oriented statements may
14 also be included in the Opening Statement.

15 We will hear Opening Statements in the following
16 order, Division of Water Rights Prosecution Team, BBID,
17 then West Side. Each will have 20 minutes.

18 And the remaining parties will be limited to five
19 minutes each, in the following order, Mr. Richard Morat,
20 South Delta, Central Delta, City and County of San
21 Francisco, San Joaquin Tributaries Authority, California
22 Department of Water Resources, State Water Contractors,
23 Patterson Irrigation District, Banta-Carbona, and then
24 Westlands Water District.

25 After the Opening Statements are presented, we

1 will hear oral testimony from the parties' witnesses.

2 Before testifying, witnesses should identify their written
3 testimony as their own and affirm that it is true and
4 correct.

5 Witnesses should summarize the key points in
6 their written testimony and should not read their written
7 testimony into the record.

8 Summaries of direct testimony for Phase 1 will be
9 presented in the following order, Division of Water Rights
10 Prosecution Team, BBID, West Side, then South Delta.
11 Division of Water Rights Prosecution Team, BBID, and West
12 Side would each have 90 minutes and South Delta will have
13 30.

14 After presentation of direct testimony, we will
15 have cross-examination by the other parties. Cross-
16 examination is not limited to the scope of direct
17 testimony. It must, however, be limited to the factual
18 issues in dispute.

19 Cross-examination in Phase 1 will be conducted in
20 the following order, Division of Water Rights Prosecution
21 Team, with 60 minutes, the combination of BBID, West Side,
22 South Delta, Central Delta, Banta-Carbona and Patterson
23 will have 160 minutes. Then, the City and County of San
24 Francisco, San Joaquin Tributaries Authority, California
25 Department of Water Resources, State Water Contractors and

1 Westlands will follow, each with 10 minutes.

2 While I really do appreciate the collaboration of
3 the parties to coordinate their cross-examination, I need
4 to emphasize that I expect you will use your time
5 efficiently and productively. If I find that your cross-
6 examination of a particular witness is no longer
7 productive, I will direct you to move along.

8 I see hands. Mr. Kelly, first.

9 MR. KELLY: Yes, Board Member Doduc, and Vice
10 Chair Spivy-Weber, good morning. Daniel Kelly, for the
11 Byron Bethany Irrigation District.

12 I do have a question and, I guess, perhaps a
13 request as it relates to scheduling. Susan Paulson, who is
14 one of BBID's expert witnesses, is traveling here from
15 Southern California. She's actually on her way from the
16 airport right now. She is up here all week, except for
17 that Thursday morning she has a prior commitment in
18 Southern California that she needs to attend to.

19 My hope is that we get through her testimony, I'm
20 hoping tomorrow, and there may be some rebuttal. But I'm
21 just going to request now, before we get too far along,
22 that everybody keep that in mind and to the extent that we
23 can accommodate her previously-scheduled matters for
24 Thursday morning, that we try to do that.

25 CO-HEARING OFFICER DODUC: Thank you, Mr. Kelly.

1 MR. KELLY: Thank you.

2 CO-HEARING OFFICER DODUC: And your timing is
3 perfect because Dr. Paulson just walked in the room.

4 MR. VERGARA: Board Member Doduc, Mike Vergara.
5 I also have a question or actually ask for some
6 clarification. Will the witnesses be sworn under penalty
7 of perjury? You said "affirm".

8 CO-HEARING OFFICER DODUC: There is an oath that
9 they will be taking.

10 MR. VERGARA: Thank you.

11 MS. ANSLEY: Board Member Doduc?

12 CO-HEARING OFFICER DODUC: All right, we're going
13 to have to handle all these -- yes. Actually, I believe
14 Mr. O'Laughlin raised his hand, first.

15 MR. O'LAUGHLIN: I have two procedural questions.
16 One is, are we planning on going all day on Friday?
17 Friday's Good Friday. I just wanted to know.

18 CO-HEARING OFFICER DODUC: We will definitely
19 take that into consideration, Mr. O'Laughlin.

20 MR. O'LAUGHLIN: And can you tell me, briefly,
21 what the expected hearing days look like as far as
22 schedule? Are we planning to go 9:00 to 10:30, take a
23 break, so we can kind of plan the rest of our next two
24 weeks?

25 CO-HEARING OFFICER DODUC: Well, I'm not planning

1 my next two weeks except for being here, so I would expect
2 you to do the same. The expectation is that we will at
3 least have eight-hour days, depending on how things go. We
4 will take a break in the morning, a break in the afternoon,
5 and about a half-an-hour break for lunch.

6 My hope is we stick within the 9:00 to 5:00
7 timeframe. But again, depending on how things go,
8 depending on the flow of the testimony and the flow of the
9 proceedings, I might adjust that on a day-to-day basis.
10 But do plan to be at least here 9:00 to 5:00 every day.

11 Yes?

12 MS. ANSLEY: Good morning, Jolie-Anne Ansley,
13 Duane Morris, on behalf of the State Water Contractors.

14 Since Mr. Kelly had brought this up, we also have
15 our sole rebuttal witnesses, Dr. Paul Hutton, who has a
16 prior commitment on Friday and also for next week. I don't
17 believe that this is a problem with the current schedule
18 that you have set out, in terms of rebuttal testimony. But
19 I just wanted to make the Hearing Officers aware that he is
20 unavailable and our one witness might have to be taken out
21 of order, perhaps, on Thursday.

22 CO-HEARING OFFICER DODUC: Thank you.

23 All right, where was I? I believe I just covered
24 cross-examination. So, at our discretion, after completion
25 of direct testimony and cross-examination, we may allow

1 redirect examination upon an offer of proof as to the
2 substance, purpose and relevancy of the expected testimony.

3 Recross-examination, if any, shall be limited to
4 the scope of the redirect testimony. And we'll get more
5 into that when we get to that point.

6 Rebuttal. After the cases in chief are
7 completed, the parties may present a summary of submitted
8 written rebuttal testimony. Parties may also offer
9 rebuttal testimony that is in response to new evidence and
10 could not have been previously submitted in writing.

11 Cross-examination of rebuttal evidence shall be
12 limited to the scope of the rebuttal evidence. Rebuttal
13 evidence, in Phase 1, will be presented in the following
14 order and with the following time limits. Division of
15 Water Rights Prosecution Team 30 minutes. BBID and West
16 Side 60 minutes. California Department of Water Resources
17 10 minutes. State Water Contractor 10 minutes.

18 Cross-examination of rebuttal evidence will
19 follow the same order as presentation of rebuttal. And we
20 will determine time allowed for cross-rebuttal at a later
21 time during the hearing.

22 Moving on to Closing Arguments. Oral Closing
23 Arguments will not be permitted. We will allow the parties
24 to submit one closing brief for each proceeding, after
25 completion of both phases of the hearings.

1 All right, I have some housekeeping issues, and
2 you've actually beaten me to the punch, already, with
3 respect to time conflicts and requests for taking testimony
4 out of order.

5 So let me also note, Mr. Morat, that as we
6 acknowledge in our previous ruling, you will have the
7 opportunity to present your BBID Phase 2 testimony this
8 week. In the event the hearings have not progressed to
9 allow your testimony in the stated order, you will be taken
10 out of sequence in order to do so on Friday, March 25th.

11 I believe staff has a couple of housekeeping
12 items, as well.

13 MS. FARWELL-JENSEN: Thank you, Nicole.

14 CO-HEARING OFFICER DODUC, the Hearing Team will
15 include the Division of Water Rights' correspondence files
16 for BBID's Statement of Water Diversion and Use, S021256,
17 as Staff Exhibit 1 in hearing record.

18 Also, we'd like to include Division of Water
19 Rights' Correspondence files for the West Side's Water
20 Rights -- the West Side Water District, excuse me, Water
21 Right Application Number A000301, as Staff Exhibit Number 2
22 in the hearing record. Thank you.

23 CO-HEARING OFFICER DODUC: Mr. Kelly?

24 MR. KELLY: Yes, thank you, Hearing Officer
25 Doduc. I'm going to object to that. We were not notified,

1 prior to the commencement of this hearing, that there were
2 going to be exhibits offered by staff in this proceeding.
3 We've not seen any of that. And I don't understand how any
4 of that is relevant if the Prosecution Team has not offered
5 that as evidence in their case and chief.

6 And so, because we were all required to submit
7 our exhibits by, I believe it was January the 19th, or
8 22nd, I object to the presentation of any new exhibits at
9 this time.

10 CO-HEARING OFFICER DODUC: Mr. O'Laughlin?

11 MR. O'LAUGHLIN: I join in the objection. I
12 mean, this matter has been doing on for six months. And by
13 putting in exhibits, this is the very thing we talked about
14 earlier, staff then is taking over the job of the
15 Prosecution Team, whereas they're supposed to be neutral.

16 The evidence to be presented in this case is to
17 be presented by the Prosecution Team, not the staff. The
18 staff is to remain impartial, unbiased, and neutral. So,
19 we firmly objection to the submittal of this testimony at
20 this late date and view it as highly prejudicial.

21 CO-HEARING OFFICER DODUC: Ms. Zolezzi? It would
22 be really helpful to me if you could raise your hand,
23 because there are so many of you.

24 MS. ZOLEZZI: Jeanne Zolezzi, representing the
25 West Side Irrigation District. I would echo the protest

1 for the various reasons that were mentioned. But most
2 particularly, at this point, because we don't have an
3 opportunity to review whatever it is that's being submitted
4 as an exhibit. Thank you.

5 CO-HEARING OFFICER DODUC: Thank you. Anyone
6 else?

7 All right, we will take that under advisement.

8 CO-HEARING OFFICER DODUC: Have all -- Ms.
9 Spaletta?

10 MS. SPALETTA: Thank you, Hearing Officer Doduc.

11 CO-HEARING OFFICER DODUC: Is your microphone on?

12 MS. SPALETTA: It is, I'm not close enough.

13 I understand you're taking the offer of evidence and the
14 objections under advisement. But because none of the
15 parties have a copy of the documents that staff is asking
16 to add as an exhibit, unless you grant -- or, excuse me,
17 agree with the objections and exclude the offer, then I
18 would request that at some point today you make a decision
19 on the objection. And if you decide to let the evidence
20 in, you require staff to immediately provide a complete
21 electronic copy to all of the parties.

22 CO-HEARING OFFICER DODUC: Thank you, Ms.
23 Spaletta. I will take that under consideration.

24 Now, I would like to hear Policy Statements. I
25 do have some cards. Does anyone else have comment cards

1 for a Policy Statement? Seeing none, I will close the
2 window for submitting Policy Statements and we'll start
3 calling up those that did provide cards.

4 I will provide you five minutes each. We'll
5 begin with Ms. Gail Delihant and followed by Mr. Dennis
6 Lopez.

7 POLICY STATEMENT BY MS. GAIL DELIHANT

8 MS. DELIHANT: How's that? Sorry. Gail Delihant
9 with Western Growers Association. Just for the record,
10 Western Growers is a grower, packer, shipper of probably
11 about 50 percent of the nation's fresh produce, in this
12 State. We have a lot of growers who rely on our water
13 managers and our water rights process. And I'm here to
14 speak on behalf of BBID this morning.

15 Just for the record, in 2014, Western Growers was
16 very concerned that the drought was affecting water
17 supplies. We called your staff, asked that the water
18 managers and the water rights folks be at the table as
19 they're discussing how to manage the water in this State.

20 And we were told that that actually didn't
21 happen. They were getting information second and third
22 hand, and they really weren't allowed at the table.

23 And then, in a proceeding before your Board, you
24 guys decided that this next year, 2015, that the process
25 would be more open, that the water managers would be

1 allowed to come to the table and discuss. Since they are
2 the ones who have managed the water in this State for
3 decades and decades, they really have the expertise on how
4 to do it rightly, in our view.

5 We were also told that didn't happen. And that
6 is very discouraging to us and, frankly, egregious. There
7 are significant questions raised in this proceeding that
8 causes trust to be completely eroded in how the State will
9 implement the curtailments going forward.

10 We know that the drought probably is not over and
11 we're going to go down this road again, and it is critical
12 that you have an open process, a public process, that the
13 water managers are at the table, not hearing it second and
14 third hand from bureaucrats in the administration, either
15 federal or state. But that they are at the table so that
16 trust can be built back up. Because, frankly, we see that
17 it's completely eroded.

18 Doing a proceeding such as this, we believe is
19 punitive. This is a very small irrigation district who, in
20 our view, was just asking question after question to make
21 sure that the information that they were getting was
22 accurate.

23 We had a hearing before this Board on the
24 temperature of Shasta and the water -- the Federal
25 government was wrong in how -- what the temperature was.

1 That caused a significant curtailment on water being
2 released.

3 This proceeding should be actually, in our view,
4 dismissed. You should go back to the table with the water
5 managers and you should work this thing out so that the
6 confidence is not eroded going forward.

7 And I appreciate your hearing my views this
8 morning and do ask that you dismiss this. Thank you.

9 CO-HEARING OFFICER DODUC: Thank you, Ms.
10 Delihant.

11 Mr. Lopez, followed by Mr. Greg Gartrell.

12 POLICY STATEMENT BY MR. DENNIS LOPEZ

13 MR. LOPEZ: My name is Dennis Lopez, from Byron,
14 California. I'm in the Byron MAC. And we came to Bryon in
15 the -- my family came to Byron in 1889, from Germany and
16 Portugal, and we gave four lives fighting for this country.
17 Four lives.

18 And my grandparents and my great-grandparents
19 helped build the canals and administrative the water, and
20 worked for the Water District in periods of time off of our
21 ranch.

22 I can't believe that we're living in a period of
23 time where we're fighting with water. One of my great-
24 uncles, one time said, oil is going to be -- oil and water
25 are going to be the two most important things that we're

1 dealing with in modern day times. And this was, I don't
2 know, 50 years ago when we said it.

3 I can't believe that we're picking on BBID
4 District, Water District, when they've always managed the
5 water and distributed the water in a professional manner.
6 There was nobody that got over anybody, or anything else.
7 I think the management, I think the Board of BBID is doing
8 a great job.

9 I'm very nervous for being up here because I see
10 so much wrong, and not so much right. It's like, just this
11 water issue is just -- if it was misused or mismanaged, I
12 can understand you'd have something to complain about. But
13 every drop of water creates employment, creates food,
14 creates everything.

15 It's like right now, I'm worried about the water
16 being cutting off because we're dealing with Gallo Wine,
17 we're dealing with G3, we're dealing with people that
18 employ four, five thousand people. We're dealing people
19 that create glass bottles for wine, for agriculture. I
20 mean, we're dealing with food products, we're dealing with
21 people products, we're dealing with the whole Maryann.

22 And it seems like that we're all talking about
23 water, but we're talking about the future, we're talking
24 about a lot of issues that have nothing to do with just
25 plain water. This water is necessary for agriculture. My

1 job is agriculture. I can't live without water. My cows
2 won't survive without water. It just won't happen.

3 It's a situation where I think it's all -- it's
4 so far out of line it's not even -- it's not even -- it's
5 not even directly to do with water. It's to do with
6 politics and it makes me sick. It really bothers me.

7 That's all I have to say, thank you.

8 CO-HEARING OFFICER DODUC: Thank you, Mr. Lopez.

9 (Applause)

10 CO-HEARING OFFICER DODUC: I appreciate your
11 enthusiasm, but this is not the forum for applause.

12 Mr. Gartrell, followed Ms. Jill Duerig.

13 POLICY STATEMENT BY MR. GREG GARTRELL

14 MR. GARTRELL: Good morning, Board Members and
15 Hearing Officers. I want to thank you for the opportunity
16 to address you this morning. I just have a few, quick
17 points I'd like to make.

18 First, for a couple of reasons I believe your
19 final order should state, explicitly, that the methodology
20 used ultimately for determining water availability does not
21 set a precedent.

22 And I say that for a couple of reasons. One is
23 that while the notice regarding water available discussion
24 was specifically to a certain period in 2015, the testimony
25 of a number of parties, or all of the parties that provided

1 that, really assumed there was a universal methodology,
2 although their testimony and their exhibits don't agree on
3 that methodology. And there really isn't.

4 And this, I think, is a problem. Not just for
5 this hearing, but out into the future. This isn't the last
6 time we're going to be discussing this. With climate
7 change, this is going to become more and more frequent. In
8 my view, I think that there's a lot of good expertise here.
9 There's a lot of merit to the methodologies that have been
10 presented to you, but each has its own flaws. And none of
11 them, in my view, is definitive.

12 I think that if the State Board were to, and I
13 think they should, soon convene a process that allows the
14 stakeholder expertise that you have here, plus others, and
15 there's plenty within the USGS and universities in the
16 area, that you can get independent experts together, along
17 with stakeholders and develop a process that is reasoned,
18 that is fair, and that is clear and available to everybody.
19 In advance of the next process so everybody can know and
20 see what's coming.

21 If you do that right, I think you'll have much
22 less adversarial issues in the future.

23 Part of the reason for this is the complexity of
24 the Delta. And once again, whether it's regarding fish or
25 water availability, the Delta is immensely complex. It is,

1 in effect, a wide spot in the river. It has its own
2 storage. In dry times, the amount of storage within the
3 Delta channels is much, much greater than the flow coming
4 in and out.

5 And in particular -- and that, everybody has
6 taken advantage of that storage, from the projects and how
7 they operate to meet standards, and water quality
8 standards, to the water users within the Delta.

9 It's not unprecedented to keep track of the water
10 that is in a reservoir. For example, the state and federal
11 projects do that on a daily basis with San Luis, as water's
12 coming in, as water's going out. They don't get into the
13 mess that you can get into, if you get too complex on this.
14 Well, my water's near the intake and I have to take mine
15 before yours.

16 You can make it reasoned and simple, but you can
17 do a tracking methodology. I think that is something that
18 you need to look for and do in the future, but I think that
19 it's important that you not make this a precedent on the
20 methodology for future use. I think that needs to be a
21 separate process.

22 Finally, I conclude with saying that based on the
23 testimony that I've reviewed, I think you'll find there is
24 clear evidence that there was, probably, water available
25 for BBID up through June of 2015. Beyond that, I think it

1 becomes more complex and more difficult to say precisely,
2 based on the evidence in the exhibits I've examined. It
3 is a complex problem. I wish you well in making your
4 determination on that. I don't think it's an easy issue.
5 But I think I will just leave it at that and thank you for
6 this opportunity.

7 CO-HEARING OFFICER DODUC: Thank you.

8 Ms. Duerig, followed by Mario Arnaudo.

9 POLICY STATEMENT BY MS. JILL DUERIG

10 MS. DUERIG: Thanks. I have to relocate it.

11 Good morning, Hearing Officer Doduc and --

12 CO-HEARING OFFICER DODUC: You'll need to get
13 closer to the microphone.

14 MS. DUERIG: Is that better?

15 CO-HEARING OFFICER DODUC: Yes.

16 MS. DUERIG: Okay. Good morning, Hearing Officer
17 Doduc and Hearing Officer Spivy-Weber. My name is Jill
18 Duerig and I'm the Manager of Zone 7 Water Agency, which
19 serves Eastern Alameda County.

20 Zone 7 is a State Water Project Contractor that
21 receives State Project water conveyed through the Delta,
22 via the Banks Pumping Plant and the South Bay Pumping
23 Plant, which then pumps into the South Bay Aqueduct.

24 Byron Bethany Irrigation District diverts water
25 from the Banks Pumping Plant intake channel and then into

1 the South Bay Aqueduct. Zone 7 has a long-standing
2 contract with BBID to receive up to 5,000 acre feet
3 annually of surplus water from BBID, when it is available.
4 This water, again, is delivered to Zone 7 the same way the
5 State Project Water is delivered. Zone 7 has a long-
6 standing contract and it receives this routinely.

7 While we have not received any water under this
8 agreement since 2013, that water is an important part of
9 our overall water supply portfolio because it enables us to
10 serve not only our irrigation customers, we have about
11 3,500 acres that are largely vineyards, but also our four
12 retail water agencies which, in turn, serve water to
13 225,000 people and businesses in the Cities of Livermore,
14 Pleasanton, Dublin, and the Dougherty Valley portion of San
15 Ramon.

16 Zone 7 has been following the State Board's
17 enforcement action since its inception last summer. We
18 understand and support the State Board's desire to work
19 with water agencies across California to manage our State's
20 scarce water resources, especially during an extended
21 drought. In fact, we commend the State Board for its
22 creative efforts to ensure that all parts of California
23 have sufficient water.

24 CO-HEARING OFFICER DODUC: Ms. Duerig, I actually
25 do have your written policy statement. Thank you very

1 much. And it seems like you're just reading it. I need to
2 urge you to summarize and move on.

3 MS. DUERIG: Okay, I would be happy to do that.
4 I wasn't sure of that. In any case, primarily I was here
5 to emphasize that we are supportive of the State's approach
6 to the pre-1914 rules and we want to emphasize that we
7 support the idea that the Legislature, when it adopted the
8 Water Commission Act of 1913, did so with a grandfathering
9 of all water rights that were pre-14.

10 We feel very strongly that the State Board cannot
11 and should not take any action in excess of that authority.
12 For that reason, we urge the State Board and the Hearing
13 Officers, as their representatives, to dismiss this action
14 and return to the previous policy of working cooperatively
15 with the water users, especially during droughts.

16 We feel that we have expertise to contribute and
17 we think that the water agencies, as a whole, can work with
18 you to manage the State water resources in such a way that
19 we can meet the needs of the State.

20 Thank you so much for giving me the opportunity
21 to provide these comments.

22 CO-HEARING OFFICER DODUC: Thank you. And again,
23 thank you for your written statement, which we will
24 include.

25 Mr. Arnaudo. I apologize if I mangle people's

1 name. And then followed by our final Policy Statement,
2 from Mr. Jason Peltier.

3 POLICY STATEMENT BY MR. MARIO ARNAUDO

4 MR. ARNAUDO: All right, yeah, my name's Mario
5 Arnaudo. I'm the Manager of our family farm, in the BBID
6 Irrigation District. I'm a third generation farmer on this
7 property that my grandfather purchases in the late '60s.
8 The ranch is approximately 600 acres of farmable land and
9 300 acres of hills and pasture.

10 We employ five workers, three seasonal, and two
11 full time. Between working cows and working the fields,
12 these men stay very busy.

13 Last year was especially hard for us because we
14 had to sell about half of our herd and only harvest two
15 cuttings, out of seven, of alfalfa that we should have had.

16 Due to the lack of work, because of the
17 uncertainty from the State Water Board, of when and if
18 we're allowed to irrigate, we had to lay off two of three
19 seasonal employees. And explaining to the men as to why
20 they lost their jobs was extremely difficult to do.

21 If we are not allowed to obtain water this year,
22 I can guarantee you we will have to lay off the rest of our
23 employees. However, it comes to my understanding that the
24 water prices may go up due to the lawsuit on the District.
25 As you already know, the price of crops around the area

1 have decreased drastically. There is no way we will be
2 able to afford such increases on the water.

3 Thus, if we can get the water, but at an
4 outrageous rate, we will still have no water. Once again,
5 we will not be farming and will have to lay off the rest of
6 our men.

7 And then, also, my family farms the land in the
8 Stockton Delta, and in that area we were able to reduce by
9 25 percent, but didn't get completely cut off. And it's
10 hard to understand why an irrigation district, such as
11 BBID, that has been around for over 100 years, got shut
12 off, while just down the road we were able to keep the
13 water flowing.

14 We need to be able to farm this land for many
15 reasons. One benefit to keeping ranches, such as ours,
16 with water is that these ranches employ men. These men are
17 the providers for their families. If they don't make
18 money, they do not feed their families.

19 Farming employs so many more people than that,
20 however. So many businesses function of men and women in
21 the fields. I don't think the State realizes the
22 importance of agriculture. Without it, our economy will
23 collapse. And we need to keep the water flowing, but at a
24 rate we can afford. Thank you.

25 CO-HEARING OFFICER DODUC: Mr. Peltier.

POLICY STATEMENT BY MR. JASON PELTIER

1
2 MR. PELTIER: Good morning, I'm Jason Peltier,
3 Executive Director of the San Luis and Delta Mendota Water
4 Authority. I appreciate the opportunity to speak with you
5 briefly this morning.

6 Our 29-member agencies have all suffered through
7 the hydrologic drought we've gone through in the last few
8 years. The Authority has expended significant resources
9 attempting to protect the water supplies developed by the
10 Central Valley Project. And we continue and will continue
11 on into the future as we're certain to have regulatory
12 drought on into the future as we go forward.

13 This proceeding, however, does not appear to us
14 to be the proper venue. And as numerous folks have said,
15 previously, going to a more cooperative, collaborative kind
16 of venue, and forum, and means of doing business would be
17 most productive, much more productive given the
18 complexities of the case, of the issues before you.

19 If there was a silver lining to the drought,
20 certainly it was that there was very little -- considering
21 the consequences of the drought and the breadth of impacts,
22 there was very, very little litigation, very little
23 regulatory conflict, like you're setting up here. And I
24 was quite -- I think we should all be quite proud of that,
25 the way we worked through the last few years. And not

1 focusing on conflict so much as how do we provide mutual
2 aid? How do we work together? How do we collaborate? How
3 do we recognize the needs of each other and do what we can
4 to help everybody through the process?

5 And that is exactly the kind of way that I would
6 suggest that the Board move forward, in a more
7 collaborative process than what you're about to embark on
8 in the next couple of weeks. Thank you.

9 CO-HEARING OFFICER DODUC: Mr. Peltier, that
10 concludes our Policy Statement.

11 So, now, I will invite appearances by the
12 parties, who are participating in the evidentiary portion
13 of the hearings.

14 And let me just go ahead and just go through,
15 recognize you. And will those to be making appearances,
16 please, as I call your party, state your name, address, and
17 whom you represent, so that the court reporter can capture
18 this information for the record.

19 I will begin with the Division of Water Rights
20 Prosecution Team. This is just to identify yourself for
21 the record.

22 MR. TAURIAINEN: Andrew Tauriainen, of the Office
23 of Enforcement, 1001 I Street, Sacramento, for the
24 Prosecution Team.

25 CO-HEARING OFFICER DODUC: Byron Bethany

1 Irrigation District.

2 MR. KELLY: Daniel Kelly, with Somach Simmons &
3 Dunn, 500 Capitol Mall, Suite 1000, Sacramento, California
4 95814.

5 With me, I have Rick Gilmore, BBID's General
6 Manager, Mike Vergara, with my office, Aaron Ferguson, with
7 my office, and Theresa Barfield, behind me, also with my
8 office, all here for the Byron Bethany Irrigation District.

9 CO-HEARING OFFICER DODUC: Thank you, Mr. Kelly.
10 West Side Irrigation District.

11 MS. ZOLEZZI: Good morning. Jeanne Zolezzi,
12 Herum, Crabtree, Suntag, 5757 Pacific Avenue, Suite 222,
13 Stockton, California 95207, representing the West Side
14 Irrigation District.

15 I also have with me, from my office, directly
16 behind me, Janelle Krattiger, also representing the
17 District.

18 And I'm also representing Patterson Irrigation
19 District and Banta-Carbona Irrigation District. Thank you.

20 CO-HEARING OFFICER DODUC: Thank you for your
21 efficiency.

22 Mr. Richard Morat?

23 MR. MORAT: Is it working?

24 CO-HEARING OFFICER DODUC: Yes.

25 MR. MORAT: Thank you. Richard Morat,

1 representing myself, 2821 Berkshire Way, Sacramento 95864.

2 CO-HEARING OFFICER DODUC: Thank you, Mr. Morat.
3 South Delta Water Agency?

4 MR. RUIZ: Good morning, Dean Ruiz, of Harris,
5 Perisho & Ruiz, 3439 Brookside Road, Stockton, California
6 95219, representing the South Delta Water Agency.

7 CO-HEARING OFFICER DODUC: Central Delta Water
8 Agency.

9 MS. SPALETTA: Good morning, Jennifer Spaletta,
10 Spaletta Law, PC, 225 West Oak Street, Lodi, California
11 95240, representing Central Delta Water Agency.

12 And with me today, from my office, is Russell
13 Frink.

14 CO-HEARING OFFICER DODUC: Thank you.
15 City and County of San Francisco.

16 MR. KNAPP: Good morning. My name's Jonathan
17 Knapp. I'm representing the San Francisco City Attorney's
18 Office, on behalf of the City and County of San Francisco,
19 and the San Francisco Public Utilities Commission. And my
20 address is 1390 Market Street, Suite 418, San Francisco,
21 California 94102.

22 And with me, to my left, is Robert Donlan, from
23 Ellison Schneider & Harris, outside counsel for the City
24 and County. Thank you.

25 CO-HEARING OFFICER DODUC: Thank you, Mr. Knapp.

1 San Joaquin Tributaries Authority.

2 MR. O'LAUGHLIN: Tim O'Laughlin, O'Laughlin &
3 Paris, LLP, 2617 K Street, Suite 100, Sacramento,
4 California 95816.

5 CO-HEARING OFFICER DODUC: California Department
6 of Water Resources.

7 MS. MC GINNIS: Robin McGinnis, Office of the
8 Chief Counsel, California Department of Water Resources.
9 Also here is my co-counsel, Cathy Cavanaugh, from the
10 Office of the Chief Counsel.

11 Our address is 1416 9th Street, 11th Floor,
12 Sacramento, California 95814.

13 CO-HEARING OFFICER DODUC: Thank you, Ms.
14 McGinnis.

15 The State Water Contractors.

16 MS. ANSLEY: Good morning. Jolie-Anne Ansley
17 with the Law Firm of Duane Morris, LLP, here representing
18 the State Water Contractors. My address is One Market
19 Plaza, Suite 2200, San Francisco, California 94105.

20 With me today is Becky Sheehan, with the
21 Metropolitan Water District of Southern California for the
22 State Water Contractors. Thank you.

23 CO-HEARING OFFICER DODUC: And that was Ms.
24 Ansley.

25 MS. ANSLEY: Jolie-Anne Ansley.

1 CO-HEARING OFFICER DODUC: And Ms. Zolezzi was
2 already efficient in identifying herself for Patterson and
3 Banta-Carbona. So, Westlands.

4 MR. WILLIAMS: Good morning, Ma'am, Philip
5 Williams, representing Westlands, at 400 Capitol Mall, the
6 28th Floor, Sacramento, California 95814.

7 I'm joined by Ms. Rebecca Akroyd and Ms.
8 Elizabeth Leeper, of Kronick, Moskovitz, at 400 Capitol
9 Mall, 27th Floor, Sacramento, California 95814. Thank you.

10 CO-HEARING OFFICER DODUC: That's Mr. Williams.
11 Thank you.

12 Those are all the parties I have, so now we will
13 begin Opening Statement with the Prosecution Team.

14 OPENING STATEMENT BY MR. ANDREW TAURIAINEN ON BEHALF OF
15 CALIFORNIA STATE WATER RESOURCES BOARD

16 MR. TAURIAINEN: Thank you. Good morning, Vice
17 Chair Spivy-Weber, Board Member Doduc, Members of the
18 Hearing Team. I'm Andrew Tauriainen, of the Office of
19 Enforcement, for the --

20 CO-HEARING OFFICER DODUC: You need to get to get
21 closer to the microphone.

22 MR. TAURIAINEN: Okay.

23 CO-HEARING OFFICER DODUC: If I can barely hear
24 you then --

25 MR. TAURIAINEN: I'm Andrew Tauriainen, with the

1 Office of Enforcement, for the Prosecution Team.

2 These cases are about water districts that
3 ignored, blatantly ignored Board staff efforts to protect
4 water priority during the worst drought in recorded
5 history. They're also about how these districts should be
6 punished.

7 Evidence will show that there was no water
8 available for BBID's diversions or West Sides actual or
9 threatened diversions during parts of 2015. Evidence will
10 also show that BBID should receive an administrative civil
11 liability of not less than just over \$1.4 million.

12 And that West Side should receive a CDO,
13 prohibiting diversions during periods of unavailability,
14 unless West Side can ensure that any diversions are within
15 its valid rights.

16 Unauthorized diversion is a trespass subject to
17 administrative civil liability. The Board may issue a
18 cease and desist order to any person who's violating or
19 threatening to violate the prohibition against unauthorized
20 diverse.

21 In these proceedings, each party has the burden
22 to prove each fact that's essential for their claims or
23 defenses by a preponderance of the evidence. That's a low
24 standard. It just means that the party needs to provide
25 evidence that demonstrates that their fact is more likely

1 than not to be true, which means greater than 50 percent.

2 In the case of conflicting evidence,
3 preponderance means the more convincing evidence. We don't
4 need a higher standard in these proceedings because no
5 water right claimant holds a vested right to divert water
6 that's not available for that right.

7 Phase 1 is about whether there was water
8 available for BBID and West Side during the relevant
9 periods. It's not about whether any notice is enforceable,
10 that was received by the parties. It's about whether they
11 diverted or threatened to divert during the relevant
12 periods.

13 In this relatively wet March, we shouldn't forget
14 that we've experienced the worst drought in recorded
15 history. In 2014 -- or by 2014 and 2015, the Governor, the
16 Legislature and the Board took action to protect the water
17 right priority system. This is the backdrop to the
18 Division's water availability determinations in 2015.

19 Brian Coats, with the Division, will describe the
20 supply and demand methodology that the Division used to
21 determine water availability in 2015. The methodology
22 compares the available water suppliers to water demands in
23 watersheds and sub-watersheds.

24 It has its roots in the '77 drought. The
25 Division implemented a version of the methodology in 2014.

1 In 2014, they refined the methodology in ways that
2 benefited diverters. The methodology is simple math, like
3 what you'd use to set a budget. And with any budget, when
4 demand outstrips supply, you need to adjust your spending.

5 Mr. Coats describes how staff defined the
6 watersheds for this supply and demand methodology. For
7 2015, staff included the Delta in both the Sacramento and
8 the San Joaquin River watersheds, and then assigned Delta
9 demands, depending on how much water supply was flowing
10 into the Delta from each watershed.

11 This prorated Delta method credits Southern Delta
12 diverters, like BBID and West Side, with Sacramento River
13 flows that they would not naturally receive. This allowed
14 them to divert for longer in 2015, after San Joaquin flows
15 had dropped to almost nothing.

16 Mr. Coats and Jeff Yeazell describe how staff
17 determined the available supplies, using DWR's Bulletin
18 120, Full Natural Flow Forecasts, and DWR's Full Natural
19 Flow Daily Calculations.

20 Steve Nemeth, of DWR, describes how DWR develops
21 those forecasts and those calculations.

22 DWR has been doing those forecasts and those
23 calculations for decades and they're relied on by many
24 public agencies and private entities.

25 Mr. Coats and Mr. Yeazell will also discuss how

1 staff adjusted the supply information that more generously
2 estimated the available supply, which benefited diverters.
3 Most notable, staff included a 40 percent return flow
4 credit to Delta stakeholders, at the stakeholders' request.

5 Mr. Coats and Mr. Yeazell describe how staff
6 determined the demand for water in the watersheds. The
7 demand comes from the Board's own information, which is
8 provided by the water users, themselves, in the forms of
9 the annual Reports of Licensees and Permittees, and the
10 triannual Reports from Statement Filers, pre-14s and
11 riparians.

12 Staff also incorporated usage data received from
13 the February 2015 Information Order, which went to the top
14 90 percent, by volume, of riparian pre-14 claimants. Staff
15 performed significant quality control on the demand data,
16 again making every estimate in favor of diverters. All
17 told, this is the best available demand data.

18 What the supply and demand methodology showed, in
19 2015, was that the late winter and spring runoff season was
20 absolutely dismal. There was not enough water to serve
21 post-14 rights in the Sacramento watershed, and in the
22 Delta, including West Side's license, by May 1st.

23 Staff issued a Notice of Unavailability to these
24 water right holders by May 1st. These conditions of
25 unavailability lasted for those right holders until

1 November 2nd.

2 Conditions were so bad that by June 12th, there
3 was no water available for diversion by pre-1914 right
4 claimants, with priorities of 1903 and later. This means
5 that any diversions by post-1902 diverters took away water
6 from senior right holders, or from parties who had released
7 stored water upstream.

8 Staff issued a Notice of Unavailability to these
9 right holders, including BBID, on June 12th. The
10 conditions of unavailability for those right holders lasted
11 until September 17.

12 Staff will show how the data available since
13 those notices went out validates the findings of
14 unavailability noticed in those notices. For example, this
15 chart shows the combined Sacramento and San Joaquin River
16 Basin supply and demand as of August 19th. It includes the
17 actual full natural flow readings, which is the dark,
18 squiggly line.

19 You can see that after June 12th, the available
20 supply dropped precipitously and actually reached into
21 riparian levels by around July 1st.

22 Mr. Coats -- pardon, this chart shows San Joaquin
23 flows measured at Vernalis, with actual flow data through
24 most of July, all of which is well below the demand levels
25 of rights at BBID and West Side's priorities.

1 Mr. Coats and Mr. Yeazell discuss the various
2 critiques of the supply and demand methodology offered by
3 the Delta party's witnesses, Greg Young and Nick
4 Bonsignore. The witnesses critique aspects of the
5 methodology, but they don't expose any significant flaws.

6 For illustration, Mr. Yeazell shows how this
7 chart, which is based on a chart from Greg Young, and
8 incorporates critiques presented by Young and Bonsignore,
9 and makes every assumption in their favor, shows that even
10 then there would not have been water available for BBID
11 after June 12th.

12 Les Grober, in a couple days, will discuss the
13 Delta party's latest iteration of the Delta pool theory, as
14 expressed by Burke and Paulson. The Delta parties argue
15 that the principles of supply and demand basically work
16 differently in the Delta. Even using their own
17 assumptions, though, 2015 was so dry in terms of late
18 winter and spring runoff that there was no water to serve
19 BBID and West Side last summer.

20 2015 was much worse than any other drought year,
21 worse even than 1931. The drought was so bad, in fact,
22 that the DSM2 model essentially breaks down as a predictive
23 tool, at least for the purposes that Burke and Paulson try
24 to put it. While there may have been fresh water in the
25 channels at BBID and West Side's points of diversion, that

1 water belonged to others.

2 Mr. Grober also discusses how Dr. Paulson's
3 assumptions regarding the resident's time of water in the
4 Delta are just wrong. This figure shows that the Delta is
5 not an unlimited pool of fresh water that can always
6 provide water for in-Delta uses and still hold back the
7 tide.

8 The Delta, and particularly the Southern Delta,
9 which is the very small, blue square, kind of on the right-
10 hand side, have extremely limited volumes and they rely on
11 freshwater inflow to keep the salt water out. In a year
12 like 2015, when there was very little fresh water inflow
13 during the spring runoff season, the state and federal
14 project releases kept the water fresh at BBID and West
15 Side's diversions during the summer. BBID and West Side
16 are not entitled to divert that water.

17 The Prosecution Team recommends, for Phase 1,
18 that the Board find that no water was available for BBID's
19 diversions from June 13th through June 24th, 2015, and that
20 no water was available for West Side's actual or threatened
21 diversions during May 1st through November 2nd.

22 BBID Phase 2 examines how BBID responded to the
23 conditions of unavailability after June 12th. Kathy Mrowka
24 and Paul Wells discuss BBID's rights and their diversions.
25 The sole right available for BBID's diversion during the

1 relevant period, in June 2015, is a pre-14 claim, Statement
2 21256, that has a priority date of May 1914. BBID,
3 therefore, was subject to the June 12th unavailability
4 notice and it was served with that notice.

5 It's important to note, though, that this
6 proceeding is not about enforcing that notice. That notice
7 was not an order of the Board. That notice was not even a
8 staff order. It was simply notifying the parties that
9 staff had done math and had determined that there wasn't
10 any water available for them.

11 Now, this is an important point. What got the
12 Enforcement Unit's attention about Byron Bethany was
13 public statements made after June 12th, regarding Byron
14 Bethany's continued diversions.

15 This is an article from June 25th, that quotes
16 Byron Bethany's General Manager, Rick Gilmore, as saying
17 that Byron Bethany had just turned off its pumps on
18 Wednesday, the 24th, and that Byron Bethany hadn't decided
19 whether to keep the pumps off, yet.

20 Needless to say, statements like that, during the
21 worst drought in recorded history, will get the attention
22 of the Board staff who are tasked with investigating
23 unauthorized diversions. So, investigate staff did.

24 One of the lessons from this drought is the
25 importance of having real-time data. Byron Bethany self-

1 reports its diversions every day to the Department of Water
2 Resources, and those diversions get posted to a public
3 database called the CDEC website.

4 Mr. Wells looked there and took this information.
5 This shows BBID's June diversion and average CFS per day.
6 Now, it turns out there's a day lag in between the
7 reporting and the actual posting, so June 1st's diversion
8 show upon CDEC as June 2nd.

9 But the Enforcement Unit took a look and
10 concluded that BBID's diversion during June 13 through June
11 24th were generally consistent with its diversions from
12 June 1st through June 12th, and that therefore Mr. Gilmore
13 was speaking the truth in the newspaper. On that basis,
14 the Prosecution Team issued the ACL Complaint.

15 The evidence will show that all told BBID
16 diverted 1,887 acre feet from June 13th to June 24th. They
17 haven't provided any basis for reducing that volume for
18 calculating an administrative civil liability penalty.

19 1,887 acre feet is reasonably close to the amount
20 that you would expect Byron Bethany to divert during any 12
21 days in June, based on Byron Bethany's recent year
22 reportings.

23 Applying the enhanced drought penalties,
24 available under Water Code Section 1052, BBID's maximum
25 penalty is just over \$4.7 million. However, the

1 Prosecution Team applied the factors as required under
2 Water Code 1055.3 and concludes and recommends that Byron
3 Bethany should be awarded an administrative civil liability
4 of just over \$1.4 million.

5 This amount is an appropriate punishment for
6 BBID's unlawful diversions and it provides a strong
7 disincentive to others who might be tempted to disregard
8 staff notices regarding water unavailability.

9 West Side Phase 2 examines how West Side
10 responded to conditions of unavailability starting on May
11 1st.

12 Kathy Mrowka and Cathy Bare discuss West Side's T
13 License 1381, which is a post-14 right, with a priority
14 date in 1916. License 1381 was subject to the May 1st
15 notice and West Side was served with the notice. But as
16 with the Byron Bethany matter, the West Side enforcement
17 matter is not about enforcing the May 1st notice. The May
18 1st simply provided notice that there was no water for West
19 Side, starting on May 1st.

20 In 2015, West Side also had an agreement with the
21 Banta-Carbona Irrigation District to divert water pursuant
22 to Banta-Carbona's pre-14 claim, which has a priority date
23 of 1912 and was, itself, subject to the June 12th notice.

24 Cathy Bare discusses her investigation into West
25 Side, which began in March 2015, after a public complaint

1 regarding an agreement between the City of Tracy and West
2 Side, under which West Side was going to divert Tracy's
3 wastewater out of the Old River.

4 John Collins, of the Delta Water Master's Office,
5 describes his May 18 site inspection, during which staff
6 told him that the District continued to divert, but that
7 they were diverting tail water from the Bethany drain.

8 So, staff investigated and determined two things.
9 First, that the Tracy Wastewater Agreement had not sought
10 or obtain a Wastewater Change Petition, as required under
11 the Water Code, from the State Board. And second, that
12 West Side may not have rights to divert all of the water
13 coming out of Bethany drain.

14 By July 7th, the District's counsel, Ms. Zolezzi,
15 wrote to the Board staff and indicated that the District
16 may resume diversions at any time. The same letter also
17 confirmed that West Side diverts tail water from Bethany
18 drain. On the basis of these threatened diversions, the
19 Prosecution Team issued the Draft CDO.

20 Another lesson from this drought is how important
21 it is to have the right information gathering tools. This
22 is part of a table that West Side provided in response to
23 an Information Order that was issued contemporaneously with
24 the Draft CDO. And also, we had to seek the same
25 information later, under a subpoena.

1 It shows that West Side diverted over 735 acre
2 feet from May 1st through May 13th. The evidence indicates
3 that these diversions were likely under License 1381.

4 Well, wait a minute, though, perhaps these
5 diversions were under the Banta-Carbona pre-14 right, which
6 West Side also had in 2015.

7 Well, no, West Side's Information Order response
8 tabulated the Banta-Carbona diversion separately and
9 demonstrate that West Side didn't start diverting under
10 Banta-Carbona agreement until June 12th -- or, June 1st,
11 pardon me.

12 The West Side also diverted over 85 acre feet
13 from June 17th through June 27th, in 2015, after the June
14 12th notice and when no water was available for the Banta-
15 Carbona right.

16 Wait a minute, maybe those diversions are all
17 tail water diversions. West Side claims the right to
18 divert tail water from Bethany drain, maybe that's what
19 those were.

20 Well, no, the May 1st through May 13th diversions
21 and the June 17th through June 27th diversions weren't tail
22 water because West Side tabulated those differently.

23 West Side diverted tail water, which it calls
24 accretion water, throughout the entire unavailability
25 period.

1 There are a number of problems with the diversion
2 of flows from the Bethany drain. First, the evidence shows
3 that West Side doesn't measure them properly, doesn't
4 measure them precisely. Second, not all of the flows arise
5 on West Side's lands. Third, West Side does not even
6 attempt to balance the diversions with the discharges from
7 the drain.

8 Instead, West Side balances its deliveries to the
9 discharges from the drain. The discharge goes into the Old
10 River and West Side pulls the water back out of the Old
11 River. By balancing its deliveries with the discharges
12 from the drain, it ignores potential conveyance losses
13 within its own system.

14 So, after the investigation and discovery process
15 in this case, there are at least four bases for a CDO
16 against West Side. We'll see in a few days, in Phase 2,
17 that there might be a fifth. Any of these actual or
18 threatened unauthorized diversions, by themselves, warrant
19 a Cease and Desist Order against West Side.

20 Finally, the Prosecution Team recommends an ACL
21 against Byron Bethany of at least \$1.4 million and a Cease
22 and Desist Order against West Side, in accordance with the
23 terms that Kathy Mrowka proposes in her testimony.

24 These cases are important. These cases aren't
25 important because we're violating some sort of

1 collaborative process. I think, if you had been part of
2 the proceedings the last couple years, you would see that
3 there was an attempt by the Board staff to engage with the
4 regulated community, and with the pre-14 and riparian
5 community. That's part of the evidence in this case.

6 Instead, these cases are important because Byron
7 Bethany and West Side blatantly disregarded staff notices
8 that there was not water available to serve their rights
9 during the worst drought in recorded history. They took
10 water that should have gone to senior right holders, or
11 which was released to upstream storage and which belonged
12 to others.

13 Other, similarly-situated water right holders
14 heeded the call to cease diverting when there wasn't
15 sufficient flow this time. But if this level of blatant
16 noncompliance goes unpunished, the Board should expect less
17 compliance in future droughts. Thank you.

18 CO-HEARING OFFICER DODUC: Thank you. BBID.

19 OPENING STATEMENT BY MR. DANIEL KELLY ON BEHALF OF

20 BRYON BETHANY IRRIGATION DISTRICT

21 MR. KELLY: While we're waiting for the Power
22 Point to load, I have a few slides that are going to help
23 with my Opening Statement today.

24 I just want to recognize a few folks that are in
25 attendance today. Russell Kagehiro, BBID's Board

1 President, is here, along with BBID's Vice President, Tim
2 Maggiore, Mark Maggiore, one of our Board Members. Rick
3 Gilmore is here. Kelly Geyer, BBID's Director of
4 Administration, is here. Seth Harris, the District's
5 General Manager, is also here. And we have San Joaquin
6 County Supervisor, Bob Elliott, also here to observe these
7 proceedings. And I just want to let you know that they're
8 all in attendance because they recognize the importance of
9 what's going on here.

10 And just so I know here, which button do I hit to
11 advance the slide? Okay.

12 I think what you're going to see a lot of in this
13 proceeding is confirmation bias. I wasn't going to talk
14 about that at all, right now, until I listened to the
15 Prosecution Team's Opening Statement.

16 And so, I'm going to deviate a little bit from
17 what I was going to say. The Prosecution Team and all of
18 the parties were presented with overwhelming evidence in
19 this proceeding about the availability of water in the
20 Delta. None of what you're going to see, from the
21 Prosecution Team, addresses any of that.

22 And so, I'm concerned that what we've got going
23 on here is confirmation bias. It's a pre-determined result
24 that everything they did following that June 12th notice
25 was done with the sole purpose of proving that they were

1 right. And it's not right.

2 Now, I'm also going to say that the
3 Administrative Civil Liability Complaint in this proceeding
4 was not based on a newspaper article that somebody read on
5 June the 25th. You're going to see evidence that when BBID
6 sent a letter to this Board, on June the 23rd, questioning
7 what this Board was doing in court with respect to water
8 availability and curtailments, within 24 minutes of
9 receiving that letter on June the 23rd, the Prosecution
10 Team, Office of Enforcement, and State Water Board
11 Management directed the action be taken. It has nothing to
12 do with a newspaper on June the 25th.

13 It has everything to do with the fact that BBID
14 stood up for itself and stood up for other water diverters,
15 and questioned what was going on, and they were targeted
16 for this proceeding. And the evidence will demonstrate
17 that unquestionably.

18 Now, with that as background, on June the 12th,
19 2015, the State Water Board issued a Curtailment Notice to
20 BBID. It wasn't from staff. It was from the State Water
21 Board and it was under Tom Howard's signature. It directed
22 BBID to cease diverting water under its pre-1914
23 Appropriative Water Right from the Delta.

24 The notice was based on a watershed-wide
25 assessment. And you're going to see that and nobody's

1 going to debate that. It's undisputed.

2 And so, in addition to having errors that
3 overstated demand and understated supplies, it absolutely
4 failed to take into account the historic conditions of the
5 Delta. It failed to take into account the Delta as a
6 reservoir, that you heard in some of the Policy Statements,
7 and you're going to see a lot of evidence in this
8 proceeding on that issue.

9 So, why are we here? When the State Water Board
10 initially issued the Curtailment Notices, it believed that
11 water right holders needed to comply with the directives
12 contained in the notice. It ordered everybody to stop
13 diverting. That's what the notices say and that's why the
14 court's found them problematic.

15 While this Board later rescinded and clarified
16 that June the 12th notice, the prior finding of
17 unavailability was maintained, and you're going to see
18 evidence of that as well.

19 So, how can the State Water Board curtail water
20 rights without having considered the source of water that's
21 been available to BBID and the rest of the folks in the
22 Delta for the past hundred years?

23 Well, in order to find out, BBID sought
24 reconsideration of the findings contained in that
25 Curtailment Notice, with this Board. But you rejected it.

1 You refused to even hear the request for reconsideration.
2 We asked you to have a hearing so we could test the water
3 availability that required us to curtail our water rights
4 and you said, you can't have it reconsidered.

5 So, BBID filed a lawsuit, challenging that
6 notice, to try to defend its water rights. It challenged
7 the June 12th notice and the rescission clarification
8 because you and your staff failed to consider that historic
9 source of water in the Delta. You, not the Prosecution
10 Team, this Board argued in court that BBID not only
11 couldn't seek reconsideration, but couldn't bring a
12 judicial action to challenge what you did, and to challenge
13 that Water Availability Notice in court.

14 You argued to the court that BBID couldn't do
15 that unless and until you brought an enforcement action.
16 So, what did you expect for BBID to do? What did the
17 Office of Enforcement expect BBID to do?

18 After receiving that Curtailment Notice and the
19 rescission clarification -- well, after receiving the
20 Curtailment Notice, then, BBID had two options. Let's make
21 this very clear, two options. One, comply and stop
22 diverting. That's what staff wanted, that's what staff
23 demanded.

24 Two, keep diverting and be subject to
25 enforcement. That was it.

1 There was no way for BBID to come here and to ask
2 you to verify what had been done. There was no opportunity
3 for a hearing. There was no opportunity for a workshop to
4 test that water availability analysis at all. BBID had to
5 either comply or subject itself to enforcement.

6 Now, if BBID would have just walked away and
7 stopped diverting, it would have not protected the water
8 rights of all of the farmers that you see here in the room.
9 It would not have done that. They would have just walked
10 away and it would never have had its day in court on this
11 water availability question. That's unacceptable. It's an
12 unacceptable result. But that's why we're here today.

13 Now, it is undisputed that BBID diverted water
14 that was present in the Delta when flows into the Delta
15 subsided. Prior to the existence of the Federal and State
16 Water Projects, BBID diverted water from the interior of
17 the Delta when flows dropped -- coming into the Delta, when
18 flows dropped off. That source of water was ignored.

19 So, what you see on the screen is going to be a
20 part of evidence. It was referenced in Susan -- Dr.
21 Paulson's report, it's BBID Exhibit 384. And we're going
22 to look at that this week. And what that shows is, that
23 shows the condition in 1931. The two darker lines at the
24 bottom of the graph show flows into the Delta dropping off
25 in late June and early July, to not even near zero, but it

1 appears they go actually below zero.

2 And if you thought about that graph in the
3 context of the water availability analysis that the staff
4 did, that would mean that there was no water available for
5 any water rights. It would be physically impossible.
6 There were no State and Federal Water Projects in existence
7 in 1931. And based on that kind of analysis, there
8 shouldn't be any water physically available for anybody to
9 divert.

10 But what do we know? Can we go to the next
11 slide. There we go. What do we know? This table is from
12 that same DWR report, Bulletin 23. What do we know? In
13 that bottom graph, the second line is the Byron Bethany
14 Irrigation District. And in 1931, you see that they
15 diverted water all summer long. All summer long.

16 So, why are we here? In your rulings on the
17 motions in limine, with respect to some of the testimony,
18 you said that you were interested in hearing evidence on
19 the historic conditions of the Delta and water availability
20 in the Delta prior to the projects.

21 The Prosecution Team had this. The Prosecution
22 Team had this during depositions. None of this was
23 considered. The water that was present in the Delta when
24 the flows dropped was never considered. Why are we here?
25 Why is the Prosecution Team and the Office of Enforcement

1 holding a sledgehammer over these farmers, with a proposed
2 over \$5 million fine, when they didn't include any of this
3 supply?

4 Now, Hearing Officer Doduc, I saw you were
5 surprised about that. They've said in the ACL that the
6 largest possible fine exceeds \$5 million. And they're here
7 asking for at least \$1.4 million. but that's what's
8 hanging over these folks. And nobody considered this. And
9 we want to know why. And we wanted to know why when we
10 filed our Petition for Reconsideration in June. We wanted
11 to know why when we filed the litigation challenging this,
12 after we filed the Petition for Reconsideration. We still
13 don't know why.

14 Another thing that I find interesting and perhaps
15 a little troubling is at least the Hearing Officers here
16 have heard from these people before. These same folks that
17 you're going to hear testimony from have appeared before
18 you for the past year and a half on curtailments and water
19 availability. And they've shown a lot of what they're
20 going to show you today to you, already.

21 And it's unclear to me why now these questions
22 are being asked and they weren't asked when the analysis
23 was being conducted originally. Why are we here?

24 Back in July of 2014, you committed to a process
25 to figure this out. To figure out how this could happen

1 and to figure out what water availability means in the
2 Delta and watershed-wide. You committed to that process in
3 2014.

4 The San Joaquin Tributary Authority outlined that
5 whole process, that you promised to have, in their opening
6 brief, so I'm not going to repeat it now. But the goal of
7 that proceeding or that process was to be to understand
8 this. It never happened.

9 So, with the Water Availability Analysis that the
10 Prosecution Team is going to put before you, what it failed
11 to do is it failed to consider water that remained in the
12 Delta, even in a pre-project condition, when flows upstream
13 of the Delta subsided. It simply can't do that.

14 What history tells us is that even in the driest
15 years BBID could divert and it did divert water from the
16 Delta, even when inflows into the Delta dropped off. It's
17 not in dispute.

18 You're going to hear testimony with respect to
19 Delta conditions, diversions and ag production in 1931.
20 Some people are going to tell you about how, yeah, they
21 diverted in 1931, but there was crop losses, and there were
22 voluntary curtailments that happened to enable these people
23 to continue to divert all summer long.

24 But what the evidence is going to show you is the
25 production loss is less than five percent of the total

1 Delta ag value, and so it's not a significant drop in crop
2 production. But what it does show you is that diversions
3 and ag production proceeded all summer long, when flows
4 into the Delta dropped off to zero.

5 The State Water Board Prosecution Team's analysis
6 cannot explain that. It's physically impossible under the
7 analysis that they did.

8 You're going to hear criticism of what Dr.
9 Paulsen and what Tom Burke did, and you're going to hear
10 criticism of Greg Young and Nick Bonsignore. And you're
11 going to hear criticism from me of Dr. Hutton. And you're
12 going to hear criticism from me of Paul Marshall.

13 But what you're not going to hear is you're not
14 going to hear any credible testimony that says that it's an
15 inappropriate method. That looking at what happens in the
16 Delta, when flows drop off, nobody's going to say it was an
17 inappropriate method in determining water availability.
18 You're not going to hear that testimony.

19 And none of the experts are going to be able to
20 explain to you, using the State Water Board Prosecution
21 Team's methodology, how this was possible.

22 This is a slide from a complaint that the State
23 Water Contractors filed against in-Delta diverters on June
24 the 6th, of 2015. You're going to see this. This was
25 submitted prior to the curtailments going into effect

1 watershed-wide. They had CH2MHill conduct an analysis of
2 the California Delta, you know, with and without project
3 condition.

4 Now, I'm going to be critical, when Dr. Hutton
5 comes on and testifies about this, about what they used to
6 do this modeling. Because I think they made some
7 incredibly conservative assumptions that aren't supported.

8 But what does this show you? Now, they ran this
9 for three years, from 2012 through 2015. So, they gave the
10 model a couple of years to spin up, as they say. And what
11 does it show you? It shows you on June the 13th, of
12 2015 -- now, the with-project model run is on the run and
13 the without-project run is on the right.

14 And what does it show you? That without the
15 projects being in place at all, no projects, the Delta
16 would have been sufficiently fresh for people to use that
17 water for agricultural purposes. It's not in dispute.

18 The Prosecution Team has had this since June. It
19 was part of the depositions. I asked the Prosecution Team
20 questions about this. Did you consider it? Is it
21 relevant? And everybody looked confused.

22 Why are we here? Why are these people under
23 threat of those fines? Everybody has this information.
24 This is the State Water Contractors' modeling run. It's
25 not mine.

1 Like I said, what you're not going to hear is how
2 1931 could have happened, using the method the Prosecution
3 Team employed. This can and it does. It shows you why.
4 It captures the concept of the Delta being, as Greg
5 Gartrell phrased it, a reservoir at the end of the system.
6 None of that water was part of the analysis.

7 So, at the end of the day, the Prosecution Team
8 hasn't even come close to establishing that there was
9 insufficient water available for BBID or for West Side.
10 Certainly not for BBID in those two weeks in June. That's
11 what the Delta looked -- would have looked like in June,
12 without the projects. BBID is at the bottom of that
13 diagram. Not in dispute.

14 This is what BBID came to you about in its
15 Petition for Reconsideration, in June. You insisted BBID
16 stop diverting and be subject to enforcement. With this
17 kind of information, what did you expect BBID to do? Walk
18 away and give up its water rights, and let the farmers that
19 came here today go without water, without putting up a
20 fight? Absolutely not. No way.

21 And so with that in mind, I want you to listen
22 carefully to what the Prosecution Team witnesses testify
23 to, because they testify that there was no available, based
24 on the analysis they did. They're not going to say that
25 there was no water available. There was no water available

1 based on the watershed-wide, simple math analysis that they
2 did. That's not good enough. It's not good enough. The
3 analysis wasn't good enough, it didn't capture any of this.

4 You cannot issue an Administrative Civil
5 Liability Complaint against BBID, aside from all the legal
6 issues we raised, when you look at this from the State
7 Water Contractors. You can't impose an Administrative
8 Civil Liability Penalty on BBID based on an analysis that
9 doesn't capture any of this. You can't do it.

10 I'm actually glad the Prosecution Team used this
11 in their Opening Statement, because I've been looking at
12 this since the fall, and I'm trying to understand what it
13 means. And Mr. Tauriainen explained that if you look at
14 the dark blue, squiggling line, that was the full natural
15 flow number that supported what they did. That when the
16 demands dropped below the squiggly line, that anybody who
17 diverted above that, there was insufficient water available
18 for them and they were violating Water Code Section 1052.

19 So, let's put this in context. You're going to
20 see a lot of graphs that show only the pre-14 and riparian
21 demands as part of the testimony. This shows all the
22 demands in the watershed. All the pre-14, all the
23 riparian, and all of the post-1914 demands. Look at where
24 that squiggly line is. It's at the, roughly, 10,000 CFS
25 mark on March the 1st.

1 The Prosecution Team said that the Unavailability
2 Notices went out May the 1st, to post-1914 water right
3 holders. What does this show? This shows, then, that
4 anybody above the 10,000 CFS demand, in the month of March,
5 diverted when there was insufficient water available,
6 according to their analysis, insufficient water available
7 for diversions.

8 Look at how many -- look at how much water falls
9 within that demand section. I will tell you that the
10 California Department of Water Resources rights for
11 Oroville to store water, that third demand shows up in the
12 top of that graph. We've looked into it. They're demand
13 falls into the top of that graph.

14 The Department of Water Resources diverted water
15 under its 1951 priority from December the 3rd through April
16 the 17th, of 2015.

17 When you plot their priority on that graph, all
18 the water that went into storage in Oroville is well above
19 that full natural flow line, well above it. Why aren't
20 they going after the Department of Water Resources? Why
21 aren't they going after any of the other people in that
22 area above the squiggly line prior to May 1st? Why BBID?

23 It's because BBID stood up for itself. There's
24 no other explanation. There's none. BBID's diversions and
25 portion of that pre-14 demand are a very thin, paper thin

1 slice of that demand. Look at all the water and all the
2 demand above that squiggly line in March and in April. Why
3 aren't they going after those people?

4 If this is so important to teach people a lesson,
5 and if it's solely based on availability and not on the
6 receipt of a notice, and if it's not based on BBID standing
7 up for itself, why aren't they going after those people?
8 It's outrageous.

9 The farmers in this room are being punished
10 because that District stood up for itself. It's
11 outrageous.

12 So, I certainly hope that this proceeding isn't
13 being maintained to prove a point or to tee up a legal
14 issue.

15 CO-HEARING OFFICER DODUC: I hope you're wrapping
16 up. I wasn't paying attention to the clock and you're out
17 of time.

18 MR. KELLY: I'll wrap up. I hope that this
19 proceeding isn't being maintained to prove a point or to
20 get at an important legal issue that people think need to
21 be addressed. Because doing it in the context of a \$5
22 million fine against these farmers is not the right way to
23 go about that.

24 If you want to get at those legal issues, we'll
25 get at those legal issues. But don't do it under the

1 threat of a \$5 million fine, when you know and they know
2 that the analysis didn't capture the water that was
3 available in the Delta.

4 CO-HEARING OFFICER DODUC: Thank you, Mr. Kelly.

5 Before West Side comes up, let's address this
6 logistic issue. I actually have a timer in front of me.
7 Do you know how to operate that? Okay, so please, so that
8 I can keep an eye on it, because I'm not going to turn this
9 way.

10 All right, West Side.

11 OPENING STATEMENT BY MS. ZOLEZZI ON BEHALF OF
12 WEST SIDE IRRIGATION DISTRICT

13 MS. ZOLEZZI: Thank you. Jeanne Zolezzi for the
14 West Side Irrigation District. I'm going to address only
15 Phase 2 issues, so you'll have to try to remember those for
16 about a week.

17 And what you will see in Phase 2 of the
18 proceedings, regarding the West Side Irrigation District,
19 is a District desperately trying to provide water to its
20 landowners, in full compliance with the law.

21 The situation for West Side, in 2014 and 2015,
22 was desperate and without minimal supplies of water trees
23 and crops in the District would have died.

24 So, what West Side did was take its staff, they
25 put their head together in consultation with their

1 attorneys, and with the generous support of its neighboring
2 districts, the District was able to get by just barely. No
3 trees died, fortunately.

4 In the seven years prior to 2014, the District
5 pumped an average of 22,000 acre feet of water every year.
6 In 2014, the District pumped just over 8,000 acre feet.
7 And in 2015, the District pumped just under 6,000 acre feet
8 of water. In 2015, to put it into perspective, the
9 District pumped 75 percent less than in a normal year.

10 Now, for some reason, the Prosecution Team wants
11 you to see the District as irresponsible and as flouting
12 the law. The testimony and other evidence that you'll
13 hear, however, will paint a different picture.

14 What you'll see is a District that worked hard to
15 develop legal alternative sources of water to prevent trees
16 and crops from dying. It took pains to comply with the
17 law.

18 There are two issues to be addressed in West
19 Side's Phase 2. The first is West Side's use of its
20 irrigation tail water and groundwater supplies. And the
21 second is its use of treated wastewater under contract with
22 the City of Tracy.

23 Now, regarding the tail water, West Side's
24 actions in using the tail water and salvaged groundwater
25 have been supported by California Water Law for over 150

1 years. We are not creating new law here. The right has
2 been recognized by the California Supreme Court, by this
3 Board, and by the Legislature.

4 Why the Prosecution Team has chosen to challenge
5 West Side's reuse of its returned flows and groundwater,
6 particularly when they've known about them for at least 18
7 years, is uncertain.

8 The testimony in Phase 2 will show that water in
9 the Bethany drain, during the irrigation season, when it
10 was being reused by the District, is comprised solely of
11 two sources. The first is irrigation tail water from lands
12 within the District. That is, water that is irrigated,
13 will have some of that surface water applied to irrigation,
14 run off the land and back into the drain. That is a very
15 minor source of water in the drain.

16 Now, the Prosecution Team told you that West Side
17 is not entitled to some of the water in the drain because
18 it comes from outside of the District. The sole source of
19 water, and it's a minor source, but the sole source of
20 water coming outside of the District, into that drain, is
21 groundwater.

22 Groundwater is intercepted through tile drains
23 that were installed by the District decades ago. The
24 majority of the water in the Bethany drain, during the
25 irrigation season, is that shallow groundwater captured by

1 the District through tile drains.

2 And the flow does not vary much year-round. The
3 flow sustains itself. It is not increased when there is
4 irrigation, it's not decreased when there's irrigation. It
5 remains the same year-round.

6 West Side captures the water in the Bethany
7 drain, this tail water and the groundwater, and transport
8 it to the District's intake canal, which is not Old River.
9 You'll see, through the testimony, that it is set back from
10 Old River through a man-made, dredged canal, and it dumps
11 it into the end of that intake canal shortly before where
12 the District pumps from the intake canal into its laterals.

13 And the Bethany drain is discharged there for the
14 specific purpose of recapture into the District's
15 irrigation system.

16 Now, for some reason, also, the Prosecution Team
17 said today that West Side does not measure the discharge
18 into that Bethany drain. And I continue to be confused as
19 to why they maintain this. They have information from the
20 District about exactly how we measure. And we measure
21 consistent with accepted engineering standards. And you
22 will hear testimony to that effect.

23 You also heard that the District doesn't even
24 attempt to balance what it pumps from the Bethany drain,
25 dumped into the intake canal, with what it delivers to its

1 landowners.

2 The record will show and the testimony will
3 establish that in 2014 and 2015, West Side recaptured less
4 than 70 percent of the water discharged from the Bethany
5 drain into the intake canal. We believe that provides more
6 than enough leeway for any kind of conveyance loss. Which
7 you will also hear testimony is approximately five percent.

8 In short, West Side's actions in recycling and
9 reusing the tail water and shallow groundwater are in full
10 compliance with the law. In fact, California law and
11 statutes allow exactly the kind of actions that West Side
12 undertook in 2014 and 2015, that are being challenged by
13 the Prosecution Team.

14 Regarding the City of Tracy wastewater. Again,
15 West Side worked closely with its attorneys. It worked
16 closely with the City of Tracy and the City of Tracy's
17 General Counsel to develop a plan to utilize this treated
18 wastewater.

19 And again, while the Prosecution Team paints us a
20 rogue District, acting in disregard of the law, nothing is
21 further from the truth. West Side spent a lot of money
22 working with the City to determine whether or not its
23 actions in entering into the contract, in 2014, would be in
24 compliance with the law, and concluded that it was.

25 It then fully complied with the California

1 Environmental Quality Act, received no comments on that,
2 and proceeding, in 2014, to pump water under the agreement.

3 Now, all parties agree, including West Side, that
4 Water Code Section 1211 requires approval of the State
5 Board, in most instances, when treated wastewater is
6 contracted with a third party for reuse. It's very clear.

7 However, the law expressly provides an exception
8 to that rule. Section 1211(b), in the Water Code, provides
9 that no approval of the State Board is needed for "changes
10 in the discharge or use of treated wastewater that do not
11 result in decreasing the flow in any portion of the
12 course".

13 Now, this exception to the rule was added to the
14 law in 2001, at the request of the State Water Resources
15 Control Board, which argued to the Legislature that where
16 there is no threat to in-stream flows, or third-party water
17 right holders, requiring State Board review is an
18 unnecessary burden on wastewater reclamation.

19 So, in its written testimony, submitted to you,
20 the Division of Water Rights staff acknowledged that a
21 single, small diversion of 14 CFS from the Delta, such as
22 that being made by West Side Irrigation District, under
23 contract with the City of Tracy, from a relatively large
24 channel, would have no substantive observed effect on flow
25 or levels in the Delta channels.

1 Again, this is not West Side's testimony. This
2 is testimony submitted by the Prosecution Team.

3 Therefore, by its own testimony, the Prosecution
4 Team has acknowledged that Water Code Section 1211 does not
5 apply to West Side's diversion.

6 The Division of Water Rights is also -- staff is
7 also, for some reason, now claiming that not only should
8 West Side comply with 1211 of the Water Code, but that for
9 some reason it needs a Water Right Permit to divert that
10 water. And that water under the control of a party, being
11 conveyed in a natural water course, cannot be diverted
12 without a Water Right Permit. And it seems, for reasons of
13 being right here, it's simply reinventing the law and
14 placing another layer on water rights.

15 Because any water right lawyer will tell you
16 that's simply not the case and has not been the case in
17 California for over a hundred years. And it's most
18 recently been supported by the courts in 2012, in the Santa
19 Maria Groundwater adjudication, where the court again
20 stated that when you have control of that water, you
21 developed it and you are transporting it in a natural water
22 course, it is not subject to appropriation. It is in your
23 control and you have the prior right to take it.

24 So, in conclusion, as to the Phase 2 issues, we
25 believe the Prosecution Team brought the CDO simply as a

1 knee-jerk reaction to seeing the fact that West Side was
2 continuing to pump after the Curtailment Notice went out.

3 What the Prosecution Team didn't do, and we were
4 very shocked to see, is they didn't do a thorough
5 investigation of the legal basis for why West Side was
6 pumping. They didn't contact West Side. They didn't sit
7 down with us one time to ask us under what right we were
8 pumping, and allow us to give that information. They
9 simply brought the CDO action.

10 The approach has cost both the District and the
11 State a tremendous amount of time and money that could have
12 been spent elsewhere. We believe it was an unnecessary
13 enforcement.

14 The evidence will show that West Side has ensured
15 that its diversions in 2014 and 2015 were authorized under
16 the law. So, no CDO is warranted.

17 And I have to echo Mr. Kelly's statements that
18 why are we here? Thank you for your time.

19 CO-HEARING OFFICER DODUC: Thank you, Ms.
20 Zolezzi.

21 I promised you a morning break, so let's take it
22 now, before we go into the remaining Opening Statements.

23 We will -- it's now 10:40. We will resume at
24 10:50.

25 (Off the record at 10:40 a.m.)

1 (On the record at 10:51 a.m.)

2 CO-HEARING OFFICER DODUC: All right, take a seat
3 and we're going to resume.

4 Before we begin, two items. First, regarding the
5 opposition -- the objections made earlier this morning
6 regarding staff's introduction -- or least the Hearing
7 Team's introduction of two exhibits, I've considered your
8 objections and I am ruling that these exhibits will not be
9 included in the record.

10 I am not doing it on the basis of your argument,
11 Mr. O'Laughlin. Staff does have, the Hearing Team does
12 have the opportunity to provide exhibits and introduce
13 exhibits into the record. But I am not allowing these
14 particular exhibits because they are not available to be
15 made to the parties today.

16 And in future practices, looking at my staff, we
17 will ensure that any exhibits introduced by the Hearing
18 Team will be made earlier and will be made available to all
19 parties.

20 With that, also, I wanted to give you a little
21 bit of logistics. We have about ten other parties
22 providing Opening Statements. What I would like to do is
23 take a short, 30-minute lunch break after those parties
24 have provided their Opening Statements. So that when we
25 reconvene, the Prosecution Team can present their direct

1 testimony in its entirety, without having to take a break
2 in the middle.

3 So with that, I will now turn to Mr. Morat for
4 your Opening Statement, followed by South Delta Water
5 Agency. And you will each have five minutes.

6 MR. MORAT: Hearing Officer Doduc, I'm with the
7 Phase 2 BBID. You have my written Opening Statement. I
8 don't think it would benefit you or the staff to summarize
9 it. If that's okay with you, I'll pass.

10 CO-HEARING OFFICER DODUC: Thank you, Mr. Morat.
11 You are setting a fine example.

12 South Delta Water Agency, followed by Central
13 Delta.

14 MS. SPALETTA: Good morning, Jennifer Spaletta
15 and I will be providing a combined Opening Statement for
16 Central Delta and South Delta this morning. So, if I do
17 exceed the five minutes, I would like the ability to have
18 the time for both agencies. Thank you.

19 CO-HEARING OFFICER DODUC: Granted.

20 OPENING STATEMENT BY MS. SPALETTA ON BEHALF OF
21 CENTRAL DELTA WATER AGENCY AND SOUTH DELTA WATER AGENCY

22 MS. SPALETTA: First of all, when we started this
23 process it wasn't really clear how involved the Delta
24 Agencies were going to be. And I will just tell you that
25 as the process went along it became imperative that the

1 Delta Agencies become more and more involved because of the
2 way that the Prosecution Team handled the cases. Both the
3 filing of the initial Draft Enforcement Actions, handling
4 the preparation of the case, and the way they're presenting
5 the arguments and the evidence to you here, today.

6 It has become clear to us that this is really not
7 a hearing about addressing egregious behavior in the time
8 of a drought. Rather, it's a hearing about trying to get
9 to some key, but very complex, factual and legal issues
10 that the State Board wants to resolve regarding water
11 availability in the Delta.

12 And that's why these two entities, located almost
13 next to each other on a Delta channel, appear to have been
14 selected for enforcement. And the Delta Agencies feel very
15 strongly that this enforcement proceeding is not the right
16 place to address those complex, legal and factual issues.

17 We agree with some of the prior comments that
18 when the State Board suggested, in the middle of 2014, that
19 there be a public workshop process on water availability in
20 the Delta during drought that that was, by far, a better
21 process than trying to get at the issues in these
22 enforcement proceedings.

23 Now, when it comes to legal issues, we have
24 raised several in our pre-trial briefings. And I will not
25 repeat those here. We will deal with them in the closing

1 brief.

2 So, I want to focus, instead, on the factual
3 issues, what you're going to hear in this hearing and how
4 the burdens of proof are going to work.

5 I took issue with something that the Prosecution
6 Team's counsel said during their opening. They made the
7 argument that this was a preponderance of the evidence
8 case. There's actually significant case law in the State
9 of California that indicates that preponderance of the
10 evidence is not the right burden of proof when you are
11 dealing with important rights.

12 And so, the proper burden of proof when you're
13 dealing with important rights is that there's no doubt that
14 the evidence proves the point.

15 And I think that we briefed that for you, but I
16 want to make it clear that this is not a preponderance of
17 the evidence case. And so, this is not about whether it's
18 a close call. It's about whether the Prosecution Team can
19 prove beyond any reasonable doubt, essentially, that they
20 are correct.

21 Now, I also want to talk about what they have to
22 prove. And I think Mr. Tauriainen mentioned this, but his
23 evidence doesn't reflect it. The Prosecution Team has to
24 prove that there was actually, in the real world, not water
25 available for either West Side or BBID to divert during the

1 relevant time periods, at the specific points of diversion,
2 in the channel. They have no evidence that addresses that
3 burden.

4 Instead, they are attempting to meet that burden
5 by relying on calculations that were performed a year ago,
6 using forecasted or projected information as a proxy. And
7 that is a problem.

8 What's particularly troublesome about it is that
9 here we are, a year later, and we have, and the Prosecution
10 Team has, and the State Board has the actual data. We have
11 the actual, updated, DWR unimpaired flow data that shows
12 the unimpaired flow, assuming that's the proper measurement
13 as the State Board has asserted, was significantly higher
14 than any of the forecasted flows that are going to show up
15 on the charts that they show you during their case in
16 chief. But they haven't updated a chart for this
17 proceeding that includes that most recent, updated DWR
18 monthly flow.

19 The other thing you're going to see is that Mr.
20 Tauriainen, in his opening, claimed that they used the best
21 available information because it was what they got from the
22 2015 Information Order. That's a misleading statement.

23 The 2015 Information Order requested three types
24 of information, 2014 actual diversions, 2015 projected
25 diversions and then, by the 5th of every month, actual 2015

1 diversions. The only data from the 2015 Information Order
2 that was used by State Board staff for curtailment, and
3 then incorporated into the Prosecution Team's case was the
4 2014 diversion information.

5 So, even though this Board authorized information
6 orders for the specific purpose of getting 2015 actual
7 diversion data, it was not used. And when you look at it
8 after the fact, that diversion data shows that diversions
9 were significantly less than what the State Board staff
10 projected.

11 There are several other things that are missing
12 from the State Board staff's water availability analysis,
13 and you're going to hear a lot about those today and over
14 the course of the next couple days.

15 For one, Mr. Tauriainen asserted, in his opening,
16 that on these charts, these colorful charts that show
17 supply and demand, that the data validated the State Board
18 staff's determination. Now, he promised you the data would
19 validate the State Board staff's determinations. But what
20 he didn't tell you is what the data is that's on those
21 lines.

22 And what you're going to find out is when the
23 State Board staff did its analysis, it looked at full
24 natural flow, but it also looked at other sources of
25 supply, like return flows. A significant amount of return

1 flows in the Delta. It looked at return flows from the
2 Sacramento River and the San Joaquin River. It looked at
3 additional flow from minor tributaries, that's not included
4 in DWR's full natural flow calculations. And it put that
5 data into its spreadsheet. But when it generated that
6 nice, solid blue line on all these charts, it didn't
7 include any of that supply.

8 So, when Mr. Tauriainen promises you that the
9 data validates their prior determinations, I'd like you to
10 think about that as each one of his witnesses testifies,
11 and we ask them exactly what was included in the data
12 points that are on his graph and what was excluded.

13 The other thing that you're going to hear is what
14 was completely missing from the State Board staff's
15 determination of water availability, what was omitted. And
16 what was omitted is really, really important.

17 Now, staff is going to say that they attempted to
18 collaborate, in Mr. Tauriainen's words, with the
19 stakeholders. But to be frank, having an impromptu meeting
20 two weeks before or after a curtailment notice is issued,
21 and providing no explanation of how staff came up with the
22 numbers on the chart is not collaboration.

23 It has taken us every single bit of the time
24 you've provided in these hearings to understand what is in
25 Mr. Yeazell's spreadsheets. And to this day, there are

1 still questions. From his testimony, which took, I
2 believe, a combined more than 30 pages to explain what he
3 did, he references nine separate spreadsheet models. Those
4 are not available on your website. They certainly were not
5 provided to these stakeholders prior to the curtailment,
6 nor was there any formal process for these stakeholders to
7 explain to the State Board staff why the operations in the
8 spreadsheet did not make analytical sense in the real
9 world.

10 So, the biggest missing component, of course, is
11 supply in the Delta channels. And you're going to hear a
12 lot about how the Delta channels work, how there's a
13 reservoir of water there. How water that flows in from the
14 Sacramento River, in prior months, hangs around in the
15 Delta. It sloshes back and forth and provides an available
16 supply for months after it enters the Delta. None of that
17 was considered by the State Board staff.

18 And not only was it not considered when they did
19 their curtailments, but as Mr. Kelly described, it wasn't
20 even considered for the purposes of these enforcement
21 proceedings. And that is troubling. It is, if staff, in
22 the enforcement proceedings, chose not to look at something
23 that they fully understand exists. And we're still trying
24 to get to the bottom of why that choice was made. It's as
25 if someone told them to ignore part of the real world.

1 There are other things that are completely
2 missing from the Prosecution Team's case and also from what
3 the State Board staff did with respect to curtailments.

4 There was a significant amount of stored water that moved
5 through the system in 2015, and satisfied demands.

6 The North Delta Water Agency has a contract with
7 DWR. None of the stored water released pursuant to that
8 contract was counted in supply, but all of the demand was.

9 Similarly --

10 CO-HEARING OFFICER DODUC: Give Ms. Spaletta
11 another five minutes since she's presenting for two
12 parties.

13 No, you only gave her five.

14 MS. SPALETTA: West Side had unused time and I'm
15 actually addressing the water availability issues for them,
16 as well. I will wrap up, though, quickly.

17 CO-HEARING OFFICER DODUC: Thank you.

18 MS. SPALETTA: Yeah. The other thing about
19 stored water is a lot of stored water was delivered to
20 settlement contractors on the Sacramento River, settlement
21 contractors on the Feather River and, most significantly,
22 the San Joaquin River Exchange Contractors. All of the
23 demand for the exchange contractors was included as
24 riparian demand showing up on the charts that the staff
25 prepared, but none of the stored water that was delivered

1 to satisfy that demand was included in supply.

2 And that results in an incredibly misleading
3 picture of supply and demand. And it took us a lot of time
4 to sort through the minutia of the cells in these very
5 large databases, and questioning of Mr. Yeazell to figure
6 that out. And that's really, really unfortunate. That's
7 not how this process should work.

8 Finally, Mr. Tauriainen put up a charge prepared
9 by one of our experts, Mr. Greg Young, and asserted that
10 this chart, which adjusted demand downward, makes every
11 assumption in favor of the diverters and shows no
12 significant different in the supply and demand
13 determination.

14 He was flat out misleading this tribunal and
15 violating the duty of candor. Greg Young prepared that
16 chart to represent a single adjustment that was one of many
17 criticisms that we made to the Prosecution Team's theory of
18 water availability.

19 There was significant other information that you
20 will hear, from Mr. Bonsignore and Mr. Young, about other
21 adjustments. And you'll also hear the Prosecution Team's
22 own witnesses explain adjustments that they have now made
23 after the fact, for purposes of rebuttal.

24 So, again, I take the duty of candor to this
25 tribunal very seriously. You will not hear our witnesses

1 or our experts overstate anything. You will not hear them
2 make conclusions that are not supported by the evidence.

3 And I hope that you hold that same standard to
4 every other party in this case. Thank you.

5 CO-HEARING OFFICER DODUC: Thank you, Ms.
6 Spaletta.

7 And just for the record there are only two of us
8 here, unless you count me twice.

9 City and County of San Francisco, followed by San
10 Joaquin Tributaries Authority.

11 OPENING STATEMENT BY MR. JONATHAN KNAPP

12 ON BEHALF OF CITY AND COUNTY OF SAN FRANCISCO

13 MR. KNAPP: Good morning. My name is Jonathan
14 Knapp. I'm a Deputy City Attorney with the City and County
15 of San Francisco. I'm here on behalf of the City and
16 County, and the San Francisco Public Utilities Commission.
17 San Francisco appreciates the opportunity to give this
18 Opening Statement and to appear in these proceedings.

19 San Francisco is appearing in these proceedings
20 for the limited purpose of preserving its rights and
21 positions with respect to certain threshold matters, and
22 joins in the positions taken by several parties regarding
23 these matters.

24 First, San Francisco questions the State Water
25 Board's jurisdiction to bring the enforcement proceeding

1 against Byron Bethany Irrigation District, a pre-1914
2 appropriator, under the authority of Water Code Section
3 1052.

4 San Francisco respectfully submits, as set forth
5 in our briefs, that Water Code Section 1052 does not
6 authorize the State Water Board to administratively
7 prohibit the use of valid pre-1914 appropriative rights
8 that are being exercised within the proper scope of such
9 rights.

10 Second, San Francisco shares many of the concerns
11 raised by other parties about the methodology developed by
12 State Water Board staff to determine water availability,
13 which ultimately led to the enforcement actions in these
14 proceedings.

15 In particular, San Francisco believes that the
16 water availability methodology developed and used by State
17 Water Board staff constitutes a rule or regulation of
18 general applicability, under the California Administrative
19 Procedures Act, that was not lawfully adopted and
20 promulgated by the State Water Board.

21 San Francisco also shares concerns with several
22 other parties regarding the inadequacies of the
23 methodology, itself.

24 San Francisco does not intend to put on a direct
25 case in this proceeding, but respectfully reserves the

1 right to participate in all other respects. San Francisco
2 also plans to fully participating in post-hearing briefing.
3 Thank you.

4 CO-HEARING OFFICER DODUC: Thank you, Mr. Knapp.
5 San Joaquin Tributaries Authority, followed by
6 the Department of Water Resources.

7 OPENING STATEMENT BY MR. O'LAUGHLIN ON BEHALF OF

8 SAN JOAQUIN TRIBUTARIES AUTHORITY

9 MR. O'LAUGHLIN: Good morning, Tim O'Laughlin,
10 the San Joaquin Tributaries Authority. We're going to be
11 spending a lot of time here this year, it seems like.

12 A couple quick ones. I think the evidence will
13 show that in California, and I don't think there's any
14 disagreement on this point, that we have a dual system of a
15 riparian and appropriative system.

16 I think the evidence will show that the
17 methodology used by staff was only applicable to a riparian
18 analysis and it cannot be used in an analysis of water
19 available subject to an appropriative right.

20 The other point I'd like to make, and we left it
21 in our brief, and I'm not going to belabor the point, but I
22 remember appearing in front of this Board and talking about
23 a collaborative process whereby we could arrive at a
24 methodology to inform water users of water availability.
25 That process did not occur. Well, it did not happen and

1 it's unfortunate that it did not happen.

2 But even though that process did not happen, the
3 point that was most important coming out of that -- or
4 would have been important coming out of that process would
5 have been the information. But we can't lose sight that in
6 an enforcement proceeding it is fact-specific as to each
7 diversion and each diversion's location, and cannot be done
8 on a basin-wide, general applicability of water
9 availability.

10 And finally, I'd like to address what I think is
11 probably the fundamental flaws in this case. The
12 Prosecution Team, in their Opening Statement, said that
13 they were here to protect water right priorities. Well,
14 that's an interesting statement. Is that protecting water
15 right priorities in the abstract? Because that's not
16 allowed under the law.

17 In fact, the problem with this case, that I've
18 seen from the get-go, is that the Prosecution Team flip-
19 flops between water right priorities and protecting senior
20 water rights. And yet, to this day, at every deposition
21 that was taken, and you'll hear it as we go through the
22 case, not one single entity has been identified that has
23 suffered an injury or impact to their water right
24 diversions.

25 But you heard the veiled, underlying, kind of

1 threat or threat to a water right, and the Prosecution Team
2 stated this in their Opening Statement, that the DWR kept
3 the water fresh at their, i.e. BBID and West Side's
4 diversions.

5 This all goes back to DWR's complaint that their
6 stored water was being diverted in the Delta. And to date,
7 the State Water Resources Control Board has failed to take
8 action on that complaint.

9 And in this case there's a major, fundamental
10 issue. And the major, fundamental issue is this, 4,000 CFS
11 was being released by DWR and the Bureau of Reclamation in
12 this time period to maintain Delta outflow. And the sole
13 question that comes to mind is was that water protected?

14 Because remember, the water released under that
15 criteria is for a water quality objective and is not a
16 water right.

17 So, when the San Joaquin Tributaries Authority
18 went to implement the San Joaquin River Agreement, in the
19 1995 Water Quality Control Plan, we had to do a 1707 to
20 protect our water being released to meet a water quality
21 objective at Vernalis.

22 We've asked, of all of the witnesses from the
23 Prosecution Team, if there is any protection for the water
24 being released by DWR, in reclamation, to meet the 4,000
25 CFS outflow requirement?

1 Because you're going to hear from experts that
2 that 4,000 CFS just doesn't leave in one day. It sloshes
3 back and forth, back and forth. Well, if it's abandoned
4 water, but previously stored, it is subject to
5 appropriation by a senior appropriative right. It may not
6 be available for riparians, but it's clearly available for
7 an appropriative right.

8 So we think, in a large way, and you've read the
9 testimony of Mr. Michael George, that this is an indirect
10 attack or approach to resolving the DWR complaint. And
11 this problem isn't going to go away because this problem is
12 going to raise its head, unfortunately, in the Water Fix
13 proceeding as well.

14 Until this Board tells the regulated community
15 how water that's being released, under a water right, to
16 meet a Water Quality Control Plan objection, is or isn't
17 protected as it moves through the system, we will continue
18 to have this problem on the Sacramento, the San Joaquin,
19 and in the Delta.

20 Thank you.

21 CO-HEARING OFFICER DODUC: Thank you, Mr.
22 O'Laughlin.

23 DWR, followed by the State Water Contractors.

24 OPENING STATEMENT BY MS. MC GINNIS ON BEHALF OF
25 CALIFORNIA DEPARTMENT OF WATER RESOURCES

1 MS. MC GINNIS: Good morning, Hearing Officers
2 and Hearing Team members. Robin McGinnis, for the
3 California Department of Water Resources. I'm pleased to
4 present the Opening Statement of DWR.

5 These enforcement actions are about whether BBID
6 and West Side diverted water illegally. They are not about
7 the Board's statutory or constitutional authority, whether
8 water is stored in Delta channels, or rights to stored
9 water.

10 DWR supports the actions taken by the Division of
11 Water Rights in 2015, regarding alleged actual and
12 threatened diversions by BBID and West Side.

13 Water Code Section 1051 states, "The Board may
14 determine whether water appropriates are legal", and the
15 California Supreme Court held that, "The Board has
16 authority to prevent illegal diversions, waste and
17 unreasonable use of water regardless of the type of water
18 right".

19 DWR sought to be designated as a party in these
20 enforcement actions to provide information to the Board and
21 clarify issues related to the operation of the State Water
22 Project.

23 DWR was concerned that the parties to these
24 enforcement actions would submit evidence outside of the
25 scope of the hearing notices and mischaracterize conditions

1 in the Delta, and agreements between DWR and BBID, which is
2 exactly what happened.

3 DWR's rebuttal testimony offers evidence in
4 response to information and assertions made in the direct
5 testimony of BBID and West Side.

6 In BBID's Exhibit Numbers 384 and 388, and West
7 Side's Exhibits Numbers 123 and 124, their experts state
8 that water is always available in the Delta in terms of
9 quantity and quality. However, they offer an incomplete
10 description of Delta hydrodynamics and the California Water
11 System, as a whole, and the relative influences of various
12 factors, especially in a drought year like 2015, when the
13 Delta system was imbalanced conditions.

14 DWR's evidence shows there is no water stored in
15 the Delta. It is not a source of water. That water comes
16 from upstream.

17 During the ongoing drought and pursuant to Board
18 orders, DWR and the U.S. Bureau of Reclamation released
19 stored water to meet Delta water quality standards, which
20 we're required to do as a condition of our water right
21 permits.

22 As DWR's testimony shows, illegal diversions
23 during these extraordinarily dry conditions caused DWR and
24 Reclamation to release more water from reservoirs that
25 would be released in the absence of those diversions.

1 These additional releases have the effect of
2 reducing the stored water available for critical water
3 needs, endangered species protection, and Delta water
4 quality protection.

5 DWR also followed these actions because it has
6 entered into agreements with BBID over the years. In
7 BBID's Exhibit 201, BBID's witness states that DWR provides
8 BBID with 50,000 acre feet of water per year. But this
9 statement is contrary to the express terms in the
10 agreements between BBID and DWR.

11 DWR submitted rebuttal testimony to set the
12 record straight here. BBID diverts under its water rights,
13 which are subject to the Board's authority.

14 Also in Exhibit 201, BBID mischaracterized
15 discussions it had with DWR, in 2015, regarding its efforts
16 to obtain alternate water supplies.

17 DWR's rebuttal testimony offers its view of these
18 discussions.

19 These enforcement actions are fairly straight
20 forward. Did BBID and West Side divert illegally and are
21 they subject to any penalties?

22 In their cases in chief and legal briefs, other
23 parties have attempted to enlarge the scope of these
24 hearings beyond what is appropriate to be heard and decided
25 in these enforcement actions against these two parties.

1 DWR decided to follow these enforcement actions,
2 hoping they would remain limited in scope and the parties
3 would not attempt to confuse the issues and muddy the
4 record.

5 However, this has happened because the parties
6 submitted incomplete evidence, mischaracterized agreements,
7 and made strained legal arguments.

8 Thank you. DWR looks forward to participating in
9 these hearings.

10 CO-HEARING OFFICER DODUC: Thank you, Ms.
11 McGinnis.

12 The State Water Contractors, followed by
13 Patterson Irrigation District.

14 OPENING STATEMENT BY MS. ANSLEY ON BEHALF OF
15 STATE WATER CONTRACTORS

16 MS. ANSLEY: Good morning, Jolie-Anne Ansley from
17 State Water Contractors. We just briefly wanted to state
18 that we are here not putting on a case in chief. We are
19 here simply for the limited purpose of protecting stored
20 water supplies in the context, as it has come up in these
21 proceedings, regarding water availability.

22 We do intend to fully participate in cross and
23 rebuttal, but we did want to emphasize the limited nature
24 of our involvement. Thank you very much.

25 CO-HEARING OFFICER DODUC: Thank you.

1 Ms. Zolezzi, Patterson.

2 MS. ZOLEZZI: Patterson Irrigation District and
3 Banta-Carbona Irrigation District do not have an Opening
4 Statement. Thank you.

5 CO-HEARING OFFICER DODUC: Westlands.

6 OPENING STATEMENT BY MR. WILLIAMS ON BEHALF OF

7 WESTLANDS WATER DISTRICT

8 MR. WILLIAMS: Good morning, Ma'am. My name is
9 Philip A. Williams. I serve as the Deputy General Counsel
10 for Westlands Water District.

11 As I'm sure you know, Westlands is a Central
12 Valley Project Water Contractor. As such, we rely on water
13 captured at Shasta, later released, and that water has to
14 survive its journey through the Delta.

15 In particular, in the past few years, we have
16 relied extensively on water transfers from our fellow water
17 users. And our neighbors have kept us alive in the past
18 three years. But that transfer water also has to survive
19 its journey through the Delta.

20 Westlands is a party to the West Side Irrigation
21 District Draft CDO proceeding, only. West Side advances
22 arguments, as I believe they have done in the past, about
23 the availability of water for diversion in the Delta.
24 Participating in this one proceeding preserves our ability
25 to engage in larger legal issues about the availability of

1 water for diversion in the Delta, without getting
2 distracted in the noise of what was characterized as
3 punishment, of \$1.4 million against other water users. It
4 inserts, it injects a significant amount of murkiness into
5 an already pretty muddy process.

6 We have two major objectives. And this was a
7 deliberate exercise that we went through at Westlands. The
8 first is we protect stored water and transfer water as it
9 passes through the Delta.

10 The second, we want to support the State Water
11 Board's ability to properly and effectively administer
12 water rights, and administer against unlawful diversions.

13 We intend to establish two main points. The
14 first is the State Water Board has the authority to issue
15 Draft CDO against West Side Irrigation District.

16 Secondly, and relatedly, the exercise of that
17 authority leaves much to be desired.

18 To my first point, the recent decisions in
19 Millview & Young provide this body with ample authority to
20 conduct the kind of threshold inquiries necessary to effect
21 a statutory mandate.

22 Now, hindsight's 20/20. We can always look back
23 and look at the way we could have done things better. The
24 proper perspective here is a prospective one and not a
25 retrospective on.

1 And to the second point about there being room
2 for improvement, the question is whether the analyses
3 underlying the water availability determinations, and this
4 enforcement proceeding, were proper. Everything flows from
5 there. And that, frankly, is an open question.

6 To the extent the underlying analyses are not
7 proper, then we are only perpetuating a problem of
8 ineffective administration. And it will not be long before
9 we all find ourselves here again, arguing the exact same
10 issues, again. It's imperative that we keep the question
11 before us precise and we not get distracted by noise. And,
12 frankly, what could be characterized as blood lust.

13 Three primary flaws stand out. The State Board
14 used an aggregated water availability analysis, where
15 demand from one stream was counted against the supply from
16 a hydrologically disconnected stream. A theoretical
17 impossibility and perhaps even nonsense.

18 There's no basis for return flows in the Delta,
19 other than a conversation between water users and State
20 Board staff, where apparently 40 percent was a number
21 arrived at. And while it may be a valid opinion,
22 rightfully held, there's no data to support it. And, yet,
23 we are administering and curtailing, or shutting people off
24 from their water based on an opinion. No data.

25 And relatedly, no data, no measuring, no

1 monitoring, toothless reporting requirements. For years,
2 we've been talking about this issue. It's not a new issue.

3 The fact is that the availability analysis the
4 State Water Board conducted suffers from, frankly,
5 surprising technical and hydrological imprecision.

6 Now that being said, and I'll disagree with Mr.
7 Kelly, it's probably not -- it probably is good enough.
8 And that's embarrassing, personally. Given the standard
9 of review, it probably is good enough.

10 This proceeding is the result of a dereliction
11 that we have inherited, a legacy of imprecise application
12 of fundamental tenets of California Water Law, a legacy of
13 imprecise or altogether absent data on water availability,
14 diversion and use. And a resulting legacy of an imprecise
15 and arbitrary application of authority to the ultimate
16 detriment of men, women, and children who rely on a
17 reliable water source.

18 The only real question before us is whether we
19 will perpetuate that legacy. Thank you.

20 CO-HEARING OFFICER DODUC: Thank you, Mr.
21 Williams.

22 That concludes the Opening Statements. You all
23 have been much more efficient than I anticipated. So, let
24 me ask Mr. Tauriainen, do you anticipate using up the
25 entire 90 minutes for your direct?

1 MR. TAURIAINEN: Yes.

2 CO-HEARING OFFICER DODUC: All right. In that
3 case, then my preference is to take the lunch break and
4 then we will resume at noon to begin the Prosecution Team's
5 direct testimony.

6 (Off the record at 11:24 a.m.)

7 (On the record at 12:03 p.m.)

8 CO-HEARING OFFICER DODUC: Before we get to the
9 Prosecution Team, I have a correction to make with respect
10 to our evacuation procedures. I've been advised that our
11 assembly location, in the event of an evacuation is not the
12 park, but it is now J. Neely Johnson Parking and Community
13 Garden located at 516 11th Street, on 11th Street between E
14 and F. So, if we need to evacuate, find your way to that
15 location.

16 The second item I wanted to quickly go over,
17 before Mr. O'Laughlin, who's not back yet, is with respect
18 to Good Friday. I am entertaining the notion of breaking
19 early Friday to accommodate those who wish to pursue those
20 activities.

21 Any parties wishing to express any concerns or
22 suggestions with respect to the potential breaking early on
23 Friday?

24 Mr. Morat, we will not break before we get to
25 you, obviously.

1 MR. MORAT: Thank you.

2 CO-HEARING OFFICER DODUC: Was that your only
3 concern?

4 All right, in that case, then, let's plan on
5 breaking at an appropriate time, but no later than noon.

6 And with that, we will now hear from the
7 Prosecution Team, ready to present your direct testimony.
8 At this time, I will ask the Prosecution Team's witnesses
9 to stand up and raise your right hand.

10 (Potential witnesses complying)

11 CO-HEARING OFFICER DODUC: Do you swear or affirm
12 that the testimony you're about to give is the truth?

13 THE WITNESSES: (collectively): I do.

14 CO-HEARING OFFICER DODUC: Thank you. You may be
15 seated. And, Counsel, you may proceed.

16 MR. TAURIAINEN: Thank you. Yes, Board Member
17 Doduc. A couple of very minor housekeeping points before
18 the witnesses start their presentation. First, once my
19 computer gets booted up, I will e-mail to all the parties,
20 and to the Hearing Team, a PDF copy of this presentation,
21 which is marked as Prosecution Exhibit 253.

22 And second, I think we should be able to get
23 through this today, but we will have -- we have one witness
24 from the Department of Water Resources who needs to get
25 back to work tomorrow. So, I would ask that, to the extent

1 that any cross-examination will be done today, that we can
2 include Mr. Nemeth as part of that cross-examination, or
3 for Board questions for today so we can fully dismiss him
4 at the close of today's proceedings.

5 CO-HEARING OFFICER DODUC: We'll note that.
6 Thank you.

7 MR. TAURIAINEN: With that, the bulk of our
8 witnesses will be giving one Power Point presentation, but
9 Mr. Nemeth won't be part of that Power Point presentation.
10 He's just going to just do a brief statement, first, and
11 then we'll go into the Power Point witnesses.

12 STEVEN E. NEMETH

13 Called by THE PROSECUTION TEAM

14 DIRECT EXAMINATION BY MR. TAURIAINEN

15 MR. TAURIAINEN: Mr. Nemeth.

16 MR. NEMETH: My name is Steven E. Nemeth.
17 I have taken the oath. I am a professional engineer and I
18 work in the Snow Survey Section of the Department of Water
19 Resources, at the Joint Operation Center located at 3310 El
20 Camino Avenue, Sacramento, California.

21 My written case in chief testimony is Exhibit WR-
22 17. I have reviewed Exhibit WR-17 and it is true and
23 correct, to the best of my knowledge, and I do not have any
24 changes to it.

25 The exhibits referenced in my witness statement

1 are also true and correct. I am a member of the team that
2 develops the Bulletin 120, Full Natural Flow Forecasts of
3 the April through July, and October through September full
4 natural flow for major rivers in California. My group
5 prepares and publishes these forecasts each year.

6 My team also calculates daily full natural flow
7 values for major rivers in California and publishes them
8 through the internet.

9 The Department has been preparing full natural
10 flow forecasts and calculations for many years, and these
11 forecasts are relied on by a host of public and private
12 entities for water supply planning purposes.

13 I will be available for cross-examination.

14 KATHY MROWKA

15 Called by the PROSECUTION TEAM

16 DIRECT EXAMINATION BY MR. TAURIAINEN

17 MS. MROWKA: Good morning. I am Kathy Mrowka and
18 I have taken the oath. My written case in chief testimony
19 is Exhibit WR-7. I have reviewed Exhibit WR-7 and I have
20 three minor corrections to it.

21 On page 2, at line 5, the word "or" should be
22 "of". The line should read, "Available under the priority
23 of right".

24 On page 3, there are two minor corrections. On
25 paragraph 2, line 3, it should read, "Unavailability, there

1 was no water available". And the word "was", the second
2 word, "was", is deleted.

3 Page 3, paragraph 3, line 3, there's an extra
4 word "was". It should read, "There was no water
5 available".

6 With those edits, my testimony is true and
7 correct.

8 I am the Program Manager for the Enforcement
9 Program in the State Water Board, Division of Water Rights.
10 I manage units responsible for complaint inspections,
11 compliance inspections, drought response, development of
12 regulations, and other tasks including enforcement actions.

13 The drought response has included determining the
14 adequacy of water supply to serve the various priorities of
15 water rights in the Sacramento, San Joaquin, Bay Delta
16 Watersheds, as well as inspections to determine whether
17 anyone has diverted water after receiving notice from the
18 State Water Board that there is inadequate water supply to
19 serve their priority of rights.

20 I directly supervise, among others, Paul Wells,
21 Brian Coats, who supervises Jeff Yeazell and Victor
22 Vasquez, who supervises Katherine Bare.

23 My supervisor is the Assistant Deputy Director
24 for Water Rights, John O'Hagan.

25 During my tenure as Program Manager for

1 Enforcement, I have supervised and I have been directly
2 involved in drought response activities. Along with my
3 supervisor, John O'Hagan, I actively participated in, and
4 helped to direct, the 2015 Water Availability Analysis
5 conducted by Coats and Yeazell.

6 I am the Prosecution Team lead in both
7 enforcement actions.

8 In 2015, California was in its fourth year of
9 drought, the worst in decades. 2012 was below normal.
10 2013 was the driest year in recorded history for much of
11 California. 2014 was the third driest in 119 years of
12 record. And 2015 had the lowest snow pack on record.

13 The Governor responded with a series of
14 proclamations. The January 17th, 2014 Proclamation ordered
15 the Board to notify water right holders throughout the
16 State that they may be directed to cease or reduce water
17 diversions due to shortages.

18 Pursuant to the Governor's direction, the Board
19 notified water right holders of potential shortages.

20 The Legislature has vested the State Water Board
21 with the authority to prevent unauthorized diversions and
22 supervise the water right priority system. Drought
23 management of water rights is necessary to ensure that
24 water, to which senior water right holders are entitled, is
25 actually available to them.

1 This requires that some water remain in most
2 streams to satisfy senior demands at the furthest
3 downstream point of diversion of these water rights.

4 The failure of junior diverters to cease
5 diversion, when no water is available for their priority of
6 right, has a direct, immediate impact on other diverters.

7 The Division's Drought Water Supply and Demand
8 Analysis, and the enforcement actions against BBID and West
9 Side, are within the scope of the Board's authority and the
10 Division's duties.

11 Although, I was not Program Manager for the
12 Enforcement Unit during most of 2014, as Mr. O'Hagan served
13 in that capacity then, I have become familiar with the
14 supply and demand analysis conducted during that year.
15 Along with my supervisor, Mr. O'Hagan, I actively
16 participated in the 2015 drought water availability staff
17 determinations, and I am familiar with the supply and
18 demand analyses as supervisor to Brian Coats and Jeff
19 Yeazell.

20 As part of my duties, I regularly interacted with
21 members of the public and with the water rights community
22 regarding the drought water availability analysis.

23 To make water availability determinations during
24 the drought emergencies, the Division started with the 1977
25 Drought Report as a conceptual template. Nobody had

1 performed an analysis like this in recent years.

2 To respond to the significant drought emergency
3 and extreme water shortage, Division staff adapted the 1977
4 template to modern data processing capabilities, using the
5 best available supply and demand information and they did
6 an excellent job given their urgent circumstances and tight
7 timeline.

8 The drought water availability analysis
9 methodology evolved from 2014 into 2015, as we gathered new
10 and better information. Mr. Coats and Mr. Yeazell will
11 discuss the water supply analysis in greater detail.

12 Based on the Division's drought water
13 availability supply and demand analysis, there was no water
14 available under the priority of West Side's License 1381,
15 as of May 1, 2015.

16 For BBID's claimed pre-1914 right, the drought
17 water availability supply and demand analysis indicated
18 there was no water available as of June 12th, 2015.

19 The West Side and BBID were both sent notices on
20 the appropriate dates that I just mentioned. The notices
21 for West Side and BBID were both based on an appropriate
22 drought water availability analysis methodology and
23 incorporated the best available supply and demand
24 information.

25 The Division has used the term "water

1 availability analysis" in 2014 and 2015 to describe the
2 drought supply and demand analysis conducted, leading to
3 the various notices of unavailability of water, including
4 the ones at issue in the BBID and West Side enforcement
5 proceedings.

6 The Division also uses the term "water
7 availability analysis" to describe a site-specific water
8 availability analysis conducted as part of the water rights
9 permitting process.

10 I worked in the Permitting Unit for many years
11 and I am familiar with the permitting water availability
12 analysis. Those analyses are relatively common. They use
13 the face value of the water rights and the computations,
14 and many persons are familiar with them.

15 The drought water availability analysis is
16 fundamentally different. It is a supply and demand
17 analysis methodology that can be used to determine whether
18 water is available for various water right priority levels
19 over entire watersheds, or groups of watersheds during
20 extreme drought emergencies.

21 To my knowledge, until 2014, nobody attempted
22 this type of drought water availability analysis in modern
23 times. A lot has changed since the 1977 drought
24 curtailment, so this was really something nobody had done
25 before.

1 Still, the Division did a great job gathering
2 information, analyzing supply and demand, and notifying
3 right holders.

4 I will now turn the presentation over to Brian
5 Coates.

6 BRIAN COATS

7 Called by THE PROSECUTION TEAM

8 DIRECT EXAMINATION BY MR. TAURIAINEN

9 MR. COATS: Good afternoon, Board Members and
10 Hearing Team. My name is Brian Coats and I've taken the
11 oath.

12 My written case in chief testimony is Exhibit WR-
13 9. I have reviewed Exhibit WR-9. It is true and correct
14 to the best of my knowledge and I do not have any changes.
15 A true and correct copy of my statement of qualifications
16 is attached as Exhibit WR-10

17 I have been an employee for the State Water
18 Board's Division of Water Rights for 16 years. I received
19 a Bachelor's Degree in Chemical Engineering, from UC Davis,
20 in 1996, and I'm a registered Professional Chemical
21 Engineer with the State of California.

22 I'm currently supervised by Kathy Mrowka, to my
23 left, who is the Enforcement Program Manager.

24 As a Senior Water Resource Control Engineer, one
25 of my duties includes supervising engineers, one of which

1 is Jeff Yeazell, to my right, who you will hear from
2 shortly. My remaining duties currently include compliance
3 and enforcement of water rights and coordinating supply and
4 demand analysis for select watersheds.

5 The purpose of my testimony today is to describe
6 the supply and demand analysis undertaken for 2015. My
7 written testimony outlines the specific details of the
8 analysis. I will be testifying to the data or inputs we
9 used in the analysis, whereas Jeff Yeazell will be
10 addressing how the data was collected, organized, and
11 analyzed.

12 Mr. Yeazell reported the outcome of the analysis
13 to me, which was relayed to Kathy Mrowka, who decided if
14 enforcement actions should proceed.

15 The most basic tenet of water rights in
16 California is the first-in-time/first-in-right principle,
17 which essentially means whoever has an earlier claim to
18 divert water has the higher priority for that water, should
19 water supply be restricted.

20 During a drought, water supply is limited and
21 allocation of the restricted supply follows the first-in-
22 time/first-in-right principle. The three main classes of
23 rights are riparian, pre-14 claims of right, and post-1914
24 water rights. While exceptions do exist, riparian
25 rights -- riparian claim of rights generally have priority

1 over pre-14 and post-1914 rights, but are not allowed to
2 store water for use at a later time.

3 The types of water frequently encountered can be
4 classified as either natural, stored or abandoned. Natural
5 water is rainfall or runoff that has not been diverted for
6 use. Only natural water is subject to priority allocation.
7 An adjustment for return flows can be made, if applicable.

8 Stored water is water that has been diverted to
9 storage for use at another time. Since the paramount right
10 to the water lies with the party storing the water, stored
11 water is not subject to priority allocation.

12 Abandoned water is water that has been used for a
13 purpose, with the excess or unneeded amounts released with
14 no claim of ownership, such as some return flows or
15 wastewater treatment plan discharges.

16 Due to a diverter's uncertainty of the type of
17 water available at their point of diversion, Division staff
18 may issue Water Shortage Notices or Notices of Water
19 Unavailability to clarify.

20 Following Governor Brown's Drought Proclamation
21 and Executive Order, the Division issued an Informational
22 Order to the top 90 percent of diverters within the
23 Sacramento River, San Joaquin River, and Delta, requesting
24 use data for the 2014 diversions and anticipated 2015
25 diversions in advance of the irrigation season.

1 Division staff incorporated the results of the
2 Informational Order responses into our 2015 Supply and
3 Demand Analysis. Once the Division completed the supply
4 and demand analysis for select watersheds, Notices of Water
5 Unavailability were issued to affected parties.

6 Notice of Water Unavailability are letters
7 informing water right holders that due to a supply shortage
8 water has determined to be unavailability at their priority
9 of right. Diverters who do not consumptively use water,
10 such as for power generation or for aquaculture are
11 exempted from the supply and demand analysis, since water
12 is not used.

13 The Unavailability Notices only consider the
14 specific right. Other claims of right, such as senior
15 rights held by the diverter, or alternative bases of
16 rights, such as private contracts, water transfers or
17 groundwater supplies are separate.

18 For 2015, Water Unavailability Notices were
19 issued to post-1914 water rights in the Sacramento, and San
20 Joaquin Rivers, and Delta on May 1st, 2015, due to
21 declining water supplies.

22 As the water supply worsened, Unavailability
23 Notices were issued to 1903 and later, pre-1914 claims of
24 right in the Sacramento River, San Joaquin River, and Delta
25 on June 12th, 2015.

1 Both notices reflect Division staff
2 determinations that existing water was insufficient to meet
3 demands. The pre-1914 notice affecting Byron Bethany
4 Irrigation District was in effect until September 17th,
5 2015, with the post-1914 notice impacting West Side in
6 place until November 2nd, 2015.

7 Before any notices were issued, the Division
8 compared the water supply to reported demands. Division
9 staff performed a similar analysis in 1977, comparing the
10 natural water supply with water at demand by month. The
11 starting point for the 2014 and 2015 analyses was a
12 graphically summary prepared by the Division of Water
13 Rights Application Section Program Manager, Mert K.
14 Lininger, in 1977.

15 This graphical summary, shown on the following
16 slide, was prepared alongside the 1977 Dry Year Report, and
17 was adapted to current conditions in 2014 and 2015, using
18 the best available information.

19 In the 1977 chart, shown here, water supply is
20 shown as a red curve peaking in the winter and receding in
21 the late summer. The three main types of rights referred
22 to earlier, riparian, pre-14, and post-14 rights are shown
23 as blue curves building up from the time access, reflecting
24 the decreasing seniority as you move upwards.

25 The time axis is shown in month increments. As

1 supply drops and intersects the demand curve, the demand
2 curve affected does not have enough supply to meet the
3 demand and a portion, or priority, are notified.

4 Here, we see a 2015 version of the 1977 curve,
5 adapted to the Sacramento River Watershed. Here is the
6 2015 version of the combined Sacramento and San Joaquin
7 River Watershed, the specifics of which will be addressed
8 by Jeff Yeazell, later.

9 For the supply and demand analysis, the general
10 method is to first identify an area of interest, define a
11 boundary for that area of interest, compare water supplies
12 to the demands within that boundary, and issue
13 Unavailability Notices to those with demands exceeding the
14 available supply for the area of interest that is
15 determined by management. For example the Sacramento, San
16 Joaquin or Russian Rivers.

17 After the area has been decided, the next
18 decision is what type of boundary or boundaries should be
19 used for that area. Boundary options include a global,
20 local, tributary or sub-tributary boundary, as shown on the
21 following slides.

22 Here, we see a global boundary incorporating the
23 entire Sacramento and San Joaquin River Watershed,
24 including the Delta. The drawback to using a global
25 boundary include the availability of supply issues, which

1 we will talk about later.

2 Here, we have a couple of local boundaries which
3 are for the Sacramento and San Joaquin River Watersheds.
4 In the first Sacramento River boundary, on the left, we see
5 the high number of senior claims of right in the Delta,
6 which are shown as dark purple dots. The second boundary,
7 on the right, is a similar area for the San Joaquin River
8 Watershed.

9 The advantage of the local boundary, in these
10 cases, lie with the large number of downstream senior
11 rights, shown as the dots, which depend on the fresh
12 natural supplies provided by the upstream locations.

13 Going even further, a tributary boundary option
14 exists, as shown here for the Stanislaus River. The
15 tributary option is acceptable for hydraulically
16 disconnected areas, where natural water would not reach
17 beyond the tributary boundary, perhaps due to natural
18 depletion losses or unauthorized diversions. Thus,
19 downstream higher priority rights are moot.

20 Lastly, an even smaller boundary, down to the
21 sub-tributary level can be chosen. But the drawback here
22 lies with not knowing how much natural supply is available
23 and issues of downstream higher priority rights laying
24 claim to the water.

25 In summary, the choice of boundary depends on the

1 distribution of high priority rights and hydraulic
2 connectivity. Smaller boundaries are chosen for low
3 natural water supplies, where natural depletions would
4 absorb the flow in the absence of diversion.

5 Larger boundaries chosen are chosen for
6 downstream higher priority rights with flows supporting
7 hydraulic connectivity.

8 The ideal boundary is as small as possible, where
9 natural flows are known, and no competing claims to the
10 water, outside the boundary, exist.

11 For West Side and Byron Bethany, both points of
12 diversion are located within the South Delta. The question
13 is what boundary to choose for the supply and demand
14 analysis?

15 For 2014, the boundary was chosen based on
16 geography where, due to the source listed as the San
17 Joaquin for a majority of rights within the Central and
18 South Delta, the boundary was extended into the associated
19 areas.

20 For 2015, the boundary was chosen to include the
21 entire Delta, but instead of allocating all of the demand,
22 only a prorated or proportional amount, based on the
23 percentage of natural supplies coming into the Delta from
24 the Sacramento or San Joaquin River Watersheds was
25 included.

1 As noted in the graphs incorporating this
2 proportional demand allocation, the choice of a prorated
3 demand is not a policy decision by the State Water Board.
4 But, instead, just used for supply and demand analysis.

5 Since the Delta is hydraulically connected to
6 both the Sacramento and San Joaquin Rivers, the idea that
7 the Delta's demands should be shared was implemented with
8 the sharing fraction determined by freshwater supplies.

9 For example, if 80 percent of the natural
10 freshwater entering comes from the Sacramento River, 80
11 percent of the Delta demands would be assigned to the
12 Sacramento River analysis.

13 Based on the DWR supply forecast for April, the
14 estimated percentage of natural freshwater entering the
15 Delta from the Sacramento River was 71 percent. Due to
16 this high percentage, the supply and demand analysis
17 performed in April 2015, for the May 1, 2015 Notice, used
18 the Sacramento River boundary for those diverters in the
19 Delta.

20 For the pre-14 Notice on June 12th, 2015,
21 affecting Byron Bethany, a global Sacramento and San
22 Joaquin River boundary was chosen. While a local boundary
23 could have been chosen, the results were the same as shown
24 on the following charts.

25 For the local San Joaquin River chart, prepared

1 in June 2015, we see the same DWR supply forecasts, except
2 for the San Joaquin River stations, declined rapidly in
3 June to within the riparian demand area, shown in yellow.
4 Had we used the local San Joaquin River chart, the impact
5 to diverters would have been more severe.

6 With the combined Sacramento and San Joaquin
7 River global boundaries, all of the DWR supply forecasts
8 for June, including the provisional adjusted 50 percent
9 supply point provided at the request of Division staff,
10 following an unexpected June precipitation event, were
11 below the 1902 priority demand line.

12 For West Side, the boundary was chosen to be the
13 Sacramento River, due to a higher proportion of freshwater
14 entering the Delta from the Sacramento River.

15 For Byron Bethany, the combined Sacramento and
16 San Joaquin boundary was chosen due to a deeper and earlier
17 notice to just the San Joaquin boundary, and the local
18 Sacramento boundary producing similar results to the global
19 boundary.

20 The supplies are published by DWR in their B-120
21 forecast every year, from February to May, which includes
22 the largest impacts to a river's natural water supplies.
23 For the May 1, 2015 Notice, impacting West Side, the
24 stations include the Sacramento River at Bend Bridge,
25 Feather River at Oroville, Yuba River at Smartsville, and

1 the American River at Folsom.

2 For the June 12th Notice, affecting Byron
3 Bethany, since it was a global boundary, Division staff
4 added the Stanislaus, Tuolumne, Merced, Upper San Joaquin,
5 Mokelumne and Consumnes River Stations to the Sacramento
6 River Stations.

7 For the DWR supply forecasts, since they are
8 statistical in nature, various levels of uncertainty are
9 provided for each watershed, based on the snow pack and
10 other data. Each forecast predicts how much natural flow
11 is expected to be available upstream of each location for
12 the rest of the water year, which is October 1st to
13 September 30th.

14 As emphasized, the forecasts incorporate upstream
15 influences, only. Downstream sources and depletions are
16 not reported.

17 Here, we have a sample DWR B-120 report. The
18 exceedance percentage, which is listed as the header for
19 each row in the B-120 table, is the percent of time that
20 the actual flow is expected to exceed the projected flow.

21 The topmost table, highlighted as shown, is for
22 the Stanislaus River below Goodwin Reservoir.

23 Each row's values are the forecasted month's
24 values in thousands of acre feet.

25 For past months, which in this case are October

1 to March, highlighted in yellow, the value is the same for
2 each forecast since past amounts are known. There is no
3 uncertainty.

4 Beginning in May, the amount is uncertain. In
5 the blue-highlighted section, the April data is known,
6 which is the same for all forecast rows. In May, since the
7 month is not over yet, the forecast values differ.

8 As the exceedance forecast drops from 99 to 50
9 percent, the forecasted amounts increase since there is now
10 a smaller chance, just 50 percent, that the actual flows
11 will be higher.

12 Division staff used DWR's 50, 90 and 99 percent
13 monthly exceedance forecasts for its analysis, together
14 with DWR's daily full natural flow data.

15 As seen in prior charts, we used both the monthly
16 full natural flow, or FNF, as well as the daily full
17 natural flow. Monthly FNF is based on historical and snow
18 pack data, while the daily FNF is a calculation performed
19 by DWR, which uses current stream gauge values, known
20 upstream diversions and reservoir data to arrive at the
21 amount of available water that day.

22 Daily FNF is used in two ways. One, to serve as
23 a qualifier when Division staff select which monthly
24 forecast exceedance to follow, for example the 99, 90
25 percent or 50 percent, to use. The other is to serve as a

1 backup supply in case the monthly B-120 forecast is zero.

2 In determining supply, the Division makes every
3 assumption in favor of the diverters. For example, in the
4 summer of 2015, the last DWR updates to the B-120 forecast
5 was in May. In this forecast, three rivers in the San
6 Joaquin River Watershed estimated as zero supply for August
7 and September. However, the daily FNF, while low, was
8 above zero for some days. So, Division staff used the
9 daily FNF trend as a supply estimate.

10 In WR-78, shown here, which is a supply and
11 demand chart for the San Joaquin River, generated in August
12 2015, the blue daily FNF line is above the B-120 supply
13 forecast for July and August. Since the daily FNF is
14 slightly positive, Division staff used the daily FNF trend
15 in our monitoring, since even a small supply is of more
16 benefit.

17 Here we have, in WR-52, the chart from August
18 2015 for the combined Sacramento and San Joaquin River
19 Watershed. We see the daily FNF above the B-120 forecast
20 point in June for the first half of the month, and below
21 that for the latter half, averaging out to the daily
22 average forecast point for the month.

23 This averaging shows that DWR's monthly B-120
24 forecasts were appropriate predictors.

25 Since the full natural flows only incorporate

1 upstream sources and depletions, and downstream adjustments
2 need to be made to account for the full picture, here we
3 describe adjustments to the supply to incorporate
4 unimpaired flow from below the full natural flow stations,
5 in the valley flow, along with adjustments to either the
6 supply or demand via return flows.

7 On May 12th, 2015, Division staff met with San
8 Joaquin River and Delta stakeholders to discuss an
9 adjustment for return flows. Stakeholders indicated that
10 incorporating a 40 percent demand reduction would be
11 appropriate to address actual net irrigation demand.

12 Without any data to support the 40-percent
13 figure, Division staff incorporated an increase to the
14 supply amount, which was later routed to a demand reduction
15 to the same effect, prior to the June 12th, 2015 notice.

16 For the 1977 Dry Year Report, a return flow
17 adjustment was made to the valley floor in the San Joaquin
18 River Watershed, along with the natural depletion amount
19 for the Delta.

20 For the 2015 analysis, an adjustment was made to
21 the supply for the return flows, but not for Delta
22 depletions.

23 For the unimpaired flows below the full natural
24 flow stations, Division staff used supply estimates taken
25 from a report, prepared by DWR's Bay Delta Office in 2007,

1 titled, "California Central Valley Unimpaired Flow Data".

2 The report provides unimpaired supply estimates
3 for the regions within the Sacramento and San Joaquin
4 Valley. The estimates are based on monthly historical
5 data. As a selection criteria for which year to choose,
6 Division staff chose 1977 to represent 2015 conditions,
7 since the 1977 snow pack was better than 2015 levels.

8 In summary, the supply used for the supply and
9 analysis includes the monthly FNF station values, any
10 return flow adjustments or equivalent demand reductions,
11 and unimpaired flow from the valley floor.

12 These monthly totals, in acre feet, were
13 converted to a daily-averaged, cubic-feet-per-second rate,
14 so that the daily FNFs, which are provided in similar
15 units, could be charted on the same time step.

16 For example, on the table on the bottom, here is
17 a summary for the total supply for the San Joaquin River
18 Watershed in June of 2015. The first row is the total for
19 the six FNF stations, with the second row a supply
20 adjustment for return flow. Which, as I said earlier, can
21 be routed to a demand reduction to the same effect.
22 Producing a 1,924 CFS total at the bottom.

23 Here, in WR-78, is the corresponding chart for
24 the San Joaquin River Watershed, prepared on August 19th,
25 2015. The dark blue point, labeled "Adjusted 50 percent

1 FNF Forecast" directly above the month of June -- where am
2 I at? Okay. The dark blue point, labeled "Adjusted 50
3 percent FNF Forecast", directly above the month of June,
4 has a value extrapolated to the flow access, on the left,
5 of 1,924 CFS.

6 For the demand data, Division staff relied on the
7 reported use data from water right holders, themselves, who
8 are required to report this information to the best of
9 their knowledge. Annual use data is required to be
10 reported every one to three years, depending on the type of
11 right.

12 For riparian and pre-14 claims of right, use data
13 is submitted every three years. For example, a third of
14 the riparian and pre-14 users report in one year, the next
15 third the following year, and so on.

16 Byron Bethany reported their 2010 through 2012
17 use, as seen in WR-85 through WR-87, but will not have to
18 report their 2015 to '15 use until June 30th, 2016.

19 Due to the lack of recent data for all diverters
20 for the 2014 drought, the Division used the most recent
21 completed demand dataset, which was 2010, for riparian and
22 pre-14 claims, and either 2010 or 2012 for post-1914 water
23 rights, depending on the watershed.

24 For 2015, the Division used a four-year average
25 demand from 2010 to 2013, or whatever years were available

1 within that range, to best represent demand for those not
2 subject to the Informational Order.

3 As mentioned earlier, the Division issued an
4 Informational Order in February 2015, to the top 90 percent
5 of diverters, as measured by reported use, in the
6 Sacramento and San Joaquin Rivers, and Delta.

7 The order required an advanced reporting of the
8 2014 use, which was not normally due until June 30th, of
9 2015, along with their projected 2015 use to assist the
10 Division's supply and demand analysis. In addition, those
11 subject to the order were required to submit their past
12 month's use, in arrears, in order to provide a check
13 against their projected 2015 use.

14 For the order recipients, their four-year average
15 demand was replaced by their 2014 Informational Order
16 value. While those not subject to the order kept their
17 four-year average demand.

18 West Side, holding a post-1914 water right, was
19 not subject to the order and their four-year average demand
20 was used. Whereas, Byron Bethany had their Information
21 Demand used in the supply and demand analysis.

22 Including the order data resulted in decreased
23 projected demand, which means more water was available for
24 various water right classes, for a longer period of time in
25 2015. As compared to what would have been available using

1 the methodology employed in 2014. This is another example
2 of how the Division's analysis, in 2015, made every effort
3 to err on the side of caution in favor of diverters. For
4 an example, CWR-88, which is Byron Bethany's initial
5 response to the Informational Order.

6 Special consideration of demand was made for
7 those Delta diverters claiming both a riparian and pre-1914
8 claim of right. For these parties, any demand reported
9 under their pre-14 claim of right would be rolled over into
10 their riparian use, being treated as a higher priority for
11 the supply and demand analysis. After being advised of the
12 rollover by San Joaquin stakeholders, Division staff, in
13 order to realize a savings for the supply and demand
14 analysis, applied pre-14 demand for those redundant claims
15 to the riparian category.

16 Quality control of the demand data was performed
17 by Jeff Yeazell, who describes the method in WR-11. All
18 demand data was posted to the internet for public review.
19 Outside comments were received on the 2014 use data,
20 obtained from the Informational Order, as well as the four-
21 year average demands for the remaining diverters.

22 Since the Delta is hydraulically connected to
23 both the Sacramento and San Joaquin Rivers, and each
24 supplies a different amount of water, Division staff
25 allocated, after management's direction, a proportion of

1 Delta demand to each watershed based on their respective
2 full natural flow supplies.

3 The proposal was vetted to San Joaquin River
4 stakeholders during the May 12th, 2015 meeting, which was
5 agreed to be more of benefit to their watershed, in
6 comparison of the 2014 allocation of the entire Central and
7 South Delta demand.

8 Here we have the April 29th, 2015 chart, which
9 was the basis for the May 1, 2015 notice. As you can see,
10 there is insufficient supply to serve all the post-1914
11 rights between the 90 and 99 percent forecast supply
12 points, which are the blue and violet dots.

13 Here you notice the daily FNF trending near the
14 lower 99 supply forecast.

15 Looking hindsight, WR-55 is the October 30th,
16 2015 graph of the same Sacramento River Watershed, which
17 shows the daily FNF trending in pre-1914 demand levels from
18 May through August. This confirms there was not enough
19 supply to satisfy West Side's demand from May 1, onwards.

20 Here is WR-48, which is the combined Sacramento
21 and San Joaquin River chart, prepared on June 10th, 2015,
22 for the pre-1914 notice issued on June 12th. The chart
23 shows the daily FNF trending downward, at around 11,000
24 CFS, while the B-120 supply forecast was even lower at
25 9,000. Again, Division staff erred in the favor of

1 diverters, where possible.

2 Even using the entire daily FNF trend at 11,000,
3 which is normally used for B-120 forecasts of zero flow,
4 the demand through the 1902 priority level was about 2,000
5 CFS higher.

6 Looking hindsight, WR-52 shows the same combined
7 boundary graph two months later. Here you see the daily
8 FNF dropping precipitously in mid-June, into the riparian
9 level, before July 1, 2015. This shows there was not
10 enough supply to satisfy remaining pre-1903 claims of
11 right, thus confirming there was not enough water available
12 for Bryon Bethany's junior priority from June 12th,
13 onwards.

14 In closing, a separate analysis, using the
15 Vernalis gauge data, in comparison to the downstream
16 prorated Delta demand, was performed after the June 12th
17 notice. Which shows that even with gauge-impaired supply
18 data, not full natural flow data, there was enough water to
19 meet that demand -- there was not enough water to meet that
20 demand.

21 The Vernalis gauge is located upstream of the
22 Delta and is able to confirm whether there is enough
23 measured flow, including storage releases, which are not
24 subject to priority allocation, at its location, to satisfy
25 remaining downstream pre-1903 demands, which are the

1 demands senior to BBID's priority.

2 Here you can see in the graphs, the green and
3 violet lines represent the prorated senior demand north of
4 Mossdale Bridge, and the full demand of the Delta south of
5 Mossdale, with and without the 40 percent return flow
6 credit.

7 The red hashed demand line, also shown on the
8 chart, is the entire Central and South Delta demand, which
9 is much higher than the prorated level.

10 The blue line is the gauged Vernalis flow, while
11 the vertical purple lines denote when unavailability
12 notices were issued. Even under the best case scenario of
13 using the smaller, prorated Delta demand, available flow at
14 Vernalis was needed by downstream senior right holders,
15 riparian and pre-1914 rights, before 1902 priority, and was
16 not available for Byron Bethany's diversion during the June
17 13th through 24th time period.

18 In closing, this also demonstrates that no water
19 was available to serve West Side's license at any time
20 after the May 1 notice, until November of 2015.

21 Now, I'll hand over the presentation to Jeff
22 Yeazell.

23 JEFFREY YEAZELL

24 Called by THE PROSECUTION TEAM

25 DIRECT EXAMINATION BY MR. TAURIAINEN

1 MR. YEAZELL: My name is Jeffrey Yeazell. I've
2 taken the oath. My written case in chief testimony is
3 Exhibit WR-11. I've reviewed Exhibit WR-11 and it is true
4 and correct to the best of my knowledge, with the exception
5 of one item that I'll identify at the appropriate time in
6 my presentation.

7 A true and correct copy of my Statement of
8 Qualifications, is attached as Exhibit WR-12. I'm a Water
9 Resource Control Engineer with the State Water Board's
10 Division of Water Rights. I have a Bachelor of Science
11 Degree in Environmental Resources Engineering from Humboldt
12 State University. I'm a registered professional engineer
13 in California.

14 Since August 2013, my primary duties have
15 included compiling, organizing and maintaining water supply
16 data and demand data for purposes of conducting drought-
17 related water availability analyses. The resulting
18 deliverables were graphs comparing water supply to water
19 demand in various watersheds.

20 My testimony focuses on how these water
21 availability graphs were generated.

22 This slide presents Exhibit WR-47, which is a
23 graph showing the conditions at the time of the May 1
24 notice, for post-14 rights in Sacramento and Legal Delta
25 areas. I will discuss what the various parts of the graph

1 represent later, in my presentation.

2 And this slide presents Exhibit WR-48, which is a
3 graph showing the conditions at the time of the June 12th
4 notice of pre-14 claims of right, having 1903 and junior
5 priorities in the Sacramento, San Joaquin, and legal Delta
6 areas.

7 The basic approach to developing the
8 supply/demand graph was fairly simple. I compiled and
9 organized diversion data and use data to represent demand.
10 I compiled and organized actual daily and forecasted full
11 monthly flow, or FNF, data to represent supply. I applied
12 adjustments on these supply and demand data based on
13 directives by my supervisors, and then plotted the relevant
14 data on time series graphs.

15 Although the basic approach is simple, there are
16 many intricacies involved in creating these datasets and
17 graphs, which I've described in detail in my written
18 testimony.

19 Today, I would like to present a general overview
20 of the tasks I undertook to develop the water availability
21 graphs, beginning with developing the demand dataset.

22 The demand dataset is also known as a water
23 rights use dataset, or its acronym, WRUDS. It is a living
24 dataset and is modified as additional information is made
25 known to Division staff. It is a single source of demand

1 data that can be queried through filters and worksheet
2 calculations to generate subsets and summaries of demand
3 data to help answer questions posed by Division staff, and
4 management, relating to water availability.

5 WRUDS began with a raw data file provided by the
6 Division's Data Management Unit, in February 2015. The
7 data file, which is presented as Exhibit WR-70, contains
8 available information from the Water Board's eWRIMS and RMS
9 databases. These databases were developed by the State
10 Water Board to track information on water rights.

11 Pertinent information in the databases include
12 monthly diversion and use data from annual reports and
13 statements of water diversion of use, water right types,
14 hydrologic units, priority dates, face values, and net
15 irrigated acreages, among others.

16 The raw data file contained monthly diversion and
17 use data, as reported by the water right holders for the
18 years 2010 through 2013. The file provided to me contained
19 data for all of California.

20 Because of the large size of the dataset, the
21 first order of business was to reduce it to a more
22 reasonable size. I extracted data for water rights within
23 the Sacramento, San Joaquin, Eel River, Russian River, and
24 Legal Delta watershed areas, as these were the areas
25 considered in the 2014 analyses.

1 I also removed inactive or revoked rights, as
2 well as stock pond, livestock, and other minor water right
3 types.

4 The raw data file contained records by points of
5 diversion, or PODs, rather than by individual water rights
6 identified by application or statement numbers, on which
7 the analyses were ultimately based. Generally, riparian
8 and pre-14 rights have single PODs, whereas post-14 rights
9 can have multiple PODs.

10 For post-14 rights, with multiple PODs located in
11 the same watershed, all but one record were removed, so
12 that one representative record for each right remained.
13 For the rights with multiple PODs located in more than one
14 watershed, the watershed in which the majority of the PODs
15 resided was designated as the primary watershed.

16 Next, each water right was assigned an analysis
17 area based on the watersheds listed in WRUDS. The three
18 primary analysis areas were Sacramento, San Joaquin, and
19 the Legal Delta. The Eel and Russian analysis areas were
20 also assigned. However, they were not used in 2015.

21 Once the raw data file was cleaned up, the next
22 step was to develop the monthly demand estimates for each
23 water right. Initially, each monthly demand was assumed to
24 be the average reported diversion over the four years' of
25 data. For example, the June diversions reported by West

1 Side, under License 1381, were 3,442, 3,182, 3,320, and
2 3,163 acre feet for the years 2000 through 2013,
3 respectively.

4 The resulting June demand used in WRUDS, for this
5 water right, was the average of the four values, which is
6 3,277 acre feet. The same calculation was applied for each
7 of the other 11 months.

8 Although the water right holders are required to
9 report their diversions and uses truthfully and accurately,
10 on inspecting the raw data it was apparent that this was
11 not always the case. There were certain conditions where
12 the demands should be adjusted or further evaluated. The
13 three conditions I evaluated were potential over-reporting,
14 power-only and non-consumptive uses, and potential
15 duplicates.

16 Beginning with likely over-reporting, some post-
17 14 right holders reported diverting over one million times
18 the face value and some senior right holders reported
19 diverting over 40,000 times a worse case water duty of
20 eight acre feet per acre.

21 To compensate for these obvious excess demands, I
22 worked formulas into the WRUDS workbook to make adjustments
23 to average monthly diversions for each water right, if
24 necessary.

25 For post-14 rights, demands exceeding their

1 respective face values were reduced to equal their face
2 values listed in eWRIMS. Each monthly demand was reduced
3 in proportion to its weight of the initial monthly average
4 diversion. Using the WRUDS worksheet, in Exhibit WR-68,
5 diversion of WRUDs used in supporting the May 1 notice, 584
6 post-14 rights, with uses other than power-only, had
7 average annual demands greater than their respective face
8 values.

9 Applying the adjustment formulas to these over-
10 reported values reduced their combined demand from
11 approximately 43 million to 380,000 acre feet.

12 Riparian and pre-15 claims do not have face
13 values associated with them, but some have net acreage
14 values reported in eWRIMS. Net acreage is the amount of
15 land, in acres, available for farming.

16 For the water rights that had reported net
17 acreages values greater than zero, the formulas would
18 evaluate whether the total acreage reported the total
19 average reported demand for the year exceeded a water duty
20 of eight acre feet per acre.

21 If exceeded, the formulas would reduce the annual
22 demand down to eight acre feet per acre, with monthly
23 demands weighted in the same proportion as the original
24 average monthly diversions.

25 Again, using the spreadsheet in Exhibit WR-68 as

1 an example, approximately 2,000 statements, not subject to
2 the Information Order, had net acreage values greater than
3 zero. Of these, 93 met the criteria to reduce demand.

4 Adjustments to these 93 diversions resulted in a
5 reduction of demand from approximately 173,000 to 51,000
6 acre feet.

7 To adjust for power-only demands, I reviewed each
8 water right in the dataset that listed power as a
9 beneficial use. I researched relevant permits, licenses,
10 annual reports, and initial and supplemental statements of
11 diversion and use in eWRIMS to confirm whether the right to
12 be considered a power-only diversion.

13 If confirmed, I would then determine whether it
14 was a direct diversion or a diversion to storage right. If
15 the right only had points of direct diversion, the use was
16 considered non-consumptive and the demands for each month
17 were set for zero.

18 If the right had a diversion to storage
19 component, the monthly demand was calculated to be the net
20 diversion, which is the amount diverted minus the amount
21 used. In ones where the amount used was greater than the
22 amount diverted, the demand was set to zero.

23 To evaluate for potential duplicate reporting, I
24 wrote a formula in WRUDS that would flag groups of water
25 rights that had identical owner names and equal monthly

1 average diversions in each of the 12 months. I then
2 reviewed relevant annual reports and statements in eWRIMS
3 for evidence that supported duplicate reporting.

4 If the evidence was compelling, such as the
5 diverter explicitly stated that the amounts are duplicates,
6 then all but one right were flagged as duplicates and their
7 monthly demands were set to zero.

8 As I mentioned previously, WRUDS is a living
9 document and changes are made to it as staff is made light
10 of new information. So, the overall demand used for the
11 May 1 notice will be somewhat different than what was used
12 for the June 12th notice.

13 Additional adjustments to the demand have been
14 made after identifying inconsistencies while working with
15 the data. For instance, Statement 8720 reported excessive
16 diversions for domestic and fire protection use. It
17 reported diversions of 138,000 acre feet for 2013, compared
18 to an average household domestic use of around 0.4 acre
19 feet. This was clearly an excessive amount and was
20 ultimately removed from the demand.

21 Demands were also adjusted to reflect stakeholder
22 comments, as presented in the testimony of Brian Coats.

23 After the initial data cleanup and adjustments
24 were made in WRUDS, I incorporated the 2014 demands,
25 provided by the diverters subject to the 2015 Information

1 Order, by replacing the monthly average demands originally
2 calculated in WRUDS with their respective 2014 values. If
3 2014 data were not reported, the original monthly average
4 values were still used for those diverters.

5 Once the demand dataset was complete, the next
6 step was to collect and organize water supply data, which I
7 maintained in a Microsoft Excel workbook. The workbook
8 contained daily FNF data reported on the CDEC website, and
9 monthly FNF forecast data provided by the Department of
10 Water Resources.

11 I collected data from the ten river stations
12 discussed by Mr. Coats, in his testimony.

13 To collect the daily FNF data, I would visit the
14 CDEC website several times a week, and copy new or updated
15 data into the supply workbook. Formulas in the workbook
16 would add the individual station values together to get
17 combined daily supply data for each analysis area.

18 For the monthly FNF forecasts, I compiled the 50,
19 90 and 99 percent exceedance values for the ten stations,
20 for May 1 -- from the May 1, 2015 Sacramento River and San
21 Joaquin River water forecast breakdowns into the supply
22 workbook. Only 50 percent exceedance values are provided
23 by the DWR for the Consumnes and Mokelumne Rivers.
24 Therefore, these 50 percent exceedance values were also
25 used in the 90 and 99 percent FNF forecast calculations.

1 Now that we have compiled the supply and demand
2 data, we are ready to build the graphs. The graphs
3 visually compare FNF supply to demand on a monthly basis.
4 If demand is greater than supply in a given month, a water
5 shortage is indicated.

6 These analyses are not intended to be hydrologic
7 models, but tools to compare supply and demand, and to find
8 areas of interest, and to estimate at what priority demand
9 would be greater than supply in a given month.

10 At this point, I would like to make the
11 correction to my written testimony. Due to the large
12 number of analysis iterations I've made, I lost track of
13 the timeline as I prepared my witness statement. Exhibit
14 WR-77 is the true and correct spreadsheet that produced the
15 resulting graph in Exhibit WR-58.

16 I used a June 9th, 2012 version of the WRUDS as
17 the starting point for the supply demand analysis in
18 Exhibit WR-77.

19 As I previously stated, WRUDS is a living
20 document and is updated as additional information is made
21 available. I reviewed earlier versions of WRUDS and
22 analysis workbooks, which were also provided in the PRA
23 response, and found that prior versions of WRUDS, through
24 June 12th, did not contain certain adjustments previously
25 requested by stakeholders, that should have been included.

1 After being made aware of this omission, I
2 updated WRUDS to include these adjustments.

3 I also removed rights that had been revoked or
4 inactivated since obtaining the February eWRIMS raw data
5 file, and whose demands should no longer be considered.

6 I saved this workbook as the June 15th, 2015
7 version of WRUDS, which is identified as Exhibit WR-51. I
8 did not keep a copy of the June 9th version of WRUDS.

9 Exhibit WR-53 contains a supply/demand graph
10 using the same analysis parameters that were used in
11 Exhibit WR-77, but includes demands from the June 15th
12 version of WRUDS, rather than the June 9th version. The
13 differences in demands are so minor that staff's
14 recommendations on timing of issuing the June 12th notice
15 would not have changed.

16 This concludes the correction to my written
17 testimony.

18 Each analysis workbook started with the WRUDS
19 dataset that was current at that time. For the analysis
20 associated with the May 1 notice, I used a version of WRUDS
21 dated May 1, 2015. For the analysis associated with the
22 June 12th notice, I used a June 9, 2015 version as the
23 starting point.

24 The area to be evaluated for each analysis was
25 then defined. For the May 1 graph, the Sacramento and

1 Legal Delta areas were considered. For the June 12th
2 graph, the Legal Delta area, San Joaquin area, and
3 Sacramento area, excluding the Cache Creek and Putah Creek
4 Watersheds, were considered.

5 I then created pivot tables to filter and
6 subtotal demands of the three water right types. For the
7 May 1 analysis, I created a riparian demand pivot table, a
8 pre-14 demand pivot table, and a post-14 pivot table.

9 For the June 12th analysis, only riparian and
10 pre-14 demands needed to be considered. For this scenario,
11 I created a Delta-combined, senior demand pivot table,
12 which combined riparian and pre-14 demands reported under
13 the Information Order, and were treated as riparian
14 demands.

15 I also created a Delta pre-14 pivot table, which
16 was set up to consider pre-15 only demands. Riparian and
17 pre-14 demand pivot tables were created for demands outside
18 the Legal Delta.

19 Using the filtering capabilities in the pivot
20 tables, I subtotaled the demands by area and water right
21 type, and compiled them into demand summary tables, as
22 shown in the following slide for the May 1 analysis.

23 The table shows the demands split up by three
24 water right types. And underneath each of those, the
25 demands are split out by analysis area. The table shows

1 that the Delta demand was prorated by the values in the FNR
2 ratio row, as described by Mr. Coats, in his testimony.

3 But the monthly demands are shown to the right
4 for the months of March through September.

5 After the monthly demands were calculated and
6 totaled, they were converted from monthly acre feet to
7 daily cubic feet per second, and then arranged so that they
8 could be plotted on the graph.

9 This next series of slides show how the demands
10 are stacked in order of priority type, using the data and
11 graph from Exhibit WR-75. The X axis represents the time
12 period from March 1 through September 30th, 2015. The Y
13 axis represents flow in cubic feet per second.

14 So first, the riparian demand is plotted. The
15 closer the demand is to the X axis, the higher the priority
16 it has. Next is the pre-14 demand, then comes some of the
17 post-14 demand. The post-14 demand here would represent
18 the more senior rights.

19 The next layer represents post-14 demands more
20 junior than the previous. And again, addition of more
21 junior post-14 demands. More junior post-14 demands until
22 all the demands are represented.

23 Now, the supply portions of the graph will be
24 constructed. For the forecasted FNFs, I started with the
25 water year forecast breakdown data and I compiled into the

1 CDEC supply table's workbook. Adjustments were then made
2 to account for minor tributary flow additions and return
3 flows.

4 The May 1 analysis, minor tributary flow
5 additions were added to the FNF forecast.

6 For the June 12th analysis, riparian return flows
7 from the San Joaquin, and riparian and pre-14 return flows
8 from the Delta were added to the forecasted full natural
9 flows, in addition to minor tributary flows.

10 This table shows the monthly minor tributary
11 additions in acre feet, applied for the May 1 analysis.
12 The bottom row shows the values in CFS.

13 This table shows the monthly additions in acre
14 feet applied for the June 12th analysis. The additions
15 were subtotaled, converted to CFS, then added to the
16 forecasted FNFs before plotting.

17 This next series of slides show how the demands
18 are stacked in order of priority type and then the supply
19 data values are added, this time using the data from
20 Exhibit WR-77, the supply/demand analysis in support of the
21 June 12th notice.

22 So, first, the riparian demand is plotted.
23 Again, the closer the demand is to the X axis, the higher
24 the priority it has. Next is the pre-14 demand, through
25 the 1902 priority. Next is the remaining pre-14 demand

1 junior to 1902.

2 Next, I added the adjusted 50 percent FNF
3 forecast points. The adjusted FNF points are plotted at
4 the mid-point of each month to represent a monthly value.

5 Next, I added the adjusted 90 percent FNF
6 forecast points. Then I added the daily FNF data through
7 June 7th, 2015.

8 Then I added supporting text and put the
9 finishing touches on the graph to publish, Exhibit WR-48,
10 the conditions at the time of the June 12th notice.

11 This same general process was done to create the
12 graph in Exhibit WR-47, the conditions at the time of the
13 May 1 notice.

14 Thank you. I will now turn the presentation over
15 to Paul Wells.

16 PAUL WELLS

17 Called by THE PROSECUTION TEAM

18 DIRECT EXAMINATION BY MR. TAURIAINEN

19 MR. WELLS: Good afternoon. My name is Paul
20 Wells. I have taken the oath. I am -- oh, let me get to
21 my slides, sorry. I am a Professional Engineer and a
22 Senior Water Resource Control Engineer with the State Water
23 Resources Control Board, the Division of Water Rights.

24 My written case in chief testimony is Exhibit WR-
25 15. I have reviewed Exhibit WR-15 and it is true and

1 correct to the best of my knowledge, and I do not have any
2 changes.

3 Most of my testimony relates to Phase 2 of the
4 BBID proceedings and I will discuss it during that phase.
5 But I will now briefly summarize the portions of my
6 testimony related to BBID's diversions after June 12th,
7 2015, as an offer of proof that BBID did divert during the
8 2015 unavailability period.

9 BBID self-reports its diversions every day, and
10 the diversion amounts are published daily on the Department
11 of Water Resources' CDEC website. There is a day lag
12 between reporting and posting, so the June 1st diversions
13 show up as June 2nd.

14 I reviewed the relevant CDEC data and found that
15 BBID diverted 1,887 acre feet from June 12th through June
16 24th. Sorry, that's June 13th through June 24th.

17 There is a difference from the ACL complaint
18 diversion amount because of the day lag in reporting, which
19 we weren't aware of until later.

20 According to BBID's reports of diversions for
21 recent years, BBID typically diverts 1,920 acre feet in any
22 12-day period in June. So, the CDEC diversion amount is
23 reasonable.

24 I have reviewed the information provided by
25 BBID's witnesses and in their subpoena response, and they

1 have not provided information indicating that any of the
2 diversions during this period should be deducted from that
3 reported on the CDEC website.

4 CO-HEARING OFFICER DODUC: Hold on a second,
5 please. Stop the clock.

6 Mr. Kelly?

7 MR. KELLY: Thank you, Board Member Doduc. I
8 have an objection. The first part of this proceeding is
9 supposed to be water availability. While I understand the
10 testimony and what Mr. Wells is trying to explain, I think
11 that's probably better part of Phase 2. And because it
12 deals with whether or not BBID diverted and then how much
13 water diverted was not going to be the subject of the water
14 availability portion of the hearing. And so, I just want
15 to get clarification on whether it's properly part of this
16 phase of the proceeding.

17 CO-HEARING OFFICER DODUC: Thank you, Mr. Kelly.
18 I was just wondering the same thing. Mr. Tauriainen, would
19 you like to respond to that?

20 MR. TAURIAINEN: Yeah, as Mr. Wells indicated,
21 we're just offering this as an offer of proof. The key
22 issues that no party objected to you skipping reading this
23 morning indicated that the questions for the Phase 1 of the
24 proceeding are whether the water that was diverted by the
25 two parties, during the relevant periods. And then there's

1 an "if any" in the key issues.

2 And I took that to mean that we should at least
3 make a basic offer of proof. Although, you have ruled that
4 parties can't move for directed verdicts or judgments on
5 that I, just out of an abundance of caution, had these --
6 Mr. Wells, and Ms. Bare after Mr. Wells, are going to be
7 making the same types of testimony regarding to the two
8 Phase 2 proceedings.

9 If the parties are willing to agree not to object
10 to us not putting on evidence about how much Byron Bethany
11 or West Side diverted during the relevant periods during
12 Phase 1, we can skip the rest of our Phase 1 presentation.

13 CO-HEARING OFFICER DODUC: And reserve it for
14 Phase 2?

15 MR. TAURIAINEN: That's correct.

16 CO-HEARING OFFICER DODUC: That's actually my
17 preference.

18 MR. TAURIAINEN: Okay.

19 CO-HEARING OFFICER DODUC: So, you're hereby
20 directed to do so.

21 MR. TAURIAINEN: I think that wraps up our Phase
22 1 presentation.

23 CO-HEARING OFFICER DODUC: Thank you very much.
24 How are the court reporters doing? Can we go through or do
25 you need a break? You're good, all right.

1 Because of the Prosecution Team's request, it was
2 back to the unavailability of Mr. -- I've forgotten his
3 name -- Nemeth tomorrow. I would request that -- actually,
4 since the first party to conduct cross is the BBID, West
5 Side, South Delta, Central Delta, Banta-Carbona ID and
6 Patterson ID has a huge chunk of time, let me ask, do any
7 of the other parties, meaning San Francisco, San Joaquin
8 Tributaries Authority, DWR, State Water Contractor, and
9 Westlands, do you have questions for Mr. Nemeth? This is
10 only Mr. Nemeth, who will not be returning tomorrow.

11 All right.

12 MS. ANSLEY: No, as to the State Water
13 Contractors.

14 CO-HEARING OFFICER DODUC: Not hearing any
15 takers, I will conclude that none of the other parties have
16 questions or cross-exam for Mr. Nemeth.

17 And now, I will turn cross-exam over to the Joint
18 Party of BBID, West Side, South Delta, Central Delta,
19 Banta-Carbona and Patterson, who have consolidated their
20 cross.

21 MR. KELLY: Thank you, Hearing Officer Doduc. If
22 I may, I know that there are court reporters here and I
23 think it would be good for us, personally, to talk amongst
24 ourselves as we prepare. Can we take a five-, ten-minute
25 break?

1 CO-HEARING OFFICER DODUC: You have not talked
2 among yourselves and coordinated before this?

3 MR. KELLY: We have. But in light of some of the
4 corrections that were made to the testimony, we just would
5 like a few minutes to confer. And maybe just take a couple
6 of minutes before we then transition into cross-
7 examination.

8 CO-HEARING OFFICER DODUC: All right, we'll take
9 a five-minute break and resume at 1:15.

10 MR. KELLY: Thank you.

11 (Off the record at 1:11 p.m.)

12 (On the record at 1:19 p.m.)

13 CO-HEARING OFFICER DODUC: Question, I don't see
14 Mr. Collins and Mr. George. Oh, they're in the audience.
15 At least Mr. George is in the audience.

16 Do you have cross-examination of Mr. George and
17 Mr. Collins?

18 MS. SPALETTA: They haven't put on their
19 testimony, yet, so we're assuming that's going to be Phase
20 2.

21 CO-HEARING OFFICER DODUC: They're indicated, at
22 least on their exhibits list, that their testimonies are
23 for Phase 1 and Phase 2 of West Side.

24 MS. SPALETTA: I understand that, but the
25 Prosecution Team apparently elected not to enter their

1 testimony. We can confirm that.

2 CO-HEARING OFFICER DODUC: Is that correct?
3 Please confirm.

4 MR. TAURIAINEN: That's correct. Again, we
5 listed Phase 1 on the exhibit list out of an abundance of
6 caution. But the Phase 1 witnesses -- actually, now, with
7 the exclusion of Mr. Wells and Ms. Bare are just the four
8 seated there, now.

9 CO-HEARING OFFICER DODUC: All right. We'll have
10 that on the record. Thank you. You may proceed, then.

11 MS. SPALETTA: Hearing Officers, if it would be
12 okay, we're thinking that, just from a logistics stand
13 point it may make sense to go ahead and cross-examine Mr.
14 Nemeth, and get any redirect and recross done with him so
15 that he can sit down and not have any need to come back
16 tomorrow.

17 CO-HEARING OFFICER DODUC: An excellent
18 suggestion, thank you.

19 STEVEN E. NEMETH

20 CROSS-EXAMINATION BY MS. SPALETTA
21 FOR WEST SIDE IRRIGATION DISTRICT,
22 SOUTH DELTA WATER AGENCY,
23 CENTRAL DELTA WATER AGENCY

24 MS. SPALETTA: This is kind of an awkward setup.
25 But good afternoon, Mr. Nemeth. My name is Jennifer

1 Spaletta. We met before, at your deposition. Thank you
2 for appearing today. I do have a few questions to follow
3 up on --

4 CO-HEARING OFFICER DODUC: Actually, if I may
5 interrupt and request that Mr. Nemeth move further down,
6 that way it won't be as awkward for you.

7 MS. SPALETTA: That would be wonderful.

8 CO-HEARING OFFICER DODUC: We would not want you
9 to be uncomfortable.

10 MS. SPALETTA: All right, good afternoon, Mr.
11 Nemeth. My name is Jennifer Spaletta, as I said. I'm here
12 asking you questions today on behalf of Central Delta,
13 South Delta, West Side Irrigation Districts.

14 And the first thing I wanted to have you do is
15 just clarify that your work at DWR involves the calculation
16 of actually three different types of full natural flows.
17 There's the forecasted full natural flow, the actual daily
18 calculated full natural flow, and then the monthly
19 unimpaired flow. Can you just explain to us what the
20 difference is between those three things.

21 MR. NEMETH: The daily full natural flow is the
22 expected -- no, is the actual full natural flow that has
23 occurred over a 24-hour period.

24 The monthly full natural flow, in many cases, is
25 calculated with the same method and it is for a monthly

1 period, going from the end of one month to the end of the
2 following month.

3 Part of the water supply forecasting effort that
4 I help with involves calculating the full natural flow up
5 to the date of forecast. And thereafter, the full natural
6 flows made on a monthly basis are expected.

7 MS. SPALETTA: And then, is there an after-the-
8 fact calculation of the monthly unimpaired flow?

9 MR. NEMETH: In some cases there is because some
10 of the observed flows upon which the full natural flow
11 calculations are based come from the USGS, the US
12 Geological Survey. And the following spring is a time when
13 they publish their final monthly values. And it is during
14 that time that I will look into what their final monthly
15 values are, enter those into CDEC, and recalculate the
16 monthly full natural flows.

17 MS. SPALETTA: And so it occurs, then, that once
18 you calculate the monthly full natural flows, they can
19 actually be different than the dailies, if you're corrected
20 any gauge errors or other errors that occurred in the
21 dailies. Correct?

22 MR. NEMETH: The equations for the dailies and
23 the monthlies for some of the rivers are identical. In the
24 end, there could be a slight difference between the sum of
25 the daily values and the monthly value.

1 MS. SPALETTA: And isn't it also true that the
2 after-the-fact monthly calculation can be different than
3 the forecasted full natural flows?

4 MR. NEMETH: Yes, unless our forecast is
5 absolutely perfect to the nearest acre foot.

6 MS. SPALETTA: I'd like to mark West Side Exhibit
7 181.

8 Can I approach? It's not.

9 CO-HEARING OFFICER DODUC: It's a cross-
10 examination exhibit.

11 (Exhibit WSID-181 was marked for
12 identification.)

13 MS. SPALETTA: Mr. Nemeth, I pulled the document
14 that's been marked as West Side Exhibit 181 off of DWR's
15 CDEC website, from the monthly flow-out report. Do you
16 recognize this information?

17 MR. NEMETH: Yes.

18 MS. SPALETTA: And does this provide the after-
19 the-fact monthly, full unimpaired flow calculations for the
20 Sacramento Basin stations and the San Joaquin Basin
21 stations, as well as others?

22 MR. NEMETH: Yes, this is the monthly flow-out
23 report for May 2015. And I am responsible for this.

24 MS. SPALETTA: Now, I noticed that on this report
25 the monthly totals are expressed in terms of thousand acre

1 feet per month. So for example, on page 1, for May, you
2 see the Sacramento River above Bend Bridge, which is the
3 last item on the page, shows a monthly total of 280,000
4 acre feet per month?

5 MR. NEMETH: Correct, for that month.

6 MS. SPALETTA: And then if we turn to the next
7 page, we see the other stations for the Sacramento River
8 with a total for the Sacramento River of -- or Sacramento
9 Basin, I should say, of 506,400?

10 MR. NEMETH: Yes.

11 MS. SPALETTA: And then the total for the San
12 Joaquin Basin being 360,900 for May?

13 MR. NEMETH: Yes.

14 MS. SPALETTA: My next exhibit is going to be
15 marked as West Side Exhibit 182.

16 (Exhibit WSID-182 was marked for identification.)

17 MS. SPALETTA: So, to save all of us from having
18 to flip through this lengthy document as we go here, the
19 next couple of weeks, I went ahead and summarized the acre
20 feet from the months for the Sacramento and the San Joaquin
21 Watershed from Exhibit 181, and put it on Exhibit 182. I
22 just wanted you to confirm for me that that summary looks
23 accurate.

24 MR. NEMETH: Well, I'm looking at the report you
25 provided me a moment ago and it looks like the 506,000

1 number is correct, and the 306,000 number is correct for
2 May.

3 MS. SPALETTA: And then, if we were to convert
4 those monthly acre feet numbers into a CFS figure, is the
5 generally accepted way to do it to simply divide by 30, and
6 then divide again by 1.98?

7 MR. NEMETH: I would divide by the number of days
8 in the month, whether it's 30 or not, 30 or 31, to give me
9 the acre feet per day. And then, multiple that number by
10 12.1 and divide that by 24, which approximates the 1.98
11 ratio you mentioned.

12 MS. SPALETTA: Okay, very good. So, I actually
13 did it the rougher way on here. We might need to do a
14 revised exhibit that does the calculation. But thank you
15 for explaining it to me.

16 Now, I wanted to confirm with you that when you
17 put together the full natural flow, both the forecast and
18 the after-the-fact monthly numbers, and even the daily
19 numbers, that's dealing with the amount of flow you would
20 expect at the measurement station based on what's occurring
21 upstream naturally, correct? It doesn't include any flow
22 that enters the river below the measurement station?

23 MR. NEMETH: Yes, the forecasts and the full
24 natural flows that I calculate are at the Foothill location
25 and don't include anything below that point.

1 MS. SPALETTA: And then, I also wanted to confirm
2 that the data that you used to compute the forecasted full
3 natural flows, some of that actually comes from other
4 parties, right. Other parties provide you with information
5 on the daily full natural flows. Other parties provide you
6 with information on changes in storage or other things that
7 are happening upstream in order for you to make those
8 calculations. Correct?

9 MR. NEMETH: Well, if you're referring to other
10 parties as utilities and water agencies then, yes, I do get
11 data from them.

12 MS. SPALETTA: And the daily full natural flows
13 for the San Joaquin River, the Merced River and the
14 Tuolumne River, those actually are not computed by DWR,
15 they're computed by other agencies, correct?

16 MR. NEMETH: Can you repeat those three?

17 MS. SPALETTA: Sure. The San Joaquin River, the
18 Merced River and the Tuolumne River.

19 MR. NEMETH: Yes, I get those daily FNF values
20 from other agencies.

21 MS. SPALETTA: I don't have any other questions
22 for you, Mr. Nemeth, thank you.

23 MR. KELLY: No follow up for BBID. Ms. Spaletta
24 covered my questions.

25 CO-HEARING OFFICER DODUC: What about the other

1 members of this joint party, any additional cross for Mr.
2 Nemeth?

3 MS. SPALETTA: I do have just one thing that
4 someone caught. There was a transposition on my attempt to
5 do a summary exhibit. It says, for San Joaquin Watershed,
6 it says 306,900. It should say 360,900. Correct, for May?

7 CO-HEARING OFFICER DODUC: Does that complete
8 your cross for Mr. Nemeth?

9 MS. SPALETTA: I'd like him to answer the
10 question and then it will, yes.

11 CO-HEARING OFFICER DODUC: Oh.

12 MR. NEMETH: Yes, the full report says 360.9 and,
13 yes, your sheet that you gave me, that summarizes the five
14 months, has Many as 306.

15 MS. SPALETTA: So, fixing that, we'd put 360,900?

16 Thank you.

17 CO-HEARING OFFICER DODUC: Does that complete
18 your cross of Mr. Nemeth?

19 MS. SPALETTA: It does.

20 CO-HEARING OFFICER DODUC: Do you wish to
21 redirect and, if so, for what purpose?

22 MR. TAURIAINEN: No, no need for redirect.

23 CO-HEARING OFFICER DODUC: In that case, we are
24 done with Mr. Nemeth. Thank you very much.

25 You may now continue your cross of the other

1 witnesses.

2 KATHY MROWKA

3 CROSS-EXAMINATION BY MR. KELLY

4 FOR BYRON BETHANY IRRIGATION DISTRICT

5 MR. KELLY: Ms. Mrowka, my name's Dan Kelly. I'm
6 General Counsel for the Byron Bethany Irrigation District.
7 And I'm going to be asking you some questions, and then
8 Ms. Spaletta and Ms. Zolezzi may have some follow up.

9 In your testimony today, and in other documents
10 that I've seen, I see that you've used the word "staff" a
11 lot. Like when you said that the water availability
12 analysis was conducted, it was conducted by staff. And
13 that when the notices went out, they were staff findings.
14 Is that a correct representation of your testimony?

15 MS. MROWKA: Yes, it is.

16 MR. KELLY: So, then are you considered staff at
17 the State Water Resources Control Board?

18 MS. MROWKA: I consider myself staff. I'm not in
19 the Executive Office, nor am I in the Board level.

20 MR. KELLY: John O'Hagan, is he staff?

21 MS. MROWKA: John is.

22 MR. KELLY: Tom Howard, is Tom Howard staff?

23 MS. MROWKA: Tom Howard's in the Executive
24 Office.

25 MR. KELLY: So, he would not be staff, in your

1 view?

2 MS. MROWKA: He's in the Executive Office.

3 MR. KELLY: So, would he be staff at the State
4 Water Board, in your view?

5 MS. MROWKA: In my view, he serves as one of my
6 supervisors.

7 MR. KELLY: Well, John O'Hagan is your
8 supervisor, right?

9 MS. MROWKA: Correct.

10 MR. KELLY: But you said that he was staff. And
11 so, I want to know if you consider Mr. Howard to also be
12 staff?

13 MS. MROWKA: Mr. Howard is one of the Executive
14 Officers and, as such, I don't know that he would be
15 considered staff in certain matters, but other matters he
16 may be considered staff. It would depend on his role in
17 that matter.

18 MR. KELLY: And can you explain to me how his
19 role would change from staff to something else? Can you
20 give me an example?

21 MS. MROWKA: If I was working with Mr. Howard on
22 a matter, directly with him, then I would -- we may be
23 working as staff, together, on the matter.

24 In matters where there's a delegated authority
25 and we're abiding by strict rules regarding that delegation

1 of authority, then he may not be sitting as staff in that
2 case.

3 MR. KELLY: How about Les Grober. Is Les Grober
4 staff?

5 MS. MROWKA: Les Grober sits in the same
6 equivalent role as Mr. O'Hagan.

7 MR. KELLY: So, he would be staff?

8 MS. MROWKA: Yes.

9 MR. KELLY: Is Les Grober, if you know, a member
10 of the Prosecution Team or is he a member of the Hearing
11 Team?

12 MS. MROWKA: Mr. Grober is appearing on behalf of
13 the Prosecution Team.

14 MR. KELLY: Do you remember me asking you that
15 question during your deposition?

16 MS. MROWKA: Yes.

17 MR. KELLY: Do you remember, do you recall what
18 your answer was during the deposition?

19 MS. MROWKA: I don't recall.

20 MR. KELLY: Ms. Mrowka's deposition is WSID-152.

21 At page 167, at line 16, I asked you a question
22 about who was on your side of the wall. And then I asked
23 who was on the other side of the wall that you can't
24 communicate with.

25 Beginning on line 23, you said, "I can't talk to

1 and don't talk to Les Grober because he is the Assistant
2 Deputy for the hearing side of the house".

3 Was that your testimony, your sworn testimony at
4 your deposition?

5 MS. MROWKA: Yes, it was. And subsequent to
6 that, because that deposition was taken very early in this
7 process, we had asked for Mr. Grober's assistance on the
8 prosecution side.

9 MR. KELLY: I'd like to strike the second half of
10 that answer as nonresponsive. I simply asked if that was
11 her sworn testimony in her deposition.

12 CO-HEARING OFFICER DODUC: Noted.

13 MR. KELLY: So, Mr. Grober is now a member of the
14 Prosecution Team?

15 MS. MROWKA: Yes, he is.

16 MR. KELLY: And you said that he supervises the
17 hearing staff?

18 MS. MROWKA: In general, although he's not
19 participating in that function in this matter, since we
20 asked him to join the Prosecution Team.

21 MR. KELLY: When did you ask him to join the
22 Prosecution Team?

23 MS. MROWKA: I do not know. My attorney asked
24 for his assistance. I didn't personally communicate with
25 him on that.

1 MR. KELLY: So, you don't know the date that Mr.
2 Grober became a member of the Prosecution Team?

3 MS. MROWKA: I wasn't a party to that
4 conversation.

5 MR. KELLY: Can I approach the witness with an
6 exhibit?

7 CO-HEARING OFFICER DODUC: Yes.

8 MR. KELLY: This is being marked as BBID Exhibit
9 400.

10 (Thereupon Exhibit BBID-400 was marked for
11 identification.)

12 MR. KELLY: Ms. Mrowka, do you recognize what's
13 been marked as BBID-400?

14 MS. MROWKA: I see that it's an e-mail, which I
15 had received a cc of.

16 MR. KELLY: And that e-mail is from Les Grober?

17 MS. MROWKA: It is.

18 MR. KELLY: So, do you know whether Les Grober
19 participated in developing the water availability analysis
20 that was implemented in 2015?

21 MS. MROWKA: He did not do so.

22 MR. KELLY: What was his role in the water
23 availability analysis for 2015?

24 MS. MROWKA: To the best of my knowledge, Mr.
25 Grober was not involved in the water availability analysis

1 performed for the drought analysis work. Mr. Grober also
2 has other functions in the Division related to Delta
3 information. And my staff had current information in their
4 databases regarding the water demands and uses of parties.
5 So, we may have been discussing with him about demands and
6 uses.

7 MR. KELLY: As part of the water availability
8 analysis?

9 MS. MROWKA: Mr. Grober did not direct any of the
10 water availability work. Mr. O'Hagan and myself did.

11 MR. KELLY: You indicated that you were asking
12 information on, I believe you said supply and demand. Was
13 that for the water availability analysis that you and your
14 staff were conducting?

15 MS. MROWKA: What I indicated was that my staff
16 had the most current database information on demand data
17 that they had compiled it to use for our work in the
18 drought curtailment issues. And that, you know, others in
19 the Division were aware that we had very current
20 information.

21 MR. KELLY: So, Mr. Grober was not involved at
22 all in the water availability analysis for 2015?

23 MS. MROWKA: To the best of my knowledge, no.

24 MR. KELLY: Thank you. I'm going to show you an
25 exhibit that's being marked as BBID-401.

1 (Thereupon Exhibit BBID-401 was marked for
2 identification.)

3 MR. KELLY: Ms. Mrowka, were you here for the
4 Prosecution Team Opening Statement?

5 MS. MROWKA: Yes, I was.

6 MR. KELLY: And did you hear Mr. Tauriainen
7 explain that the reason the Prosecution Team initiated the
8 enforcement action against BBID was because of statements
9 made in a San Francisco newspaper on June the 25th?

10 MS. MROWKA: I heard him make that statement.

11 MR. KELLY: I want you to take a look at what's
12 been marked as BBID-401. Do you recognize this e-mail and
13 the letter that's attached to it?

14 MS. MROWKA: I do.

15 MR. KELLY: And by this e-mail, on Tuesday, June
16 the 23rd, of 2015, to 2:40 in the afternoon, Byron Bethany
17 Irrigation District caused this letter to be sent to Mr.
18 Howard. Isn't that what this e-mail says.

19 And then 19 minutes later Mr. Howard sent it to
20 you, Mr. O'Hagan, Ms. Evoy and Ms. Trgovich, correct?

21 MS. MROWKA: Yes.

22 MR. KELLY: And then five minutes later, you
23 reported to somebody named Taro Murano that "Tom wanted us
24 to enforce ASAP". Isn't that correct?

25 MS. MROWKA: Yes.

1 MR. KELLY: And so, the decision to bring the
2 enforcement action against the Byron Bethany Irrigation
3 District wasn't made on June the 25th, as a result of
4 something that was said in the newspapers, was it?

5 MS. MROWKA: No, it was made based on information
6 we received from that newspaper article.

7 MR. KELLY: On the 25th?

8 MS. MROWKA: That we were looking at the issue
9 and determining whether or not we should bring enforcement
10 action. We're going to look at all the factors that would
11 help to ascertain whether we should bring enforcement
12 action. And especially with respect to whether the
13 violation appears to be continuing.

14 MR. KELLY: Ms. Mrowka --

15 MS. MROWKA: And so, the newspaper article did
16 inform our actions.

17 MR. KELLY: Ms. Mrowka, wasn't the decision to
18 enforce against BBID made on June the 23rd, at 3:04 p.m.?

19 MS. MROWKA: We received information from Mr.
20 Howard that he would like us to enforce. However, you
21 know, the enforcement task is delegated to the Prosecution
22 Branch, and we had to look and make sure that we were going
23 to take action. You're talking about a time differential
24 of two days. In two days, we don't have everything line up
25 and we don't have -- we're still looking at facts to decide

1 how we're going to move on a matter. And then, we looked
2 at the newspaper article and that helped to inform our
3 decision making process.

4 MR. KELLY: It seemed like somebody was able to
5 make that decision in 24 minutes, at the State Water Board,
6 doesn't it?

7 MS. MROWKA: I don't know how long Mr. Howard
8 looked at this issue. I couldn't tell you that.

9 MR. KELLY: In your testimony, you testified that
10 the units that you manage are responsible for the
11 development of regulations at the State Water Board. Is
12 that an accurate --

13 MS. MROWKA: That is. We just recently did the
14 Water Reporting and Measurement Regulation.

15 MR. KELLY: Were any of your staff involved in
16 the development of regulations in 2014, for the curtailment
17 of post-1914 water rights?

18 MS. MROWKA: As I said in my testimony, I didn't
19 have this position during most of 2014. I stepped into
20 this role on September 11th, 2014. So, I can't answer that
21 very well.

22 MR. KELLY: Subsequent to your assuming the
23 position you're currently in, were you involved at all in
24 the development of regulations for the curtailment of water
25 rights?

1 MS. MROWKA: No.

2 MR. KELLY: Are you aware of any regulations that
3 were in existence, any State Water Resources Control Board
4 regulations that were in existence providing for the
5 curtailment of water rights in 2015?

6 MS. MROWKA: For 2015, no. Except insofar as
7 there were ones relating to fishery-based curtailments.
8 There were regulations pertaining to those.

9 MR. KELLY: And those would have been Deer, Mill
10 and Antelope Creeks, I believe?

11 MS. MROWKA: That's correct.

12 MR. KELLY: Other than regulations for the
13 curtailment to protect fisheries on those three
14 tributaries, do you know of any regulations that were in
15 effect at the State Water Resources Control Board for the
16 curtailment of water rights?

17 MS. MROWKA: We had the Information Order type
18 regulations that were for the purpose of obtaining
19 information.

20 MR. KELLY: But they didn't provide for the
21 curtailment of water rights though, did they?

22 MS. MROWKA: No.

23 MR. KELLY: There were some statements in the
24 Opening Statement of the Prosecution Team, and I didn't
25 hear any testimony in this respect, so I need to understand

1 something. Through this water availability analysis that
2 you conducted and in issuing the Administrative Civil
3 Liability Complaint, BBID is only accused of taking water
4 that was needed for appropriators senior to BBID and
5 riparian water right holders. Isn't that correct?

6 MS. MROWKA: That is correct.

7 MR. KELLY: So, there's nothing contained in the
8 Administrative Civil Liability Complaint, and certainly
9 nothing that you've provided, that would suggest that BBID
10 had taken any stored project water, correct?

11 MS. MROWKA: That issue was not evaluated in
12 determining whether there was sufficient supply to meet
13 demands.

14 MR. KELLY: And so, you're not seeking to
15 establish that BBID took stored water, correct?

16 MS. MROWKA: The issue was simply not a part of
17 what we evaluated. And because we looked at full natural
18 flow and full natural flow does not include the stored
19 water element.

20 MR. KELLY: Who decided what water supplies would
21 be included in the water availability analysis?

22 MS. MROWKA: Again, I assumed this role after the
23 initial 2014 work. But what we did look at, and you can
24 ask Jeff Yeazell and Brian Coats, they were there for 2014
25 and 2015 and they can give you a better picture.

1 MR. KELLY: So, then, you were not involved in
2 the decisions on which supplies to include. Is that a fair
3 statement?

4 MS. MROWKA: I was not involved in those
5 decisions in 2014, which is when the modeling initiated.
6 In 2015, I was involved in the decisions regarding
7 refinements of the modeling.

8 MR. KELLY: What decisions were you involved in
9 with respect to refinements in the modeling? And let me
10 back up. I thought I heard testimony from somebody that
11 this really wasn't a model, that it was a spreadsheet.
12 You're using the word "modeling". And so, we seem to be
13 getting different characterizations of what the effort was.
14 Mr. Tauriainen referred to this as "simple math".

15 In your view, was the analysis that was conducted
16 a model?

17 MS. MROWKA: The analysis was a series of
18 calculations and, oftentimes, people use lingo for a series
19 of calculations saying "the model". It's lingo.

20 MR. KELLY: Do you understand it to be a model?

21 MS. MROWKA: I would characterize it as -- a
22 model can -- yes, I would say it's a -- I'm using lingo and
23 my lingo would be a model, or the derivations, or the
24 spreadsheet-based analysis. All of those are very
25 equivalent in my mind.

1 MR. KELLY: Mr. Tauriainen referred to it as "a
2 budget". Are you familiar with budgets?

3 MS. MROWKA: Yes, I am.

4 MR. KELLY: Would you consider a budget to be a
5 model?

6 MS. MROWKA: Depending on -- you know, it depends
7 on what I'm looking at.

8 MR. KELLY: A budget. Would you consider a
9 budget to be a model?

10 MS. MROWKA: It models my household expenses.

11 MR. KELLY: Okay. Do you know whether any return
12 flows were included in what you're referring to as a model?

13 MS. MROWKA: That is one of the adjustments that
14 was made in 2015.

15 MR. KELLY: What return flows were included?

16 MS. MROWKA: Again, I'd prefer, if you're talking
17 about the specific numbers, to talk to the persons that did
18 that particular work.

19 MR. KELLY: Okay, one of the things I'm trying to
20 understand is you had testified that you had become
21 familiar with the --

22 MS. MROWKA: Yeah.

23 MR. KELLY: -- supply and demand analysis. And
24 in fact, you actually incorporated Mr. Coats' and Mr.
25 Yeazell's testimony into yours. And so, I'm trying to

1 understand that if you incorporated and you became familiar
2 with it, what your level of understanding is about what the
3 model did, what the inputs were and what the outputs were.

4 So, you're telling me, if I have any specific
5 questions about the inputs or the outputs, or how the model
6 was run, I should ask Mr. Coats or Mr. Yeazell?

7 MS. MROWKA: Yes.

8 MR. KELLY: Thank you. To your knowledge does
9 the water availability analysis look at any particular
10 diversion, in any geographical location?

11 MS. MROWKA: It looks at all of the diverters in
12 those geographical locations that were highlighted in Mr.
13 Coats' presentation.

14 MR. KELLY: But it only looks at them on a
15 priority basis, correct?

16 MS. MROWKA: Correct. It looks at them, and
17 based on their relative priority of the rights.

18 MR. KELLY: As compared to each other, only based
19 on priority, not on geography, correct?

20 MS. MROWKA: Well, they are placed within the
21 model -- within the spreadsheets based on where they are
22 located. Because if somebody is located in the San Joaquin
23 River, we're well aware of that when we do our evaluation
24 of their impacts on other right holders.

25 MR. KELLY: And so, do you know which

1 geographical area BBID was included within for the purpose
2 of curtailments? Do you know? If, Ms. Mrowka, I prefer
3 that if you know, you answer the question. If you don't
4 know, we'll ask Mr. Coats. I'm just curious as to whether
5 you know?

6 MS. MROWKA: Yes, I would prefer you ask Mr.
7 Coats.

8 MR. KELLY: Okay, thank you.

9 Ms. Mrowka, did you conduct any analysis of the
10 availability of water at BBID's point of diversion?

11 MS. MROWKA: That is a task which is delegated to
12 staff to do.

13 MR. KELLY: Is the answer to that no? Did you
14 conduct any analysis --

15 MS. MROWKA: I did not personally conduct such
16 analysis.

17 MR. KELLY: Thank you.

18 I also noted in your written testimony, and you
19 repeated it here orally, that you testified that based on
20 the Division's drought water availability supply and demand
21 analysis that water was not available for West Side or for
22 BBID. Is that correct?

23 MS. MROWKA: That is correct.

24 MR. KELLY: And so, the lack of availability is
25 based solely on the water supply analysis that staff

1 conducted, the watershed-wide analysis?

2 MS. MROWKA: Yes. And as you heard Mr. Nemeth
3 say, we brought in information from the Department of Water
4 Resources, we used the 1977 Drought Report. We used all
5 available reporting types of information that we had in
6 order to assure ourselves of a good quality product.

7 MR. KELLY: I'm going to show you what's being
8 marked as BBID-402.

9 (Thereupon Exhibit BBID-402 was marked for
10 identification.)

11 MR. KELLY: Do you recognize what's been marked
12 as BBID-402?

13 MS. MROWKA: Yes, I do.

14 MR. KELLY: And BBID-402 is an e-mail chain
15 beginning on June the 16th, of 2015, and then eventually
16 running to August the 3rd, of 2015. And the initial e-mail
17 is from you, to several people within the Division of Water
18 Rights, with respect to what's called here, "The State
19 Water Contractors Water Rights Complaint". Is that
20 correct?

21 MS. MROWKA: Yes, it is.

22 MR. KELLY: And were you here for my Opening
23 Statement?

24 MS. MROWKA: Yes, I was.

25 MR. KELLY: And did you see one of the slides

1 that I had on the screen, that I indicated was from the
2 State Water Contractors complaint?

3 MS. MROWKA: I did.

4 MR. KELLY: Did you recognize that as one of the
5 slides that was contained in that complaint?

6 MS. MROWKA: I did.

7 MR. KELLY: And after you sent that complaint,
8 that contained that information, you sent it to Barbara
9 Evoy, John O'Hagan, Victor Vasquez, Diane Riddle, Les
10 Grober, and Michael George. That Barbara Evoy responded to
11 you, to have you work with Les and Diane. Do you know that
12 to be Les Grober and Diane Riddle?

13 MS. MROWKA: I do.

14 MR. KELLY: And the modelers, to see if it's an
15 approach that can be supported.

16 And then, Diane e-mailed Rich Satkowski, who I
17 believe is on the Hearing Panel, to assign someone to
18 review and assess the basis of complaint, correct?

19 MS. MROWKA: That is correct.

20 MR. KELLY: And then Mr. Satkowski responded to
21 or e-mailed Larry Lindsay, on August the 3rd, talking about
22 a discussion about the complaint, correct?

23 MS. MROWKA: Yes.

24 MR. KELLY: And so, you had that information as
25 well, didn't you? The information contained in the State

1 Water Contractor's complaint that dealt with water
2 availability, particularly in the Delta?

3 MS. MROWKA: Yes. On our complaints process,
4 when we receive a complaint, we have to vet the complaint
5 and we also ask parties to respond.

6 This particular complaint has never gotten that
7 far. They didn't include an attached list of the parties
8 that were alleged to be committing the issue in the
9 complaint. And so, I could never send it out to a main
10 list to get comments. So, it hasn't gotten anywhere.

11 MR. KELLY: Well, Barbara Evoy's e-mail to you,
12 on June the 16th, says, "The approach is along the lines of
13 what we had proposed to look at in our 'Delta Pool',
14 proposal of December". Do you know what that proposal was?

15 MS. MROWKA: I am not privy to the Delta
16 discussions. I don't know.

17 MR. KELLY: Well, that e-mail was from Barbara to
18 you and John O'Hagan. Was she talking to somebody else, do
19 you know, then?

20 MS. MROWKA: Barbara frequently has conversations
21 with John regarding the Division and management of Division
22 resources, things like that. And so, I can't speak to a
23 discussion, if she had one with John. I didn't personally
24 have one with Barbara, other than this little bit in this
25 e-mail, with respect to the Delta pool.

1 MR. KELLY: Do you know whether or not there was
2 any consideration, in conducting the water availability
3 analysis, of that concept?

4 MS. MROWKA: I don't know which unit you're
5 referring to. What portion of the Division.

6 MR. KELLY: With you and your staff's water
7 availability analysis, was there any consideration of the
8 Delta pool proposal that was considered, apparently, that
9 prior December.

10 MS. MROWKA: We are not a Delta modeling unit.
11 That's why this e-mail exists is because we don't have the
12 basics -- we don't do Delta modeling as a general process
13 in my specific unit. We do complaints type issues. We do
14 the drought work. And so, we just lacked the underlying
15 information to assess the State Water Contractor complaint,
16 and that's why this discussion occurred.

17 MR. KELLY: Was there ever any discussion with
18 and Mr. O'Hagan, or you and your staff, about consideration
19 of the water that was present in the Delta, as part of your
20 water availability analysis?

21 MS. MROWKA: Because the model originated in
22 2014, I can't speak with certainty what discussions
23 occurred in 2014, before I came to the Unit. I only know
24 as to 2015, and at that point we were making refinements
25 based on return flow and issues of that nature. We didn't

1 make any judgment calls with respect to adding an element
2 on Delta pool. We made none.

3 MR. KELLY: So is the answer then that, no, you
4 didn't consider any of the water present in the Delta
5 channels as part of the analysis, in 2015?

6 MS. MROWKA: What we considered in the analysis
7 was traditionally engineering, water flowing down the
8 stream system. That's what we considered.

9 MR. KELLY: And so, if I --

10 CO-HEARING OFFICER DODUC: Is the answer no? Ms.
11 Mrowka, I would ask you to please answer the question as
12 they're directly asked.

13 MS. MROWKA: No.

14 MR. KELLY: And if I wanted to understand whether
15 or not that was considered and who made those decisions in
16 2014, who would I need to talk to?

17 MS. MROWKA: You would need to ask Mr. O'Hagan.

18 MR. KELLY: Mr. O'Hagan. Did Mr. O'Hagan make
19 decisions with respect to the water availability analysis
20 that was conducted in 2014 and 2015?

21 MS. MROWKA: He was part of our team in 2015.

22 CO-HEARING OFFICER DODUC: Is that a yes?

23 MS. MROWKA: That is.

24 MR. KELLY: I want to show you, next, what's been
25 marked as BBID Exhibit 403.

1 (Thereupon Exhibit BBID-403 was marked for
2 identification.)

3 MR. KELLY: Do you recognize what's been marked
4 as Exhibit BBID-403?

5 MS. MROWKA: Yes.

6 MR. KELLY: Ms. Mrowka, do you remember me asking
7 you questions about this graph at your deposition?

8 MS. MROWKA: I recall that you asked questions
9 about a graph.

10 MR. KELLY: Based upon the water availability
11 analysis that you and your staff conducted in 2015 -- well,
12 let me tell you what my understanding is and you can
13 correct me if I'm wrong. That if there were demands that
14 were above the full natural flow line, that that meant that
15 those demands could not be met by full natural flow. Is
16 that a correct summary of what the graph shows?

17 MS. MROWKA: Yes.

18 MR. KELLY: And so, when Mr. Tauriainen, in his
19 opening, and when Mr. Coats showed graphs on the screen
20 that showed the full natural flow dipping below the 1914
21 demand, and dipping below the 1902 demand, that was that
22 same concept, that BBID's priority was above that full
23 natural flow line. And that establishes that there was
24 insufficient full natural flow to satisfy that right,
25 correct?

1 MS. MROWKA: Yes.

2 MR. KELLY: And so, now, if we take a look at
3 this graph, what's been marked as BBID-403, and if I pick
4 the month of March of 2015, and that would be the bottom
5 left-hand. The dates run monthly along the bottom axis, is
6 that correct? And then the -- up the left-hand side is
7 time-averaged CFS, correct?

8 MS. MROWKA: Correct.

9 MR. KELLY: And so, between March the 1st of 2015
10 and April the 1st of 2015, the full natural flow line on
11 this graph runs anywhere from, it appears, about 15,000 CFS
12 down to just below 10,000 CFS. Is that reasonably
13 accurate?

14 MS. MROWKA: The blue daily full natural flow
15 line does that.

16 MR. KELLY: And is the blue daily full natural
17 flow line the line that we should look at for curtailments
18 for unavailability?

19 MS. MROWKA: When we are looking at making
20 decisions, we look at what has already occurred, which is
21 that daily full natural flow line, and then we project
22 forward as to what we expect to occur, which is those other
23 forecasted lines. And so, we look at both pieces of
24 information.

25 MR. KELLY: And demands below that line can be

1 met with full natural flow. Demands below that line cannot
2 be met, correct?

3 MS. MROWKA: Correct.

4 MR. KELLY: And so, for the month of March, in
5 2015, it appears to me, from looking at this graph, that
6 there was insufficient full natural flow to satisfy any
7 water rights that exceeded the 15,000 CFS limit. Is that
8 what this graph shows?

9 MS. MROWKA: Yes.

10 MR. KELLY: And all of the orange is post-1914
11 demand. Right, that's the demand that your staff analyzed
12 and plotted on these graphs, correct?

13 MS. MROWKA: The kind of burnt orange. There's
14 two oranges on the graph.

15 MR. KELLY: So, the darker orange. And so, all
16 of the demand, at least between 15,000 CFS and 50,000 CFS,
17 for the month of March, could not have been met with full
18 natural flow, correct?

19 MS. MROWKA: Yes.

20 MR. KELLY: But there was no Unavailability
21 Notice sent out yet, right?

22 MS. MROWKA: Correct.

23 MR. KELLY: In your opinion, in your position at
24 the Water Board, with your many years of experience at the
25 Water Board, and based upon your analysis in the ACL that

1 you issued to the Byron Bethany Irrigation District, based
2 on a lack of availability of water, didn't everybody within
3 that upper demand section violate Water Code Section 1052?

4 MS. MROWKA: In March, it's early in the year for
5 us to know what -- we want to wait and see until the last
6 possible moment before we issue curtailments.

7 MR. KELLY: I'm going to object to this as being
8 nonresponsive. Ms. Mrowka, I'm asking you, based on the
9 analysis that you conducted and the lines that you used not
10 only to implement curtailments, but the lines that you used
11 to issue the Administrative Civil Liability Complaint
12 against the Byron Bethany Irrigation District, seeking over
13 \$5 million in penalties, is all of the demand between
14 15,000 CFS and 50,000 CFS, are all of those diverters
15 violating Water Code Section 1052?

16 MS. MROWKA: If they were diverting. I mean, how
17 do you know they were diverting.

18 MR. KELLY: Well, didn't your analysis, Ms.
19 Mrowka, didn't this analysis assume that they were
20 diverting, which is why they were a demand on the system?
21 Is this artificial demand?

22 MS. MROWKA: No, it's from our Water Rights
23 database.

24 MR. KELLY: And so, from April the 1st of 2015 to
25 May the 1st of 2015, when the Notice of Unavailability went

1 out, is the same true that everybody above the 15,000 CFS
2 line, all the way up to about 55,000 CFS in demand, did all
3 of those people violate Water Code Section 1052?

4 MS. MROWKA: If they were diverting.

5 MR. KELLY: If they were diverting. But your
6 analysis certainly assumes, because it's part of the
7 demand, that all of those people were actually diverting,
8 right?

9 MS. MROWKA: It is part of the demand.

10 MR. KELLY: And so, can you explain to me why
11 Administrative Civil Liability Complaints or Cease and
12 Desist Orders didn't get sent to the folks that diverted
13 unlawfully in all of March and all of April?

14 MS. MROWKA: We had not yet informed them that
15 there was insufficient supply. And until we informed
16 persons, we didn't take actions related to enforcement.

17 MR. KELLY: Why is the notice important?

18 MS. MROWKA: It's important because we don't
19 believe that all of the water-diverting community has the
20 resources to make this type of evaluation on their own. We
21 certainly think that some agencies would have that
22 resource, but not everybody has that resource. And we want
23 to make sure we inform persons when we think there is a
24 problem with supply, of the scale we saw during the
25 drought.

1 MR. KELLY: So, when I look at this chart, I
2 think to myself, if this was all real demand in the system,
3 that this chart, it's impossible. It's impossible that
4 there was less than 20 percent of the water needed to meet
5 the total demand, yet we didn't -- in March, we didn't see
6 people having a lack of water supply. Can you explain
7 that?

8 MS. MROWKA: I don't believe I have any testimony
9 related to March diversions.

10 MR. TAURIAINEN: And also, the Prosecution
11 objects to that entire question as testimony by counsel.

12 CO-HEARING OFFICER DODUC: Noted.

13 MS. MC GINNIS: DWR joins in that objection, the
14 whole hypothetical, assumes facts not in evidence, calls
15 for a legal conclusion.

16 MR. KELLY: Ms. Mrowka has been designated as an
17 expert witness on behalf of the Prosecution Team. And
18 expert witnesses absolutely can testify with respect to
19 hypotheticals. And she seemed to fully understand the
20 hypothetical that I posed and she gave answers to those
21 hypotheticals.

22 CO-HEARING OFFICER DODUC: Thank you. I will
23 note the objections.

24 Mr. Kelly, I appreciate your line of questioning
25 and I believe Ms. Mrowka has addressed them. I would

1 encourage you to wrap up this line of questioning and move
2 on.

3 MR. KELLY: I will move on. Thank you.

4 I'd like to show you what's being marked as BBID-
5 404, please.

6 (Thereupon Exhibit BBID-404 was marked for
7 identification.)

8 MR. KELLY: Ms. Mrowka, BBID-404 is an e-mail
9 from Tom Howard to Joe Schofield, who, according to this e-
10 mail is the Assistant General Counsel with the Sacramento
11 Municipal Utilities District. And when I looked at these
12 e-mails, it appears to be a request from the Sacramento
13 Municipal Utilities District, whom I will refer to as
14 SMUD -- is that how you know that organization?

15 MS. MROWKA: Yes.

16 MR. KELLY: -- SMUD, to get what can only be, I
17 guess, described as an exception to curtailments or relief
18 from curtailments for SMUD's License 11073 and 11074, for
19 SMUD's reservoirs up in the Sierra's. Is that an accurate
20 statement?

21 MS. MROWKA: Yes.

22 MR. KELLY: And by this e-mail, Mr. Howard told
23 SMUD that it could go ahead and divert water to storage,
24 even in light of curtailments of post-1914 water rights.
25 Isn't that correct?

1 MS. MROWKA: Yes, the water was for subsequent
2 power generation and would return to the stream system in
3 the same volume as it had left it.

4 MR. KELLY: But at a different time, correct. It
5 was actually being stored in those reservoirs, right?

6 MS. MROWKA: Correct.

7 MR. KELLY: And if you turn to the pages that
8 follow the letter, there are the two licenses, 11074 and
9 11073. And I will say that I attached these to these
10 exhibits. They were not attached to the original e-mail.

11 But I would like you to take a look at something
12 in these licenses, and it's on the second page of the
13 License 11074, and it's about four-fifths of the way down
14 the page. And it's a paragraph that starts with "No
15 diversion or use of water". Do you see that?

16 MS. MROWKA: I do.

17 MR. KELLY: Can you read that aloud for me,
18 please, into the record?

19 MS. MROWKA: "No diversion or use of water shall
20 be made under this license which will in any way interfere
21 with diversion or use of water for irrigation or domestic
22 purposes, whether such higher uses are made under either
23 prior or subsequent right."

24 MR. KELLY: Thank you. And then, if you look at
25 License 11073, the second page of that license, just about

1 in the middle of the page. Does the same exact language
2 appear?

3 MS. MROWKA: Yes. This is fairly typical
4 language for large power water rights.

5 MR. KELLY: And does this express a preference
6 that, to the extent there's water in the system, that it be
7 used for domestic and irrigation purposes before it's
8 stored for power uses?

9 MS. MROWKA: It is a provision that allows for
10 irrigation and domestic uses to be developed.

11 MR. KELLY: Do you know whether it expresses the
12 State Water Board policy that those uses are higher than
13 the use of water for power generation?

14 MS. MROWKA: I can't speak as to the policy
15 issue. I do know it's very, very standard in power water
16 rights.

17 MR. KELLY: But by Mr. Howard's e-mail, SMUD was
18 authorized under its post-1914 water right to divert water
19 to storage, even with curtailments in place. And SMUD
20 stored water.

21 MS. MROWKA: Yes. And if you read further into
22 the e-mail, it talks about the fact that there would be
23 full natural flow available downstream of Folsom Reservoir,
24 and so they were not expecting any impacts to other
25 diverters.

1 MR. KELLY: Well, BBID was curtailed on June the
2 12th of 2015, wasn't it? And so, wouldn't the water that
3 SMUD had diverted into its upstream reservoirs, in light of
4 curtailments, made it down into the system and been
5 available to BBID and other senior water right holders?

6 MS. MROWKA: They are saying explicitly, in this
7 e-mail, that they would assure that full natural flow
8 occurred.

9 MR. KELLY: How can you assure full natural flow
10 occurs, do you know?

11 MS. MROWKA: Yes, reclamation makes sure that if
12 there was any shortage in full natural flow that they put
13 in a like amount so that there would not be a reduction in
14 the quantity associated with full natural flow.

15 MR. KELLY: And do you know whether any of that
16 water that the United States added to the system, and I
17 take it that that would be at Folsom, would have been
18 available then to BBID to divert?

19 MS. MROWKA: I do not know as to -- how it would
20 change the calculations in the spreadsheet because there
21 was still full natural flow.

22 MR. KELLY: But what this shows is that SMUD was
23 allowed to divert real water into its reservoirs in the
24 face of curtailments, correct?

25 MS. MROWKA: It does show that. It does show

1 that it was done --

2 MR. KELLY: Thank you.

3 MS. MROWKA: -- under certain provisions.

4 MR. KELLY: I have no further questions.

5 CO-HEARING OFFICER DODUC: Mr. Kelly, I'm sorry,
6 is that no further questions for Ms. Mrowka, or no further
7 questions --

8 MR. KELLY: Yes, I'm sorry. I have no further
9 questions for Ms. Mrowka. My associate, Aaron Ferguson,
10 will be cross-examining other witnesses. But thank you for
11 the clarification.

12 MS. SPALETTA: If it's okay with the Hearing
13 Officers, what we'd like to do is go witness-by-witness, so
14 that it's more cohesive, if that's okay?

15 CO-HEARING OFFICER DODUC: Thank you. Actually,
16 I appreciate that.

17 CROSS-EXAMINATION BY MS. SPALETTA
18 FOR WEST SIDE IRRIGATION DISTRICT, SOUTH DELTA WATER AGENCY
19 AND CENTRAL DELTA WATER AGENCY

20 MS. SPALETTA: Good afternoon, Ms. Mrowka.
21 Jennifer Spaletta, I'm asking you questions this afternoon
22 on behalf of the Delta Agencies and West Side Irrigation
23 District.

24 I wanted to look at page 3 of your testimony,
25 which is Exhibit Water Rights 7. On page 3 of your

1 testimony, after explaining that you are the Prosecution
2 Team Lead for both of these enforcement actions, you have
3 two paragraphs that state that based on the Division's
4 drought water availability supply and demand analysis,
5 conducted on May 1st, 2015 and on June 12th, no water was
6 available to satisfy either West Side or BBID's priorities
7 of right. Correct.

8 MS. MROWKA: Correct.

9 MS. SPALETTA: And then you conclude each of
10 those paragraphs by stating that both the May 1st, 2015
11 notice and the June 12th, 2015 notice are based on an
12 appropriate drought water availability methodology and
13 incorporate the best available supply and demand
14 information. Correct?

15 MS. MROWKA: Correct.

16 MS. SPALETTA: And the May 1st and June 12th
17 analyses that you're referring to are reflected in what was
18 previously shown as Prosecution Team Exhibits 47 and 48.
19 Correct?

20 MS. MROWKA: I don't know the numbers but --

21 MS. SPALETTA: Let's go ahead and put 47 up on
22 the screen, please. And so, we're looking at 47 and this
23 is the analysis for the Sacramento River Basin that was
24 dated April 29th, that Mr. Yeazell testified supported the
25 May 1st notice. Is that the one you were referring to in

1 your testimony?

2 MS. MROWKA: I believe it is.

3 MS. SPALETTA: Okay. And regarding your opinion
4 that it incorporates the best available supply information,
5 this graph actually does not include the after-the-fact DWR
6 monthly full natural flow calculations, does it?

7 MS. MROWKA: It includes them on the blue line.

8 MS. SPALETTA: Ms. Mrowka, isn't it true that the
9 blue line includes only the daily FNF calculations from
10 DWR?

11 MS. MROWKA: That's correct.

12 MS. SPALETTA: And actually, those daily FNF
13 calculations include no adjustments upward for anything
14 like return flows, correct?

15 MS. MROWKA: It's full natural flow up at the
16 perimeter reservoirs, and so that's above the area where
17 you would see much of the return flow.

18 MS. SPALETTA: But the answer to my question is
19 it's correct it does not include any of the return flows
20 that get into the system below the rim reservoirs?

21 MS. MROWKA: It doesn't include any from below.
22 It would include anything that they incorporate into their
23 calculations of full natural flow for above the rim
24 reservoirs. They, being DWR.

25 MS. SPALETTA: But you don't actually know that

1 they do that, right?

2 MS. MROWKA: You would have to ask Jeff Yeazell,
3 because he's far more familiar with what they do.

4 MS. SPALETTA: And the blue line there also
5 doesn't include any abandoned releases of stored water,
6 does it?

7 MS. MROWKA: No.

8 MS. SPALETTA: And in this West Side enforcement
9 action, you have actually brought an enforcement action
10 against West Side related to a threatened diversion of
11 treatment plan discharges from the City of Tracy, correct?

12 MS. MROWKA: Yes.

13 MS. SPALETTA: And that blue line there doesn't
14 include any supply attributable to treatment plan
15 discharges, such as those from the City of Tracy, correct?

16 MS. MROWKA: That's not part of full natural
17 flow.

18 MS. SPALETTA: And there's also the Sacramento
19 Regional Treatment Plant discharges that get included in
20 the normal Delta in-flow calculation. You're familiar with
21 those, right?

22 MS. MROWKA: Only on a periphery fashion.

23 MS. SPALETTA: You know that the Sacramento
24 Regional Water Treatment Plant discharges right above the
25 Delta?

1 MS. MROWKA: Yes, I do.

2 MS. SPALETTA: And those treatment plant
3 discharges are not included in your blue supply line on
4 what's been marked as Exhibit 47, correct?

5 MS. MROWKA: No, because on the treatment plants
6 we don't have the information on all their varied sources
7 of water, so we don't put it in as full natural flow.

8 MS. SPALETTA: But you agree, don't you, that
9 all of those treatment plant discharges and all of these
10 return flows that are not included in your blue supply line
11 are actually sources of supply available to appropriative
12 rights, including BBID and West Side?

13 MS. MROWKA: They are sources of supply for
14 appropriative rights. What we don't have is the data on
15 how many of those discharges have already been assigned to
16 existing rights and are already being diverted under valid
17 rights.

18 MS. SPALETTA: You also stated, on page 3 of your
19 testimony that this was the best available demand
20 information, correct?

21 MS. MROWKA: Yes.

22 MS. SPALETTA: But what we just looked at, which
23 was Exhibit 47, doesn't actually include the 2015 actual
24 diversion data, correct?

25 MS. MROWKA: It does not.

1 MS. SPALETTA: And the 2015 actual diversion data
2 came in lower than what's depicted on Exhibit 47, correct?

3 MS. MROWKA: Correct.

4 MS. SPALETTA: And then, if we look at Exhibit
5 48, which is the other analysis that you opined was the
6 best available supply and demand information, isn't it true
7 that Exhibit 48 also does not include the actual 2015
8 diversion information?

9 MS. MROWKA: That is correct. We obtain that
10 information one month in arrears, and so it takes a while
11 for us to obtain it, to check it through our system and
12 make sure it looks okay. You know, not everybody files
13 those on time, either.

14 MS. SPALETTA: Even though you received that
15 information five days in arrears, after the actual month,
16 when you prepared, in final, the draft CDO and ACL that
17 were sent out in July of 2015, you did not have your staff
18 update these analyses to reflect the actual 2015 diversion
19 data that you had received up 'till that date, did you?

20 MS. MROWKA: I asked my staff regarding that data
21 and whether it would make any differences in our
22 determinations. And we reached the conclusion that it
23 would not make a difference. There just was such a
24 horrible supply situation.

25 MS. SPALETTA: But you have since done that

1 analysis?

2 MS. MROWKA: The staff has now formalized that
3 discussion in an analysis.

4 MS. SPALETTA: But you did not rely on that for
5 your testimony. You relied on what was done on May 1st and
6 June 12th?

7 MS. MROWKA: Correct.

8 MS. SPALETTA: Are you familiar with the North
9 Delta Water Agency contract with North Delta Water Agency
10 and the Department of Water Resources?

11 MS. MROWKA: Only in a very peripheral fashion.

12 MS. SPALETTA: We've marked it as Exhibit 100.
13 It's West Side Exhibit 100.

14 (Thereupon Exhibit WSID-100 was marked for
15 identification.)

16 MS. SPALETTA: You're aware, Ms. Mrowka, are you
17 not, that under that contract the State Water Project is
18 obligated to maintain certain water quality and water
19 supply in the North Delta?

20 MS. MROWKA: Yes.

21 MS. SPALETTA: But you did not include any of the
22 supply provided by the State Water Project to the North
23 Delta Water Agency in either Exhibit 47 or 48 that formed
24 the basis of the water availability analysis, correct?

25 MS. MROWKA: Reservoir releases are not part of

1 full natural flow.

2 MS. SPALETTA: But all of the demand in the North
3 Delta Water Agency was, in fact, included in both of those
4 water availability analyses, correct?

5 MS. MROWKA: The demands under prior rights are
6 included.

7 MS. SPALETTA: I don't think that responded to my
8 question. Did you make any adjustment to the demand for
9 the North Delta Water Agency to account for the delivery of
10 stored water under the North Delta Water Agency contract
11 with DWR?

12 MS. MROWKA: We'd have to ask Mr. Yeazell that
13 question.

14 MS. SPALETTA: But you don't know?

15 MS. MROWKA: I don't believe we've made one, but
16 you'd have to confirm.

17 MS. SPALETTA: I'd like to have you look at what
18 the Prosecution Team produced as Exhibit 58, please.

19 This is one of the exhibits that Mr. Yeazell
20 testified that he prepared, related to 2015 water
21 availability analysis. This one was prepared after the
22 fact, October 27th, 2015. Are you familiar with it?

23 MS. MROWKA: Yes.

24 MS. SPALETTA: And on this graph, which is for
25 the San Joaquin River Basin, with proportional Delta

1 demand, Prosecution Team Exhibit 58, the green line depicts
2 the actual 2015 diversion data, correct, for the San
3 Joaquin Basin?

4 MS. MROWKA: Yes.

5 MS. SPALETTA: And the blue line depicts what you
6 and your staff understood to be the actual supply, correct?

7 MS. MROWKA: I'm just reading the notes. Bear
8 with me. So, you're saying the blue line was the actual
9 demand?

10 MS. SPALETTA: No, I said the green line was the
11 actual 2015 demand, correct?

12 MS. MROWKA: Yes.

13 MS. SPALETTA: And the blue line, it's the jagged
14 up and down, is reflective of what you and your staff
15 believe was the actual supply, correct?

16 MS. MROWKA: Yes.

17 MS. SPALETTA: So, in this graph it shows that in
18 the end of the month of June, of 2015, the actual supply in
19 the San Joaquin Basin was hovering around 1,500 CFS,
20 correct?

21 MS. MROWKA: It appears that way.

22 MS. SPALETTA: But for that same period of time,
23 this graph is depicting that the actual demand on that
24 supply, that was satisfied, was in the neighborhood of
25 5,300 CFS?

1 MS. MROWKA: The green line is indicating about
2 5,300, right. It's hard to interpolate.

3 MS. SPALETTA: More than 5,000?

4 MS. MROWKA: Right.

5 MS. SPALETTA: So, isn't it true, Ms. Mrowka,
6 that if the actual supply in the system was only 1,500 CFS
7 that it would have been physically impossible for demand
8 of more than 5,000 CFS to have been satisfied?

9 MS. MROWKA: No, it just says that's the adjusted
10 senior demand in the notes. It doesn't say supplied. So,
11 that's the demand itself, and demand can be greater than
12 supply.

13 MS. SPALETTA: But this is actual. This is
14 supposed to be depicting what actually happened in the
15 system.

16 MS. MROWKA: And I understand that. I cannot
17 explain to you why, when supply's so low, people thought
18 they could divert that much water.

19 MS. SPALETTA: Well, couldn't it be because your
20 graph is either omitting a significant source of supply or
21 that your graph is overstating demand?

22 MS. MROWKA: These are based on records that we
23 are provided by diverters.

24 MS. SPALETTA: So if, for example, in this graph
25 you had the San Joaquin Exchange Contractors demand, which

1 was satisfied almost exclusively with stored water during
2 this period of time, and you had characterized it as
3 riparian demand, wouldn't that have caused the problem with
4 the visual display here?

5 MS. MROWKA: I do know that if the -- we don't --
6 we take people at their word, on their submittals, as to
7 what they're saying their water diversions and demands are.
8 And we just have to plot it as it shows it, based on
9 whatever they send to us.

10 MS. SPALETTA: So, when your staff was generating
11 these graphs that show there was a 3,500 CFS discrepancy
12 between actual diversions and actual supplies in the river,
13 you didn't question whether or not that was accurately
14 depicting what was going on?

15 MS. MROWKA: We simply put on there what
16 information we receive in the door.

17 MS. SPALETTA: At this time, I'm going to turn
18 the questioning over to Ms. Zolezzi. Thank you.

19 CO-HEARING OFFICER DODUC: While you're making
20 that change, Mr. Buckman, could you give me a time check?
21 How much time do they have left?

22 MR. BUCKMAN: Ninety minutes.

23 CO-HEARING OFFICER DODUC: I'm sorry?

24 MR. BUCKMAN: Ninety minutes.

25 CO-HEARING OFFICER DODUC: Ninety minutes, thank

1 you.

2 CROSS-EXAMINATION BY MS. ZOLEZZI

3 FOR WEST SIDE IRRIGATION DISTRICT, BANTA-CARBONA IRRIGATION
4 DISTRICT AND PATTERSON IRRIGATION DISTRICT

5 MS. ZOLEZZI: Two questions.

6 CO-HEARING OFFICER DODUC: I'm going to wait
7 until they finish with Mrowka before taking a break.

8 MS. ZOLEZZI: Thank you. Good afternoon, Ms.
9 Mrowka. I have two questions. You testified in your
10 written testimony that the failure of junior diverters to
11 cease diversion, when no water is available under their
12 priority of right, has a direct immediate impact on other
13 diverters. What do you base that statement on?

14 MS. MROWKA: I base that statement on the fact
15 that when the junior diverter takes water it's not
16 physically present in the stream to serve any other senior
17 right holders that are located downstream of that junior
18 right holder.

19 MS. ZOLEZZI: So, you have no evidence that the
20 failure of West Side or BBID to cease diverting actually
21 harmed another, more senior diverter?

22 MS. MROWKA: We know from our supply analysis
23 that there was not enough water to serve these priorities
24 of right. And so, the presumption that I made was that
25 when somebody takes water and there is not enough water for

1 those priorities of right there would be a shortage to the
2 other right holders.

3 MS. ZOLEZZI: I'll ask you the question again.
4 Do you have any evidence that the failure of West Side or
5 BBID to cease diverting actually harmed another, more
6 senior diverter? It's a yes or no question.

7 MS. MROWKA: I did not go in the field and
8 collect evidence.

9 MS. ZOLEZZI: Thank you. One more question. You
10 also testified, about ten minutes ago, "When we do the
11 evaluation of their impact on other water rights holders",
12 presumably referring to BBID, or West Side, or any other
13 junior water right holder. You actually didn't do an
14 evaluation of their impact on other water right holders,
15 correct?

16 MS. MROWKA: We do the spreadsheet analysis,
17 which is an evaluation of potential impacts because it
18 tells us which priorities of right, you know, would be able
19 to divert under the current supply situation.

20 MS. ZOLEZZI: So, you did an evaluation of
21 potential impact, if those senior diverters were actually
22 diverting as much as they projected?

23 MS. MROWKA: It is based on the demands, as was
24 explained during the earlier information. It's based on,
25 depending on if it's from the Informational Order demands

1 or if it's from the 2010 to 2013 demands. So, it's based
2 on that information.

3 MS. ZOLEZZI: So, it's projected --

4 MS. MROWKA: Rather than face value of water
5 rights.

6 MS. ZOLEZZI: It's projected demand, not actual
7 demand?

8 MS. MROWKA: It is based on our recorded demands.

9 MS. ZOLEZZI: Recorded from where?

10 MS. MROWKA: 2010 to 2013 Statements of Water
11 Diversion and Use --

12 MS. ZOLEZZI: Okay.

13 MS. MROWKA: -- Reports of Licensee and
14 Permittees, Information Order reporting demands for 2014.
15 So, quite a few pieces of information on demand.

16 MS. ZOLEZZI: But you had no information on
17 actual demands in 2015 or whether or not they were impacted
18 by junior diversions?

19 MS. MROWKA: Well, actually, no. What we had in
20 2015 was the month -- we had the projected use for the
21 persons, the top 90 percent of diverters in the Delta that
22 were sending us in information on their projected 2015
23 demands, and their month-by-month in arrears reporting on
24 what they actually used. So, we did have information.

25 MS. ZOLEZZI: And that's -- those are the figures

1 that were in the charts?

2 MS. MROWKA: There's been a number of different
3 charts presented.

4 MS. ZOLEZZI: Well, my understanding is you
5 didn't use that 2015 actual number to put in the chart,
6 correct?

7 MS. MROWKA: We looked at the numbers and made
8 our own assessment as to whether or not it would have
9 changed the conclusions on lack of availability, and we
10 decided it wouldn't.

11 MS. ZOLEZZI: So, the answer's no.

12 MS. MROWKA: The answer is we didn't think it
13 would change the availability situation.

14 MS. ZOLEZZI: So, you didn't use it?

15 MS. MROWKA: We evaluated it.

16 MS. ZOLEZZI: Did you use it?

17 MS. MROWKA: We certainly did make an informed
18 decision --

19 MS. ZOLEZZI: It's a yes or no question. Did you
20 use the information.

21 MS. MROWKA: Well, we did make an informed
22 decision. Yes, I used it for informing my decision making.

23 CO-HEARING OFFICER DODUC: I think we've had
24 enough on this, Ms. Zolezzi.

25 MS. ZOLEZZI: Thank you.

1 MS. SPALETTA: Hearing Officers, our preference
2 would be that we have any redirect by the Prosecution Team
3 of the witness before the break. We think it's probably
4 improper for the witness to be discussing matters with her
5 counsel prior to redirect. So, if Mr. Tauriainen is
6 willing, we'd like to do that now, before the break.

7 CO-HEARING OFFICER DODUC: Do you have
8 objections?

9 MR. O'LAUGHLIN: Yes.

10 CO-HEARING OFFICER DODUC: Mr. O'Laughlin, what
11 is your objection?

12 MR. O'LAUGHLIN: I'm not -- I understand the --

13 CO-HEARING OFFICER DODUC: Please, I can't hear
14 you.

15 MR. O'LAUGHLIN: Sorry about that. I understand
16 the concern being put forth by Ms. Spaletta. But there's
17 still other people who have the ability to cross-examine,
18 who haven't had their cross-examination, yet. And I would
19 prefer that we finish the cross-examination first, and then
20 go to redirect.

21 CO-HEARING OFFICER DODUC: Thank you.

22 MS. SPALETTA: I agree with that.

23 CO-HEARING OFFICER DODUC: That, actually, was an
24 excellent point.

25 Does that conclude your cross-examination of Ms.

1 Mrowka?

2 MS. SPALETTA: Yes, it does, unless there's any
3 issues that come up on redirect that we have to deal with.

4 CO-HEARING OFFICER DODUC: Right. Let's go ahead
5 and take our 10-minute break now. And we'll resume at
6 2:40.

7 (Off the record at 2:34 p.m.)

8 (On the record at 2:41 p.m.)

9 CO-HEARING OFFICER DODUC: We are resuming with,
10 I believe, the cross-examination of Mr. Coats.

11 MS. SPALETTA: I think there's continued cross-
12 examination of Ms. Mrowka by the other parties.

13 CO-HEARING OFFICER DODUC: No, I'm going to -- I
14 was going to finish your cross-examination before I get to
15 them.

16 MS. SPALETTA: Oh, I thought that we had talked
17 about the opposite before the break. Let's just make sure
18 we're clear. Our understanding was that we would do one of
19 these witnesses at a time, do all of our cross and the
20 redirect, and then do the next witness. That way it's
21 cohesive.

22 CO-HEARING OFFICER DODUC: That causes a little
23 bit of a challenge in timekeeping. Are you all right with
24 that, Mr. Buckman?

25 MS. ANSLEY: Officer Doduc, the State Water

1 Contractors would prefer to stay with the original order.

2 CO-HEARING OFFICER DODUC: I'm sorry. Yes?

3 MS. ANSLEY: The State Water Contractors would
4 prefer to stay to the original allotments and the original
5 order of cross-examination.

6 CO-HEARING OFFICER DODUC: For what reasons?

7 MS. ANSLEY: Just so that we can hear the cross-
8 examination and have our chance to sort of fully understand
9 what the case in chief is. Or, what the cross-examination
10 of the case in chief is.

11 CO-HEARING OFFICER DODUC: I would prefer that,
12 myself. So, I would prefer that the joint BBID/Westside et
13 all party complete your cross-examination of this panel
14 before we move on to the cross-examination by San Francisco
15 and others.

16 MS. SPALETTA: Okay.

17 MR. MONA: Ms. Doduc, also, when you -- all these
18 new exhibits, could you also provide us with an electronic
19 PDF copy, those exhibits that you're entering?

20 MS. SPALETTA: Yes, as long as I can do it this
21 evening.

22 MR. MONA: Okay, thank you much.

23 MR. KELLY: And, Dan Kelly for BBID. Mr. Mona, I
24 believe that the flash drive that Mr. Buckman has, has all
25 of the exhibits that we marked additionally. We can either

1 cross-reference them for you, because they'll have a depo
2 exhibit number as well. And so maybe at the next break we
3 can talk about how best just to line those up for you.

4 Thank you.

5 MS. SPALETTA: Ready?

6 BRIAN COATS

7 CROSS-EXAMINATION BY MS. SPALETTA

8 FOR WEST SIDE IRRIGATION DISTRICT, SOUTH DELTA WATER AGENCY

9 AND CENTRAL DELTA WATER AGENCY

10 MS. SPALETTA: Good afternoon, Mr. Coats. My
11 name is Jennifer Spaletta. I'll be conducting some cross-
12 examination this afternoon.

13 First of all, I just wanted to confirm that you
14 do not have any formal education in hydrology. Rather, you
15 are educated as a chemical engineer, correct?

16 MR. COATS: Correct.

17 MS. SPALETTA: And you are not a civil engineer?

18 MR. COATS: Correct.

19 MS. SPALETTA: And despite stating various things
20 regarding water law in your testimony, you are not a
21 lawyer?

22 MR. COATS: Correct.

23 MS. SPALETTA: The methodology that you describe
24 in your testimony regarding the May 1st and June 12th
25 notices, you actually did not develop that methodology,

1 correct?

2 MR. COATS: Please describe what you mean by
3 "develop"?

4 MS. SPALETTA: Did not make any decisions as to
5 what would be included in that methodology?

6 MR. COATS: I helped develop the methodology over
7 the past two years.

8 MS. SPALETTA: When I took your deposition, isn't
9 it true, Mr. Coats, that you told me that you made no
10 decisions regarding what went in the methodology. That all
11 of those decisions were made by --

12 MR. COATS: Upper management.

13 MS. SPALETTA: Correct.

14 MR. COATS: Correct.

15 MS. SPALETTA: Isn't it also true, Mr. Coats,
16 that you did not make the decision to issue either the May
17 1st or the June 12th notice?

18 MR. COATS: Correct.

19 MS. SPALETTA: All of those decisions were made
20 by Mr. O'Hagan or his supervisors, correct?

21 MR. COATS: The decision to make those were
22 forwarded by John O'Hagan to Tom Howard, who actually
23 signed the notices.

24 MS. SPALETTA: So none of you, on the panel
25 today, actually made the decisions?

1 MR. COATS: No.

2 MS. SPALETTA: I want to look at what was marked
3 as Prosecution Team Exhibit 54. This is a graph of the
4 Sacramento River Basin Supply Demand Analysis With
5 Proportional Delta Demand, prepared on October 30th, 2015.
6 This graph was prepared by Mr. Yeazell under your
7 direction, correct?

8 MR. COATS: Correct.

9 MS. SPALETTA: You actually have never gotten in
10 and worked with Mr. Yeazell's spreadsheets, correct?

11 MR. COATS: Correct.

12 MS. SPALETTA: In fact, there's no one who got in
13 and reviewed the work done in Mr. Yeazell's spreadsheets,
14 correct?

15 MR. COATS: Line by line, cell by cell, no.

16 MS. SPALETTA: Which spreadsheet contains the
17 information that's depicted on this graph?

18 MR. COATS: You would have to ask Jeff Yeazell to
19 that.

20 MS. SPALETTA: You don't know?

21 MR. COATS: No.

22 MS. SPALETTA: I want to be able to compare this
23 graph to the one that you, and Mr. Yeazell, and Ms. Mrowka
24 all testified to as forming the basis for the May 1st
25 notice, which was Prosecution Team Exhibit 47. So

1 we're going to be kind of flipping back and forth. I just
2 wanted to let Mr. Buckman know that.

3 So, looking at the Prosecution Team Exhibit 47, I
4 want to look at the differences between these two things.
5 The demands reflected on Exhibit 47 do not include the
6 actual 2015 demands, right?

7 MR. COATS: They do not include the actual 2015
8 Informational Order reported demands.

9 MS. SPALETTA: But the demands on Exhibit 54 do
10 include the actual demands, right?

11 MR. COATS: Those include the reported uses from
12 the Informational Order.

13 MS. SPALETTA: And approximately what was the
14 reduction in demands that resulted in looking at the
15 actuals in the month of June, for the senior demands? It
16 looks to me that it was about 2,000 CFS.

17 MR. COATS: You're asking an engineer. I've got
18 to make sure it's exact here. Yeah, about 2,000. 8,800 to
19 6,800's a fair bet. It's about 2,000 CFS difference.

20 MS. SPALETTA: And you had the actual demands in
21 the State Board's system at the time -- well, the actual
22 demands for April, May and June at the time that you issued
23 the Draft CDO and ACL in July, correct?

24 MR. COATS: We had not processed the demands at
25 that time, but we had the uses reported to us.

1 MS. SPALETTA: But you hadn't taken the time to
2 actually plot them and look at them before you issued the
3 Draft ACL or CDO?

4 MR. COATS: We didn't have the time, no.

5 MS. SPALETTA: Now, looking at the supply, the
6 supply that's depicted on Exhibit 54, in the solid blue
7 line, that's your daily FNFs, correct?

8 MR. COATS: That's the daily FNF supply.

9 MS. SPALETTA: Now, flipping back again to 47.
10 You also have the daily FNF supply here, plotted through
11 what, approximately the end of April, correct?

12 MR. COATS: Along with the forecast of monthly
13 FNF, yes.

14 MS. SPALETTA: And then for the forecasted FNF,
15 that's actually more than just the 10-station FNF, correct,
16 it includes something else?

17 MR. COATS: The FNFs that are depicted here,
18 because it didn't incorporate the additional adjustments,
19 just has -- that's just for the Sacramento River Basin.
20 And if you note on the legend, that indicates which
21 stations are there.

22 MS. SPALETTA: But doesn't the legend also
23 indicate that that forecast also includes the minor stream
24 FNFs that were obtained from DWR's 2007 Unimpaired Flow
25 Data Report?

1 MR. COATS: For certain UF basins, yes.

2 MS. SPALETTA: Okay. So, you included those
3 additional unimpaired flows for the non-FNF basins in this
4 chart, 47. But again, if we flip over to the other one,
5 54, you don't have the unimpaired flow from the non-FNF
6 basins depicted in this chart, right?

7 MR. COATS: And that's because we don't have the
8 monthly FNF plotted.

9 MS. SPALETTA: Right. So, this chart actually
10 only includes the daily FNF and it does not include any
11 additions that were reflected in the other chart.

12 MR. COATS: Nor depletions, correct.

13 MS. SPALETTA: Actually, you said "nor
14 depletions", but you actually didn't include depletions as
15 an issue with supply for any of the charts, correct?

16 MR. COATS: Not initially, no.

17 MS. SPALETTA: And then, when we looked at the
18 other chart, which was WR-48, this one has even more stuff
19 added to those dashed supply lines. It has the return
20 flows for the San Joaquin River and the Sacramento River,
21 so you assumed those were zero, right. So, just the San
22 Joaquin River return flows and then the Delta return flows?

23 MR. COATS: And then the Delta 40 percent,
24 correct.

25 MS. SPALETTA: But then again, if we switch back

1 over to Water Right 55 -- or I'm sorry, is it 54 -- 54,
2 that does not have those river return flows in it and
3 you've actually changed the way you're depicting the Delta
4 return flows. Now, instead of being in addition to supply,
5 they're a reduction in demand, correct?

6 MR. COATS: We never made any adjustments to the
7 daily FNF to account for those return flows.

8 MS. SPALETTA: So, just to be clear, in the graph
9 that was June 10th and marked as Exhibit 48, you adjusted
10 the monthly FNF to include a 40 percent return flow from
11 the Delta. But you never added a similar adjustment to any
12 of these daily blue lines in any of the charts?

13 MR. COATS: Correct.

14 MS. SPALETTA: And in none of these charts have
15 you included, in the supply line, the solid blue line, any
16 additional flows that might be present in the Delta
17 channels, regardless of FNF, correct?

18 MR. COATS: Well, you're referring to the daily
19 FNF as the supply. I'm referring to that as a qualifier for
20 which monthly FNF forecast to use. So, could you repeat
21 the question?

22 MS. SPALETTA: Why don't you explain to me what
23 you mean? You said you're referring to the daily FNF as a
24 qualifier?

25 MR. COATS: As a qualifier as to which monthly

1 FNF forecast to choose.

2 MS. SPALETTA: So, which line on this graph is
3 intended to depict the available supply in your supply
4 demand analysis?

5 MR. COATS: In this particular case, due to the
6 daily FNF trending slightly above the 50 percent adjusted
7 forecast, we would be using the adjusted 50 percent
8 forecast in this case.

9 MS. SPALETTA: So, you were using the adjusted 50
10 percent forecast, which is the dark blue dashed line?

11 MR. COATS: Correct.

12 MS. SPALETTA: But actually, at this point in
13 time you had received information from DWR, indicating that
14 that 50-percent forecast was being adjusted even further
15 upward, and that's denoted by the red dot on this graph,
16 right?

17 MR. COATS: That particular red-dot forecast was
18 providing by DWR, at our request, in response to a
19 precipitation event that happened in June, which was
20 unexpected. And they specifically indicated it was
21 something that they didn't have a lot of confidence behind
22 because it wasn't a publicly-produced product.

23 MS. SPALETTA: It wasn't a what?

24 MR. COATS: Publicly produced and reported
25 product. You won't find that on their website.

1 MS. SPALETTA: But they performed the calculation
2 using the exact same method that they do to perform the
3 calculation for the data that is posted on the website?

4 MR. COATS: You would have to ask them for that.
5 I'm not an expert on their calculations.

6 MS. SPALETTA: But you just told me it wasn't the
7 same?

8 MR. COATS: It wasn't -- it wasn't actually
9 produced and posted on the website.

10 MS. SPALETTA: So, the fact that data's posted on
11 the website makes it more reliable than data that's not
12 posted on the website?

13 MR. COATS: It indicates they have confidence
14 behind it.

15 MS. SPALETTA: It couldn't indicate that this is
16 just their practice to only post it monthly?

17 MR. COATS: You have to ask them for that.

18 MS. SPALETTA: Now, let's look at Exhibit 52,
19 please. Okay, so Exhibit 52 is a combined Sacramento/San
20 Joaquin analysis that was generated on August 19th, by Mr.
21 Yeazell, at your direction, correct?

22 MR. COATS: Correct.

23 MS. SPALETTA: And as of August 19th you would
24 have received, from diverters, the April, May, June, July,
25 so four months of actual diversion data?

1 MR. COATS: For the majority of them. Some of
2 them indicated that they wouldn't have enough time to
3 report but, yes.

4 MS. SPALETTA: But at this point in time you
5 still were not graphically depicting the actual diversion
6 data for 2015?

7 MR. COATS: On this graph, no.

8 MS. SPALETTA: But on a later graph?

9 MR. COATS: I believe so, yes.

10 MS. SPALETTA: For the combined?

11 MR. COATS: You have to check the exhibits, but I
12 think we did.

13 MS. SPALETTA: You don't know which one that is?

14 MR. COATS: Sorry, I'm not a computer. Sorry.

15 MS. SPALETTA: Now, on this particular graph was
16 there any effort made to remove the demands that could not
17 be satisfied with the available supply in a given sub-
18 watershed? So, for example, on the Tuolumne River, if the
19 demand exceeded the supply that was available on the
20 Tuolumne River did you remove the demand or does this graph
21 include all of that demand that could not be satisfied?

22 MR. COATS: This particular graph includes all of
23 that supply.

24 MS. SPALETTA: Even though you knew at this point
25 in time it could not be satisfied?

1 MR. COATS: We weren't focusing on that at the
2 time.

3 MS. SPALETTA: So, when you were doing the supply
4 and demand analyses, you weren't focused on whether the
5 supply actually was unavailable to meet any particular
6 demand in the watershed?

7 MR. COATS: We did do sub -- or tributary level
8 analyses graphs. But for this particular graph, since it's
9 a combined basin, we included all of the demands and
10 supplies within the basin.

11 MS. SPALETTA: Well, actually, within the two
12 basins, right, the Sacramento and --

13 MR. COATS: The Sacramento and San Joaquin.

14 MS. SPALETTA: -- San Joaquin.

15 Okay, so in the spreadsheet then, what was
16 happening is since you were dividing things up based on
17 priority, someone with a high priority right on the
18 Tuolumne River was essentially able to pull water out of
19 the Sacramento River to satisfy their right, even though
20 there was no water physically available on the Tuolumne.

21 MR. COATS: On this graph, yes.

22 MS. SPALETTA: And wasn't that also the case for
23 the other two graphs that preceded this, that would be
24 Exhibits 47 and 48 that served as the basis for the
25 curtailment notices?

1 MR. COATS: I'd have to look at those graphs
2 again, to refresh my memory.

3 MS. SPALETTA: Let's look at them.

4 MR. COATS: Sure.

5 MS. SPALETTA: So, did you remove any of this
6 excess demand on Exhibit 47, that could not have been
7 satisfied with the available supply in the watershed?

8 MR. COATS: I think on this graph we had removed
9 Cache and Putah Creek demand.

10 MS. SPALETTA: Those were the only two?

11 MR. COATS: I believe so, yes.

12 MS. SPALETTA: And then, let's look at 48. On
13 48, had you removed any of the excess demand that could not
14 be satisfied with available supply in the sub-watersheds?

15 MR. COATS: The same answer here, the Cache and
16 Putah have been removed from there.

17 MS. SPALETTA: Those were the only two?

18 MR. COATS: Correct.

19 MS. SPALETTA: Have you pulled up Exhibit 42,
20 yet? I'm sorry, 52. You'll have to excuse me, there are
21 so many graphs and so many spreadsheets that sometimes I
22 have to take a minute to get my bearings.

23 Okay, I think we looked at this one already. But
24 I just want to confirm, on this particular graph -- I think
25 I asked you this with a different graph, but I'll confirm

1 it here. For this one, this blue line that's depicting the
2 adjusted -- I'm sorry, not the adjusted, but the daily full
3 natural flow, the blue jagged line.

4 MR. COATS: Correct.

5 MS. SPALETTA: Does it include the 40 percent
6 return flow for the Delta?

7 MR. COATS: We didn't make any adjustments to the
8 daily FNF.

9 MS. SPALETTA: And for the month of June, isn't
10 it true that those adjustments for the return flows for the
11 Delta and the return flows for the San Joaquin River, they
12 totaled more than 2,200 CFS of supply?

13 MR. COATS: Now, which area are you looking at,
14 again, for June? And what was your question, again?

15 MR. COATS: Didn't the adjustments, as a result
16 of looking at return flow in the San Joaquin River and
17 return flow in the Delta amount to more than 2,200 CFS of
18 supply?

19 MR. COATS: I don't have the spreadsheet in front
20 to confirm that.

21 MS. SPALETTA: But if you were to add them,
22 wouldn't you have to bump this blue line up by 2,200 CFS?

23 MR. COATS: I don't make any adjustments to the
24 daily FNF.

25 MS. SPALETTA: You don't make any adjustments.

1 So, even if you, in your spreadsheet, were analyzing
2 additional supply that was available, as a result of your
3 discussions with your supervisors, Ms. Mrowka and Mr.
4 O'Hagan, you would not be depicting it as part of the blue
5 supply line on the graph?

6 MR. COATS: Not adjustments to daily FNF, no.

7 MS. SPALETTA: And then, you didn't provide any
8 alternative supply line on this graph that showed what the
9 daily supply would be if you added that?

10 MR. COATS: The only adjustments to those
11 particular -- on that graph, with respect to supply, are
12 the adjusted 50 and 90 percent forecasts.

13 MS. SPALETTA: But again, those are forecasted
14 data, not actual supply?

15 MR. COATS: Correct.

16 MS. SPALETTA: So, let's just go ahead and
17 confirm what that adjustment was for June. If we could
18 look at the spreadsheet, which is Prosecution Team Exhibit
19 77? And if it's not loading very quickly, that's just
20 because it's big and it doesn't load very quickly. So, if
21 we could hold the timer while it's trying to load, that
22 would be great.

23 MR. TAURIAINEN: If I could suggest, Mr. Buckman,
24 look in your downloads folder. I think it just downloads
25 the spreadsheet files, rather than opening.

1 MR. KELLY: If it helps speed things up at all,
2 we have every exhibit on the flash drive that we provided
3 to Mr. Buckman. So, instead of trying to download them
4 from the website, Mr. Buckman can access any exhibit on the
5 flash drive, if it's quicker.

6 MS. SPALETTA: So, here we go. This is a
7 spreadsheet, so let's go look at the chart just to make
8 sure it's the right one. So, you're going to go all the
9 way over and it's the chart on the -- there you go. You
10 have to scroll over more, there's more charts. No, use the
11 scroll on the other side of Excel. There you go.

12 Let's pull up the senior chart and let's just
13 make sure it's the right chart. Okay, so we're looking at
14 the same chart.

15 MR. COATS: I can't speak to that because it's
16 not listed as an exhibit for me to compare to, but if you
17 say it is.

18 MS. SPALETTA: So, you don't know which
19 spreadsheets go with which charts?

20 MR. COATS: No.

21 MS. SPALETTA: So, then that needs to be a
22 question for Mr. Yeazell?

23 MR. COATS: Correct.

24 MS. SPALETTA: All right.

25 MR. TAURIAINEN: Can we get the timer rolling

1 again, please?

2 MS. SPALETTA: I'll turn the questioning over,
3 now, to Mr. Ferguson.

4 CROSS-EXAMINATION BY MR. FERGUSON
5 FOR BRYON BETHANY IRRIGATION DISTRICT

6 MR. FERGUSON: Good afternoon, Mr. Coats. My
7 name is Aaron Ferguson, with Somach Simmons & Dunn, on
8 behalf of the Byron Bethany Irrigation District. I'm going
9 to ask a few follow-up questions related to your work in
10 this matter.

11 So, just at the broader level -- oh, excuse me.

12 In performing these water availability analyses,
13 did you use a specific definition of water availability to
14 perform your analysis?

15 MR. COATS: A specific definition by what?

16 MR. FERGUSON: Well, did you actually have a
17 definition or a set of rules in order to conduct this water
18 availability analysis that you followed?

19 MR. COATS: Well, generally, a water availability
20 analysis, as what we did, includes using full natural flow
21 in comparison to reported demands.

22 MR. FERGUSON: Did you rely on any sort of
23 written procedure that the State Board has or any
24 regulations that the State Board have in order to perform
25 this analysis?

1 MR. COATS: No.

2 MR. FERGUSON: Were there any formal hearings
3 held to determine what water availability methodology to
4 use?

5 MR. COATS: I don't believe there was, no.

6 MR. FERGUSON: And the methodology was never
7 formally adopted or approved by the State Water Board,
8 right, prior to the Board issuing the ACL or the CDO in
9 this matter, correct?

10 MR. COATS: By formally adopted, what are you
11 referring to?

12 MR. FERGUSON: Well, did the State Board have an
13 opportunity to review this methodology in a formal
14 proceeding --

15 MR. COATS: No.

16 MR. FERGUSON: -- of some sort, before the
17 enforcement actions are commenced?

18 MR. COATS: No.

19 MR. FERGUSON: So, even though there wasn't a
20 formal set of rules or written procedures, and the Board
21 hadn't reviewed the methodology, you still believe it was
22 the appropriate standard?

23 MR. COATS: Yes.

24 MR. FERGUSON: So, other than your job at the
25 State Water Board, do you have any formal education in

1 creating a water supply methodology?

2 MR. COATS: No.

3 MR. FERGUSON: Before 2013, had you ever
4 performed a water availability analysis?

5 MR. COATS: No.

6 MR. FERGUSON: And then, the method you relied on
7 in 2015 had never been used before, correct?

8 MR. COATS: To my knowledge, no.

9 MR. FERGUSON: How did you come about selecting
10 the 1977 drought year as a reference point for your 2015
11 analysis?

12 MR. COATS: In June 2014, I was approached by
13 John O'Hagan, after we had received word that due to
14 declining water supplies that we would be likely looking at
15 a drought year. And then I went downstairs into our file
16 room and researched relevant correspondence, dating back to
17 the 1970s, on drought year. I found some information there
18 that appeared to be helpful and from that point on we used
19 that.

20 MR. FERGUSON: So, other than the 1977 report,
21 did you rely on any previously existing standards to
22 develop the methodology or scientific standards of any
23 sort?

24 MR. COATS: No, we just relied on what had been
25 done in the 1977 report and then just adapted it to current

1 technology and use reports.

2 MR. FERGUSON: Are you familiar with the models
3 CalSIM and DSM2?

4 MR. COATS: I am not intimately familiar with
5 them, no.

6 MR. FERGUSON: So, you'd never used a model like
7 CalSIM before?

8 MR. COATS: No.

9 MR. FERGUSON: No. So, they didn't factor into
10 the water availability analysis in these proceedings,
11 correct?

12 MR. COATS: No.

13 MR. FERGUSON: Did the curtailment analyses or
14 the water availability analyses that supported those look
15 at actual water availability in the Delta at all?

16 MR. COATS: What do you mean by actual water
17 availability?

18 MR. FERGUSON: Well, did you actually evaluate
19 water availability at the Delta level, say at the points of
20 diversion of the two districts in this matter?

21 MR. COATS: We did a comparison, which is
22 different than a formal water availability determination,
23 using gauged flow at Vernalis. But that's not a water
24 availability determination.

25 MR. FERGUSON: What do you mean by a comparison?

1 MR. COATS: Well, in that case, as I indicated
2 earlier, a water availability determination, as we use the
3 term, compares full natural flow to reported uses. The
4 comparison that we -- that I had indicated in my testimony,
5 in our presentation related to the measured flow at
6 Vernalis which, since the gauged flow is not full natural
7 flow, I can't use the same term as a water availability
8 determination, so we use it as a comparison.

9 MR. FERGUSON: So, based on your analysis at the
10 watershed level, was it your understanding that water,
11 essentially that would be available in Redding, could
12 essentially be available in the Delta on the same day?

13 MR. COATS: The way we conducted the analysis,
14 yes.

15 MR. FERGUSON: Is that realistic or
16 scientifically realistic?

17 MR. COATS: From the resident or the actual
18 travel time, as I indicated in my deposition, not with
19 current technology, no.

20 MR. FERGUSON: Yet, you still stand by your
21 position that the watershed-wide analysis was the
22 appropriate analysis, water availability analysis to
23 support these enforcement actions?

24 MR. COATS: Because we're forward looking,
25 correct.

1 CO-HEARING OFFICER DODUC: Can we do a time check
2 here? Is that the entirety of time that they have left,
3 Mr. Buckman?

4 Okay. Even though you do have an hour, I would
5 encourage you to move a little bit faster. This is
6 becoming a bit redundant.

7 MR. FERGUSON: Okay, I just want to cover a
8 couple of items. Your analyses used 40 percent return flow
9 for the Delta, correct?

10 MR. COATS: As a return flow credit, either as an
11 addition to supply or reduction of demand, yes.

12 MR. FERGUSON: And also used return flows for the
13 San Joaquin River, as well, based on the dry year report?

14 MR. COATS: Based on the monthly percentages
15 outlined in the dry report, correct.

16 MR. FERGUSON: Are you aware that the '77 report
17 also includes return flows in the Sacramento River system?

18 MR. COATS: No, I'm not.

19 MR. FERGUSON: Can you go ahead and bring up WR-
20 79, and then pages 76 and 77. And if you go to the next,
21 77, the lines at the bottom, actually the third line up, I
22 believe, talks about monthly outflow from the Sacramento
23 River system. They're documented. And then the previous
24 lines also address various outflows from the district
25 systems up in the Sacramento River Watershed.

1 So, you were not aware of this?

2 MR. COATS: I don't recall seeing that table, no.

3 MR. FERGUSON: You didn't use this information at
4 all in the water availability analyses?

5 MR. COATS: As I haven't seen that table, no.

6 MR. FERGUSON: I just have a quick question,
7 couple questions. There were some discussion in your
8 testimony about the ability to evaluate water availability
9 at a global scale, Sacramento or San Joaquin Watershed
10 scale, a tributary and sub-tributary scale. Did you ever
11 consider whether that sort of analysis could be done for
12 the Delta, recognizing that you can do it on a sub-
13 watershed bases?

14 MR. COATS: Not for the Delta. No, we didn't.

15 MR. FERGUSON: I don't have any further
16 questions.

17 CO-HEARING OFFICER DODUC: Does that complete
18 your cross-examination of Mr. Coats?

19 MS. SPALETTA: Yes.

20 CO-HEARING OFFICER DODUC: All right.

21 MS. SPALETTA: We'll move on --

22 CO-HEARING OFFICER DODUC: Mr. Mona, would you
23 like to step out and get some water?

24 Go ahead, Ms. Spaletta.

25 MS. SPALETTA: Okay. So, we'll go ahead, now,

1 and do our cross-examination of Mr. Yeazell.

2 JEFFREY YEAZELL

3 CROSS-EXAMINATION BY MS. SPALETTA

4 FOR WEST SIDE IRRIGATION DISTRICT, SOUTH DELTA WATER AGENCY
5 AND CENTRAL DELTA WATER AGENCY

6 MS. SPALETTA: All of our questions regarding
7 spreadsheets have been directed to you, so we'll start
8 there.

9 I asked Mr. Coats about the amount of the
10 adjustment in June 2015 that was included in the June 12th
11 water supply availability analysis. So, which spreadsheet
12 do I need to pull up to find that number?

13 MR. YEAZELL: I couldn't tell you right off the
14 top of my head.

15 MS. SPALETTA: And actually, at your deposition,
16 when I asked you which spreadsheet, which had been produced
17 to us on the drive, by the Prosecution Team, support the
18 June 12th analysis, you also were not able to tell me. Do
19 you recall that?

20 Okay, so do you need to look at your testimony to
21 figure out which spreadsheet includes --

22 MR. YEAZELL: That would help.

23 MS. SPALETTA: Why don't you do that. And if we
24 could keep note of the time?

25 I think that you previously said in your

1 presentation it was either Exhibit 53 or 77, but there was
2 some confusion about which one it might be.

3 MR. YEAZELL: Put it up on the screen, please.

4 MS. SPALETTA: Which one do you want, 53 or 77?

5 MR. YEAZELL: My testimony.

6 MS. SPALETTA: Testimony. Which is Exhibit 11.
7 And so, which spreadsheet should I look at to know which
8 analysis supported the June 12th Curtailment Notice, and
9 the one that Ms. Mrowka's relying on for prosecution of
10 BBID?

11 MR. YEAZELL: For the June 12th, that would --
12 can you scroll down? It's either 75 or 77. Keep scrolling
13 down to where it says construction of the graph. Oh, thank
14 you.

15 MR. TAURIAINEN: Mr. Buckman, the clock, please.

16 MR. KELLY: This is Dan Kelly for BBID. The
17 clock here is actually running. That clocks not -- they
18 differ, now. But I think that Ms. Spaletta requested that
19 the lock be stopped until Mr. Yeazell could -- or Yeazell,
20 I'm sorry, could determine which exhibit he actually needs
21 to find. So, I don't know that the clock should run on
22 cross-examination time while he's trying to figure out what
23 he relied on.

24 CO-HEARING OFFICER DODUC: That will be the
25 official clock over there.

1 MR. KELLY: Thank you. Thank you.

2 CO-HEARING OFFICER DODUC: Is it on hold while --
3 yes, it is on hold.

4 MR. YEAZELL: Okay, you can start the clock, now.
5 It is --

6 CO-HEARING OFFICER DODUC: Maybe we shouldn't
7 start the clock, yet.

8 MR. YEAZELL: I'm sorry, I thought I had it in
9 front of me.

10 MR. KELLY: This is Dan Kelly, again. I'm
11 informed it might be on page 14.

12 MR. YEAZELL: Yes, it's the WR-77. Now, you can
13 start the clock.

14 MS. SPALETTA: WR-47 is --

15 MR. YEAZELL: Seventy-seven.

16 MS. SPALETTA: I'm sorry, 77, okay, good. I
17 thought you said 47, which is the graph. So, 77 is the
18 supporting spreadsheet?

19 Okay, so now you're having the same technical
20 difficulty that I had when I tried to open two spreadsheets
21 at my office.

22 Okay, so do we have the right spreadsheet up on
23 the screen?

24 MR. YEAZELL: Scroll a couple tabs over to the
25 right and look at the senior chart. Okay, yeah, that

1 represents -- that's correct.

2 MS. SPALETTA: Okay. So, in this analysis did
3 you look at adjustments to full natural flow to account for
4 return flows?

5 MR. YEAZELL: Those are included in the
6 forecasted FNF forecasts.

7 MS. SPALETTA: So, the tab says "FNF Adjustment",
8 should we click on that one?

9 MR. YEAZELL: Yes.

10 MS. SPALETTA: Click on that. And can you tell
11 me what the total adjustment for June was in CFS?

12 MR. YEAZELL: That would be 2,252.

13 MS. SPALETTA: That's in cell E-29, right?

14 MR. YEAZELL: Right.

15 MS. SPALETTA: So, that's adding up all of these
16 additional flows from the smaller watersheds below the FNF
17 stations, that you got from the 2007 DWR report, right?

18 MR. YEAZELL: Correct.

19 MS. SPALETTA: As well as a San Joaquin River
20 return flow component of 13,262 acre feet from the 1977
21 report. But no return flow for the Sacramento Valley. And
22 then, plus 92,730 acre feet of Delta return flow. For a
23 total adjustment of 2,252 CFS?

24 MR. YEAZELL: Correct.

25 MS. SPALETTA: And then you actually used that

1 adjustment to increase the forecasted FNF lines on the
2 chart, right? So, if we switch back over to the senior
3 chart, so those dashed blue and purple lines, those reflect
4 that adjustment, correct?

5 MR. YEAZELL: Correct.

6 MS. SPALETTA: But that solid blue line, which is
7 your daily FNF, does not include the adjustment?

8 MR. YEAZELL: Correct.

9 MS. SPALETTA: So, for the entire month of June,
10 then, which is basically where we see the blue line
11 dropping off, if we were to compare apples to apples here,
12 we would have to actually increase that blue line by 2,253
13 CFS. Correct?

14 MR. YEAZELL: That makes sense.

15 MS. SPALETTA: And that would actually place the
16 blue line near the top of the pre-1914 demand that you've
17 depicted on this chart, correct?

18 MR. YEAZELL: I'd say in the neighborhood.

19 MS. SPALETTA: And the demand that you've
20 depicted on this chart is based on prior year's data and
21 does not reflect the reduced actual demand in 2015,
22 correct?

23 MR. YEAZELL: That's correct.

24 MS. SPALETTA: Now, you mentioned in your direct
25 testimony that there was some confusion over which one of

1 these spreadsheets actually supported the June 12th notice.
2 Whether it was the spreadsheet that's marked as Exhibit 77
3 or whether it's the spreadsheet that's marked as Exhibit
4 53. And I think you said that one of them contains some
5 kind of an update. Which one contains the update?

6 MR. YEAZELL: I believe that was 52.

7 MS. SPALETTA: Fifty-two is a chart. So, which
8 spreadsheet contains the updated data?

9 MR. YEAZELL: Fifty-three. Fifty-three's the
10 spreadsheet.

11 MS. SPALETTA: And isn't it true, Mr. Yeazell,
12 that one of the major updates that was made between the
13 spreadsheet that's Exhibit 77, and your updated version
14 which is Exhibit 53, is corrections to the Joint Board
15 demand that were provided to you by MBK Engineers?

16 MR. YEAZELL: Correct. They were minor, but
17 correct.

18 MS. SPALETTA: Did you consider 740 CFS reduced
19 demand to be a minor correction?

20 MR. YEAZELL: Compared to how the full natural
21 flows were, yes.

22 MS. SPALETTA: You consider that to be a minor
23 correction?

24 MR. YEAZELL: Yes.

25 MS. SPALETTA: Well, let's go ahead and look

1 again at the graph, Exhibit 48. Now, we just went through
2 an exercise where we established that if that blue line had
3 been adjusted to reflect your return flows of 2,252 CFS,
4 that it would actually be hovering right there along the
5 top of what you've depicted as the demand in June. Isn't
6 it true that if you had actually made this adjustment of
7 740 CFS that that supply line would have been clearly above
8 the pre-1914 demand line?

9 MR. YEAZELL: With my understanding that it was
10 the monthly FNF forecasts that were used for the basis of
11 the decisions --

12 MS. SPALETTA: Mr. Yeazell, I asked you a yes or
13 no question. I'm asking you --

14 MR. YEAZELL: Okay, I'll say yes.

15 MS. SPALETTA: -- if this solid blue line, once
16 adjusted to include the 2,252 CFS of return low that you
17 did add to the FNF lines, but you did not add to the blue
18 line, if that blue line had been similarly adjusted so that
19 it would hover right around the top of the senior demand,
20 wouldn't that 740 CFS of demand reduction have made a
21 difference?

22 MR. YEAZELL: Yeah, but I can't quantify as to
23 how much or how the picture would look with all those
24 included.

25 MS. SPALETTA: So, to quantify it, you would have

1 actually had to regenerate this graph right after the State
2 Board staff had issued the June 12th notice, right, and it
3 might have actually depicted that supply was exceeding
4 demand in June?

5 MR. YEAZELL: No, because that's how it looks
6 now.

7 MS. SPALETTA: What do you mean that's how it
8 looks now?

9 MR. YEAZELL: That's the graph -- wait, that's
10 the June 10th graph. The 742 would still be -- I forget
11 what their priority year was or what type of water right,
12 but the 1902 one would still be above the blue line.

13 MS. SPALETTA: Are you absolutely positive of
14 that?

15 MR. YEAZELL: Not without recreating the graph
16 that way. That's what the other graph shows.

17 MS. SPALETTA: So, I'm looking at this graph, and
18 call me crazy, but between the end of the blue line and the
19 top of your red dashed line looks to be about 2,000 CFS to
20 me.

21 MR. YEAZELL: From the top to the -- okay.

22 MS. SPALETTA: You agree with that?:

23 MR. YEAZELL: Okay.

24 MS. SPALETTA: And we just established that your
25 blue solid line omits 2,252 CFS of supply in the form of

1 return flows, right?

2 MR. YEAZELL: You established that, correct.

3 MS. SPALETTA: So, that actually would put it
4 above your dashed blue line -- or dashed red line, excuse
5 me.

6 MR. YEAZELL: One more time?

7 MS. SPALETTA: If you add 2,252 CFS to your solid
8 blue line, it would end up above your dashed red line.

9 MR. YEAZELL: It would end up near it. I'm not
10 going to say above.

11 MS. SPALETTA: And then, if you further reduced
12 your dashed red line by 740 CFS, it wouldn't even be close,
13 would it?

14 MR. YEAZELL: Yeah, I can't argue that.

15 MS. SPALETTA: And again, we're talking about
16 demand data that's based on prior years and not the actual
17 2015 demand data that turned out to be lower?

18 MR. YEAZELL: I just put the numbers in the
19 spreadsheet so, yeah.

20 CO-HEARING OFFICER DODUC: Ms. Spaletta, let's
21 move on. You've made your point, at least to me you have.
22 So, let's move on.

23 MS. SPALETTA: Let's go back to that spreadsheet
24 we pulled up. I think it was 77. Actually, it doesn't
25 really matter which one. You have all of the senior demand

1 in here, right? It's a cut and paste out of the WREDS
2 database?

3 MR. YEAZELL: As it existed at the time I made
4 that particular spreadsheet, yes.

5 MS. SPALETTA: So you could actually, if you
6 wanted to -- we don't necessarily have to do this today.
7 But if you wanted to, you could simply use the filters on
8 your dataset here to identify the top 40 or 50 largest
9 diverters in this watershed?

10 MR. YEAZELL: Correct.

11 MS. SPALETTA: And it would take you about a
12 minute?

13 MR. YEAZELL: About that.

14 MS. SPALETTA: I've seen you use the spreadsheet,
15 you're very good at it. So, it would take you about a
16 minute to identify the top 50 diverters in this
17 spreadsheet.

18 Did your supervisors ever ask you to identify the
19 top 50 diverters so that you, or Mr. Coats, could call them
20 and verify their demand data, so that this analysis could
21 be more accurate?

22 MR. YEAZELL: I know that I did that for the
23 riparian pre-14 demands as part of the Information Order.

24 MS. SPALETTA: What do you mean you did it?

25 MR. YEAZELL: I collected the -- I sorted -- I

1 determined the top 90 percent for the Information Order, of
2 the demand holders for the senior list.

3 MS. SPALETTA: All right, so you knew how to do
4 it to get --

5 MR. YEAZELL: Yeah.

6 MS. SPALETTA: -- the information order. But you
7 could have even further refined it to pick a manageable
8 number of people to call, that would have represented a
9 very large chunk of the demand in this spreadsheet?

10 MR. YEAZELL: Yes.

11 MS. SPALETTA: But you did not do that?

12 MR. YEAZELL: I was not requested to.

13 MS. SPALETTA: I went over, earlier today with
14 Mr. Nemeth, from DWR, the fact that DWR publishes the
15 monthly unimpaired flow data. Were you aware of that?

16 MR. YEAZELL: Yes.

17 MS. SPALETTA: On these graphs, it's interesting
18 to me that you've depicted the demand in monthly chunks as
19 a bar, but you've depicted the supply as a varying line.
20 You actually had the ability, with DWR's monthly unimpaired
21 flow data, to do a visually apples-to-apples comparison of
22 monthly FNF to monthly demand, right?

23 MR. YEAZELL: Possible.

24 MS. SPALETTA: But you did not do that?

25 MR. YEAZELL: No.

1 MS. SPALETTA: And no one, none of your
2 supervisors have actually asked you to update these graphs
3 with the final monthly FNF numbers from DWR?

4 MR. YEAZELL: No.

5 MS. SPALETTA: I have no further questions.

6 CO-HEARING OFFICER DODUC: Mr. Ferguson, do you
7 have questions?

8 CROSS-EXAMINATION BY MR. FERGUSON

9 FOR BYRON BETHANY IRRIGATION DISTRICT

10 MR. FERGUSON: Good afternoon, Mr. Yeazell, I do
11 have a couple of quick, follow-up questions. I just want
12 to be clear and confirm something.

13 You indicated, when Ms. Spaletta was questioning
14 you, that on this exact graph, WR-48, that you used the
15 forecast to issue the -- to make the water availability
16 determination. Is that correct?

17 MR. YEAZELL: Oh, that's somewhat of my
18 understanding. I'm not the decider. I just put the graphs
19 together.

20 MR. FERGUSON: Okay. In Mr. Coats' testimony, on
21 WR-9, at page 18, he indicates that since daily FNF was
22 tracking higher than the 50 percent exceedance, and in fact
23 daily FNF was used to inform the decision in terms of water
24 availability, is that correct?

25 MR. YEAZELL: That's what he said, yes. Yeah.

1 MR. FERGUSON: I'd like to go to WR-47, please.
2 I want to know, in terms of plotting demands on this graph,
3 would it be possible to draw demand lines that identify
4 priority dates, essentially, for groups of water users,
5 similar to what you've done for WR?

6 MR. YEAZELL: Right, the graphs are set up to do
7 that, to basically slice it at any year.

8 MR. FERGUSON: Okay. So, say 1930, you could
9 chart it there?

10 MR. YEAZELL: Correct.

11 MR. FERGUSON: 1940, 1950?

12 MR. YEAZELL: Uh-huh.

13 MR. FERGUSON: Okay, great. I just want to ask
14 you a couple of questions about the quality control
15 procedures because you addressed some of these in your
16 written testimony. So, I understand you did a handful of
17 things. One of the procedures you mentioned had to do with
18 correcting for those demands that showed greater than eight
19 acre feet per acre of demand, is that correct?

20 MR. YEAZELL: Yes.

21 MR. FERGUSON: So, and you adjusted that demand
22 downwards, is that correct?

23 MR. YEAZELL: Yes.

24 MR. FERGUSON: What demand amount did you set
25 those to when you made that adjustment?

1 MR. YEAZELL: Just whatever they're, you know,
2 net acreage that they reported in eWRIMS was.

3 MR. FERGUSON: Set that to 8, is that correct?

4 MR. YEAZELL: Oh, why that was set to 8? That
5 was a number that as given to me. I don't recall where it
6 came from.

7 MR. FERGUSON: Okay, so you didn't do anything to
8 verify, say, with those water rights holders, whether that
9 number would be correct or not?

10 MR. YEAZELL: No. It was just basically, for my
11 understanding, the intention just to weed out -- you know,
12 to filter down the worst of the worst. Like I said, we had
13 that 40,000, you know, times the eight acre feet. That's
14 obviously big. So, we just wanted to do some sort of
15 correction for the obvious super over-reporters.

16 MR. FERGUSON: Did you independently make the
17 decision to make that adjustment?

18 MR. YEAZELL: I suggested it.

19 MR. FERGUSON: You guys have no idea of whether
20 eight acre feet would be the right number?

21 MR. YEAZELL: I can't comment on that, I don't
22 know.

23 MR. FERGUSON: WR-47, can we bring that up again?
24 Sorry about that. Okay. So, just real quickly, I have
25 quick follow-up question on some of the questions I asked

1 you about charting the demands by year. If you had to
2 chart the 1940 demand to the 1950 demand, how would you
3 actually go about doing that?

4 MR. YEAZELL: There's a -- one of the sheets in
5 the workbook, I just pull the -- if we're looking at post-
6 14 demand, I just pull the post-14 cumulative post-14
7 demand for that year, and then I tell the -- and then
8 there's a placeholder in the --

9 MR. FERGUSON: Would it help if we went to the
10 spreadsheet?

11 MR. YEAZELL: It would help, yeah.

12 MR. FERGUSON: WR-75, is that correct?

13 MR. YEAZELL: It's 75, yes. So, if you click on
14 the junior demand tab. And so, basically, that's
15 cumulative demands sorted by year. So, if you pick a year,
16 1940, then I would just copy that row of demand and then
17 paste it into, I believe it's the prorated chart data tab.

18 MS. SPALETTA: Can the witness have a mouse to
19 actually do this?:

20 MR. YEAZELL: I do? Oh, can I.

21 MS. SPALETTA: Is there a mouse so that the
22 witness can actually manipulate the spreadsheet?

23 MR. YEAZELL: I'm having déjà vu.

24 CO-HEARING OFFICER DODUC: Or, does the clicker
25 have a pointer?

1 MR. YEAZELL: Is that okay.

2 CO-HEARING OFFICER DODUC: So, why don't you move
3 over there and there should be a microphone over there.

4 MR. YEAZELL: Pick a year.

5 CO-HEARING OFFICER DODUC: Go ahead and restart
6 the clock.

7 MR. FERGUSON: All right, Mr. Yeazell, are you
8 ready?

9 MR. YEAZELL: Yeah.

10 MR. FERGUSON: Can you go ahead and create that
11 line on the graph, let's say the 1950 priority level. So,
12 cumulative demands up to 1950, I guess it would be.

13 Actually, this spreadsheet isn't quite set up to
14 do this, but I can give a -- it wouldn't exactly show the
15 line, but it would reduce the post-14 demand down to
16 whatever that years is, if that makes sense. So, basically
17 I would take the -- so, I have the appropriate demand for
18 the Sacramento area. This is just for demonstration
19 purposes, so I'm not claiming that these are the right
20 numbers.

21 So, I copy the 1950 data and I'm just going to
22 stick it in the post-14 -- in other spreadsheets I have a
23 separate little table to pick particular years. We're
24 missing a column.

25 MR. FERGUSON: You know, Mr. Yeazell, as you walk

1 through this, if it's possible to kind of explain the steps
2 you're following, it would be helpful.

3 MR. YEAZELL: Yeah, I'm trying to set some things
4 up. I'm not quite used to with this version of Excel,
5 either, so bear with me.

6 CO-HEARING OFFICER DODUC: While he's doing that,
7 Mr. Ferguson, perhaps you can help me understand what is it
8 that you are demonstrating through this experiment?

9 MR. FERGUSON: I think this relates to Mr.
10 Kelly's line of questioning, previously, about what sort of
11 actions were or were not taken with respect to the early
12 season water demands and where that line was just,
13 essentially, drawn on that chart with respect to daily FNF,
14 and comparing the two.

15 So, we wanted an understanding of, you know, if
16 they needed to make some calls by priority date along this
17 line, where exactly those demand would fall.

18 CO-HEARING OFFICER DODUC: Thank you, that's
19 helpful. Okay, and so you picked the 1950 as an example,
20 okay.

21 Let's go ahead and stop the clock while he's
22 doing this.

23 MR. FERGUSON: Mr. Yeazell, it looks like some of
24 the numbers in the columns are changing, is there --

25 MR. YEAZELL: Yeah, it was just missing a column

1 for June. I had to just stick it back in there. It was
2 there, but it just wasn't on the spreadsheet.

3 MR. FERGUSON: Showing up in the chart?

4 MR. YEAZELL: Yeah, it is showing up in the
5 chart. It's just it happened to be in the state that it
6 was saved that the column wasn't there.

7 Okay, so for 1950, you can see that it's a
8 running cumulative demand by priority, so in 1915, and then
9 it just adds -- so I pull the -- so, this is for the
10 Sacramento appropriative area, analysis area. So, copy
11 those, paste them into the Sacramento area, post-14 table.

12 And then the same thing for the Legal Delta.

13 MR. TAURIAINEN: I have a point of clarification.
14 At what point should the clock start back up again? Mr.
15 Yeazell's actually doing things that he's been asked to do
16 by the cross-examiner.

17 CO-HEARING OFFICER DODUC: As soon as he finishes
18 doing them.

19 MR. YEAZELL: Not while I'm doing them?

20 CO-HEARING OFFICER DODUC: No.

21 MR. YEAZELL: This is part of my testimony.

22 CO-HEARING OFFICER DODUC: Yes, spreadsheet on
23 demand.

24 MR. YEAZELL: I better speed up, then. Okay, so
25 and here we have the Delta demand for -- the post-14 demand

1 for 1950. I'll put that there.

2 CO-HEARING OFFICER DODUC: Okay. Are you done?

3 MR. YEAZELL: Nope. And then I take this
4 subtotal, put it on the chart data, so I have post-14, see,
5 so that's post-14 all. Why isn't it changing?

6 CO-HEARING OFFICER DODUC: Oh, dear.

7 I'm going to suggest we take --

8 MR. YEAZELL: I'm sorry.

9 CO-HEARING OFFICER DODUC: -- a break.

10 MR. YEAZELL: This is kind of hard to do on
11 demand, under pressure.

12 CO-HEARING OFFICER DODUC: Rather than sit here
13 and wait for this to happen, let's go ahead and take a 10-
14 minute break. We'll resume at 4:00.

15 (Off the record at 3:51 p.m.)

16 (On the record at 4:00 p.m.)

17 CO-HEARING OFFICER DODUC: So, it looks like
18 everyone's ready, so we might get started a minute early.

19 MS. MC GINNIS: I have a couple of things, Robin
20 McGinnis, DWR.

21 CO-HEARING OFFICER DODUC: Oh, yes.

22 MS. MC GINNIS: I'm wondering if the Court
23 Reporter can read the question back? I'm a little unclear
24 on what question Mr. Yeazell is trying to answer.

25 CO-HEARING OFFICER DODUC: That's a good point.

1 MS. MC GINNIS: And the second thing is I'd like
2 to object to Counsel's request for Mr. Yeazell to
3 manipulate the spreadsheet. I'm not sure if this is an
4 attempt to muddy the record or do an analysis that counsel
5 thinks should have been done, or to do an analysis that
6 should be done in a workshop. So, I just wanted to file
7 that objection.

8 CO-HEARING OFFICER DODUC: I will note your
9 objection. But since I'm interested in it, myself, I will
10 allow it to continue.

11 Since you're our official court reporter --

12 (Discussion off the record)

13 CO-HEARING OFFICER DODUC: Then why don't I ask,
14 Mr. Ferguson, could you restate or repeat your question?

15 MR. FERGUSON: Okay, so just to clarify, the --
16 first of all, can I make a quick request? Can you make the
17 red dashed line, that it looks like you've now drawn
18 visible or more visible? I don't know if you can change,
19 it's really hard to see it. Okay, thank you.

20 All right, I just want to back up and walk
21 through what we've asked you to do and then have you
22 confirm what you've done.

23 CO-HEARING OFFICER DODUC: And actually, you can
24 actually start the clock again.

25 MR. FERGUSON: So, I asked you if it would be

1 possible for you to chart demand at the 1950 priority level
2 on this chart. Is that what you've done here?

3 MR. YEAZELL: Yes, that's what the data in the
4 database at that time says is the 1950 demand.

5 MR. FERGUSON: So, in March, demand is at around
6 36,000, is that correct, 38,000?

7 MR. YEAZELL: Yeah.

8 MR. FERGUSON: So, I just want to confirm that,
9 you know, those demands are well in excess of the daily FNF
10 line, is that correct?

11 MR. YEAZELL: Yes.

12 MR. FERGUSON: Okay. So, any demand in excess of
13 the daily FNF line, according to the testimony we've heard
14 today, should have been water rights are essentially
15 curtailed and been issued a Curtailment Notice on May 1, is
16 that correct?

17 MR. YEAZELL: That's not my decision to make.
18 All I did was create the graphs and present what the data
19 shows.

20 MR. FERGUSON: But do you think it would be
21 possible to mark this graph that he's created as an
22 exhibit, BBID-405? If it's possible to save it and mark
23 it?

24 CO-HEARING OFFICER DODUC: Any objections?

25 MR. TAURIAINEN: I'm not sure. I'm still not

1 clear exactly what the purpose of the questioning is. And,
2 in effect, this is new -- and Jeff has admitted, Mr.
3 Yeazell has admitted that, you know, it's difficult to
4 manipulate this spreadsheet. So, we're not exactly sure if
5 the questions and the answers are matching up. Yeah, or
6 accurate for the purposes to which Mr. Ferguson is putting
7 questions forward.

8 CO-HEARING OFFICER DODUC: All right. Mr.
9 O'Laughlin?

10 MR. O'LAUGHLIN: If I heard the Chair correctly,
11 the question wasn't whether or not the questions match up
12 with the answers. The question was whether or not this
13 should be admitted or marked for admission. And the
14 answer is unequivocally yes. It's a demonstrative exhibit,
15 by an expert, to prove a point. So, this is done all the
16 time in court. It's no big deal, mark it and --

17 CO-HEARING OFFICER DODUC: So, you're objecting
18 to the objection. Thank you, Mr. O'Laughlin.

19 CO-HEARING OFFICER DODUC: Let's go ahead and
20 mark it for now, and I will consider the objections. At
21 some point you'll be entering your exhibits into the record
22 and we'll --

23 MR. FERGUSON: Yeah, and it will be BBID Exhibit
24 405.

25 (Thereupon Exhibit BBID-405 was marked for

1 identification.)

2 CO-HEARING OFFICER DODUC: Then let's move on,
3 please.

4 MR. FERGUSON: Did you save the chart, Mr.
5 Yeazell? Okay, thank you.

6 CO-HEARING OFFICER DODUC: That was a yes, for
7 the record.

8 MR. TAURIAINEN: I would ask, also, that he save
9 the spreadsheet and that BBID be directed to enter the
10 spreadsheet as the next exhibit.

11 MR. YEAZELL: I saved the spreadsheet in the
12 current state it's in.

13 CO-HEARING OFFICER DODUC: Under a different
14 name?

15 MR. YEAZELL: Yes, it has my initials after it.

16 MS. MC GINNIS: I would also ask that you
17 verbally explain which --

18 CO-HEARING OFFICER DODUC: Ms. McGinnis?

19 MS. MC GINNIS: Yes.

20 CO-HEARING OFFICER DODUC: It would just be very
21 helpful for me if you guys could raise your hands or
22 something. Because, otherwise, voices are coming at me
23 from everywhere.

24 MS. MC GINNIS: It would be helpful for the
25 record if Mr. Yeazell could explain what he did to create

1 that line so that we know for the future, when we're trying
2 to recreate this, what it is we're looking at.

3 MR. YEAZELL: Can I walk back to the computer?

4 CO-HEARING OFFICER DODUC: No. I think we all
5 saw what he tried to do.

6 MR. YEAZELL: It's just a matter of -- there's a
7 box in the -- if you go to the prorated chart data --

8 CO-HEARING OFFICER DODUC: You know what, let's
9 not. The chart was revised to reflect the new yellow line
10 that shows the 1950 level of demand, and let's leave it at
11 that.

12 MR. FERGUSON: I just have one final set of
13 questions.

14 CO-HEARING OFFICER DODUC: All right.

15 MR. FERGUSON: And WR-81, can you bring that up
16 real quickly?

17 CO-HEARING OFFICER DODUC: You're not going to
18 modify this one, too, are we?

19 MR. FERGUSON: No, we're not going to modify. I
20 just want to confirm that this graphic has been offered a
21 couple of times today by the Prosecution Team, as claimed
22 confirmation of the water unavailability for BBID. But I
23 just want to confirm that this graph is simply showing
24 measured flows from the San Joaquin system. Is that
25 correct?

1 MR. YEAZELL: It's been a while since I've spent
2 any time with that but, yeah, I believe that's the case.

3 MR. FERGUSON: And then WR-48, which is the graph
4 that the Prosecution Team has indicated supported the water
5 availability determination for the BBID enforcement action,
6 that's a combined watershed graph, right? So, it would
7 incorporate supplies from the Sacramento and the San
8 Joaquin, is that correct?

9 MR. YEAZELL: Correct.

10 MR. FERGUSON: Thank you. No further questions.

11 CO-HEARING OFFICER DODUC: Ms. Zolezzi, does
12 anyone else have questions? Does that complete your cross-
13 examination of the Prosecution Team witnesses? Thank you.

14 MR. FERGUSON: Yes.

15 CO-HEARING OFFICER DODUC: Let's move on, now,
16 just for your information, I would like to complete the
17 other parties' cross-examination of the Prosecution Team
18 today, if possible.

19 So, we'll start with the City and County of San
20 Francisco, followed by the San Joaquin Tributaries
21 Authority. You will each have ten minutes.

22 And yes, Mr. O'Laughlin, I might grant you
23 additional time if your showing of cause, and relevance,
24 and yada-yada-yada. So, please don't ask me.

25 I take it you're not representing City and County

1 of San Francisco?

2 MR. O'LAUGHLIN: Tim O'Laughlin, the San Joaquin
3 Tributaries Authority. We've worked out our time together
4 and our questioning. And I'm going to do the questioning
5 of this panel, so I would like to take the full 20 minutes,
6 if I could.

7 CO-HEARING OFFICER DODUC: We had asked that
8 parties notify --

9 MR. O'LAUGHLIN: Necessary, if it's necessary.

10 CO-HEARING OFFICER DODUC: -- us ahead of time
11 when you're going to consolidate and coordinate your
12 efforts.

13 MR. O'LAUGHLIN: Yeah, well, it didn't come up
14 until today.

15 So, based on how the witnesses went down and they
16 excluded part of their panel that went into Part 2
17 so --

18 CO-HEARING OFFICER DODUC: Let's just do this,
19 let's just give you your ten minutes, Mr. O'Laughlin, and
20 then you will need to demonstrate to me that you have
21 sufficient justified cause to continue.

22 Yes, you need to do both. Only for you, Mr.
23 O'Laughlin.

24 MR. O'LAUGHLIN: Thank you.

25 KATHY MROWKA, BRIAN COATS AND JEFFREY YEAZELL

1 CROSS-EXAMINATION BY MR. O'LAUGHLIN
2 FOR SAN JOAQUIN TRIBUTARIES AUTHORITY
3 AND CITY AND COUNTY OF SAN FRANCISCO

4 MR. O'LAUGHLIN: Okay, Ms. Mrowka, you were
5 present when the Prosecution Team made their Opening
6 Statement, is that correct?

7 MS. MROWKA: Yes, it is.

8 MR. O'LAUGHLIN: Okay, and your attorney stated
9 that two factors were in play here in regards to bringing
10 this action. One was water right priority and the other
11 was injury to senior water rights. Did you hear him make
12 those statements?

13 MS. MROWKA: I heard him make his statements.

14 MR. O'LAUGHLIN: Okay. Did you make any inquiry
15 as to what water right priority was impacted or harmed by
16 an alleged diversion by BBID in this matter?

17 MS. MROWKA: I know that parties that are senior
18 to the BBID --

19 MR. O'LAUGHLIN: No, no, no, I want a particular
20 water right. I want to know exactly. I want to know the
21 name, I want to know the water right, and I want to know
22 the location so --

23 CO-HEARING OFFICER DODUC: Mr. O'Laughlin, this
24 question has been asked.

25 MR. TAURIAINEN: He's harassing the witness.

1 CO-HEARING OFFICER DODUC: But this question has
2 been asked earlier.

3 MR. O'LAUGHLIN: No, it hasn't because the
4 question was asked, but there was no response.

5 CO-HEARING OFFICER DODUC: The question was asked
6 whether there was evidence of harm to anyone else. And she
7 answered the question.

8 MR. O'LAUGHLIN: No, she didn't. She answered
9 the question in this fashion, she said that on a water
10 right priority basis there was. So, what I want to know is
11 which particular water right priority was impacted by the
12 alleged diversion by BBID. Not a general statement that
13 water rights were impacted. I want to know the specific
14 water right priority that was impacted. It's a pretty
15 simple question.

16 CO-HEARING OFFICER DODUC: All right, answer it
17 so that we can move on. Actually, repeat your answer which
18 you had before.

19 MS. MROWKA: Right, I believe before I said that
20 we did not investigate which parties would have been
21 impacted, specifically.

22 CO-HEARING OFFICER DODUC: So, we are moving on,
23 Mr. O'Laughlin.

24 MR. O'LAUGHLIN: Well, here's the thing. I
25 understand that Chair wants to move on. I have my time and

1 it's allocated to me. And I don't want to get in a fight,
2 but I have a due process right to conduct my cross-
3 examination the way I want. So, if I want to ask
4 additional questions, I can ask additional questions.

5 CO-HEARING OFFICER DODUC: I will allow you to
6 ask additional questions, as long as it furthers this
7 discussion, rather than just repeating the same question
8 over and over again.

9 MR. O'LAUGHLIN: Well, that's your decision,
10 that's not my decision.

11 CO-HEARING OFFICER DODUC: Ask your question, Mr.
12 O'Laughlin.

13 MR. O'LAUGHLIN: I'm making a record for not only
14 here, but for afterwards on appeal.

15 CO-HEARING OFFICER DODUC: Fine, ask your
16 question.

17 MR. O'LAUGHLIN: So I have to protect -- I am
18 going to ask my questions, thank you.

19 Okay, did you make any inquiry as to an entry to
20 a senior water right holder, rather than water right
21 priorities in general?

22 MS. MROWKA: I did not investigate any
23 individuals in this matter, other than the parties named in
24 the actions.

25 MR. O'LAUGHLIN: Has there been any determination

1 by your office as to whether or not stored water was being
2 illegally diverted in the Delta?

3 MS. MROWKA: This action was related to our water
4 availability analysis, which is based on full natural flow.
5 Stored water is not a component of full natural flow.

6 MR. O'LAUGHLIN: Questions can go to either Mr.
7 Coats or Mr. Yeazell.

8 In April or May, on your spreadsheet, if
9 landowners in the Delta reported that they had both pre-14
10 and riparian rights, how were they treated in April?

11 MR. YEAZELL: If they had -- in eWRIMS, if they
12 claimed both riparian and pre-14, in other words both boxes
13 were checked in eWRIMS, they were treated as riparian.

14 MR. O'LAUGHLIN: In April, in the April
15 spreadsheet?

16 MR. YEAZELL: As far as I know.

17 MR. O'LAUGHLIN: Okay. Were you aware, Ms.
18 Mrowka, in your testimony you were -- in your deposition
19 you talked about the change that was made to pre-14s and
20 riparians in the Delta that claimed those rights were
21 changed to all riparians for the June spreadsheet. Do you
22 remember that testimony?

23 MS. MROWKA: Yes.

24 MR. O'LAUGHLIN: Okay. So, in fact then, in
25 April it may have been that they weren't treated that way,

1 is that correct?

2 MS. MROWKA: I don't believe I entered testimony
3 on April.

4 MR. O'LAUGHLIN: Okay. So, who decided to make
5 the change that people who reported that they were both
6 pre-14 and riparians were changed to riparians, only?

7 MS. MROWKA: I believe I discussed that with Mr.
8 O'Hagan, and we wanted to make sure that parties, who have
9 a senior right, are credited with that senior right.

10 MR. O'LAUGHLIN: But who made the decision?

11 MS. MROWKA: I believe that we jointly made it.

12 MR. O'LAUGHLIN: Okay. So, when you were making
13 that decision, did you take into account the Millview case
14 that, except in limited circumstances, you can't claim both
15 a riparian and a pre-14 water right at the same time?

16 MS. MROWKA: We were well aware of that.

17 MR. O'LAUGHLIN: And did you take that into
18 consideration when you were making your decision?

19 MS. MROWKA: When we were making our decision, it
20 was based upon the fact that these parties assert that they
21 had a valid right. We had sent out Information Orders. We
22 had asked for Title D documents. And so, we made our
23 decision because we had asked for these documents. We
24 hadn't had opportunity to fully view them, yet, but we had
25 done work to gather information on their claimed senior

1 rights.

2 MR. O'LAUGHLIN: And these are claimed senior
3 rights, rather than adjudicated pre-14 rights, is that
4 correct?

5 MS. MROWKA: As to riparian and pre-1914?

6 MR. O'LAUGHLIN: No, pre-14.

7 MS. MROWKA: Pre-14?

8 MR. O'LAUGHLIN: Pre-14, yeah.

9 MS. MROWKA: So, our database includes both
10 adjudicated right holders, such as in the Stanislaus River
11 adjudication area and non-adjudicated pre-14s.

12 MR. O'LAUGHLIN: In the Delta, though, were there
13 any adjudicated pre-14 water rights claimed?

14 MS. MROWKA: We did not run the database looking
15 for that, so I can't say yes or no.

16 MR. O'LAUGHLIN: Okay. So, this is a question
17 for the panel, anyone who feels comfortable answering it
18 can respond.

19 By changing the pre-14 riparians to strictly
20 riparians, does that mean in effect that all those
21 claimants now had priority over any pre-14 person who
22 claimed strictly a pre-14 right?

23 MS. MROWKA: So, on our database, what we did was
24 we based it upon information that we have in from the
25 diverters, themselves, as to their --

1 MR. O'LAUGHLIN: But here's the question, maybe
2 I'll rephrase it. When you made the change from pre-14
3 riparians to strictly riparians, based under your analysis
4 that you did, all of those people now had priority over any
5 pre-14 water right claimant, is that correct?

6 MS. MROWKA: In the way that we used the data for
7 the evaluation.

8 MR. O'LAUGHLIN: I'm assuming that's a yes.

9 MS. MROWKA: Well, their water rights are their
10 water rights.

11 MR. O'LAUGHLIN: Yeah, but if you -- okay. Well,
12 you testified earlier about you knew and understood water
13 rights. So, under the analysis that you did, if you made
14 everybody a riparian, they now had priority over anybody
15 who claimed a pre-14 right. Is that correct?

16 MS. MROWKA: In our evaluation work, yes.

17 MR. O'LAUGHLIN: Based on the change in the
18 evaluation, can either Mr. Coats or Yeazell tell me what
19 the change in the demand was in the Delta?

20 MR. COATS: I think we'd have to actually look at
21 the spreadsheet to find out what the pre- and post-
22 conditions are.

23 MR. O'LAUGHLIN: Okay, that would be great.

24 MR. COATS: I'm not an expert on the spreadsheet,
25 so I'll have to defer to Jeff to see if he can potentially

1 answer that question, as far as an actual amount.

2 MR. O'LAUGHLIN: Sure. All I want to know is how
3 the change from pre-14 and riparian, to strictly riparian,
4 changed the demand in the Delta.

5 MR. YEAZELL: Which ones?

6 MR. O'LAUGHLIN: You can take the April one and
7 take the June one.

8 MR. YEAZELL: Okay. Which ones are they?
9 I guess pull up WR-75.

10 MR. O'LAUGHLIN: And here's the point for this --

11 CO-HEARING OFFICER DODUC: And I'm sorry, you're
12 not able to give a qualitative answer to that question?

13 MR. YEAZELL: They should be the same.

14 MR. O'LAUGHLIN: If you're fine with that answer,
15 I'm willing to go with it.

16 MR. YEAZELL: And qualitatively, it should be
17 if --

18 MR. COATS: I think the total statement demand
19 didn't change.

20 MR. YEAZELL: Right.

21 MR. COATS: But the amount -- I think the
22 question is going from that duplicative claim, going from a
23 pre-14 and riparian, how much of the pre-14 amount declined
24 and how much did the riparian increase?

25 MR. O'LAUGHLIN: That's an excellent way to

1 restate the question.

2 And the reason, just so the Chair knows the
3 reason I'm asking this, so you wanted an offer of proof, is
4 if that change was made, how much that change looks like in
5 a demand basis, based on CFS.

6 MR. YEAZELL: So, if you go to prorated demand
7 tab, and then add up riparian and pre-14 values for the
8 Delta.

9 MR. O'LAUGHLIN: So in June, under that graph,
10 there's 250,923 acre feet of pre-14 Delta demand. And in
11 June, there is a -- sorry, pre-14 demand. And then for
12 riparians, there's 51,152, is that correct?

13 MR. YEAZELL: No, riparian for Delta would be
14 unadjusted or adjusted, prorated or un-prorated?

15 MR. O'LAUGHLIN: Just up on the top it says
16 what --

17 MR. YEAZELL: Okay, 12,072 riparian and 109,666
18 pre-14, whatever that totals out to be.

19 MR. O'LAUGHLIN: Compared to the June one?

20 MR. YEAZELL: That would be --

21 MR. O'LAUGHLIN: Spreadsheet.

22 MR. YEAZELL: Then that would be WR-77. And then
23 scroll to the right. I believe the senior demand summary.
24 So, it would be riparian 105,820. Pre-14, 15,940.

25 MR. O'LAUGHLIN: So, they basically flip-flopped,

1 basically, qualitatively?

2 MR. YEAZELL: Right.

3 MR. O'LAUGHLIN: So, looking at the difference in
4 those numbers, now, the 105,000 acre feet in a month
5 equates to what? And I usually just divide by 30 and
6 divide by 2, I'm not very precise on this. Would that be
7 an accurate display of how much CFS difference there would
8 be in the Delta for riparian? 105,000 divided by 2 would
9 give you roughly 55,050, divided by 3, divided by 2 again,
10 divided by 30. So, it would give you about 2,000 CFS,
11 about 1,750, ballpark? A lot of water.

12 Okay, so then, based on this analysis then, so in
13 June then --

14 MS. KALNINS TEMPLE: Objection. Objection, he
15 didn't let the witness answer the question. It sounded
16 like testimony, rather than a question, to which the
17 witness was allowed to provide an answer.

18 MR. O'LAUGHLIN: Oh, okay, I'll wait.

19 MS. KALNINS TEMPLE: Sure.

20 MR. YEAZELL: My own calculation here.

21 CO-HEARING OFFICER DODUC: And while he's
22 thinking about that, Mr. O'Laughlin, you've already used
23 your ten minutes. How do you -- I'm assuming you want more
24 time. How do you propose to use that time and what do you
25 propose to demonstrate?

1 MR. O'LAUGHLIN: I have one more line of
2 questioning about diversions on the lower San Joaquin and
3 in the Delta immediately upstream of BBID and West Side
4 that should provide insight into what water was available
5 for BBID and West Side. It's pretty limited.

6 CO-HEARING OFFICER DODUC: All right, I see a
7 hand from Ms. Spaletta.

8 MS. SPALETTA: It actually doesn't have to do
9 with Mr. O'Laughlin's questioning. But there was just an
10 objection from an attorney, who I believe is with the
11 Attorney General's Office. And I understand that the
12 Attorney General's Office is actually defending the State
13 Water Resources Control Board in the litigation related to
14 this case. So, can we get some clarification on the role
15 of the Attorney General counsel in this proceeding?:

16 CO-HEARING OFFICER DODUC: Mr. Tauriainen?

17 MR. TAURIAINEN: Thank you, I'd be happy to do
18 that. Yeah, sitting to my left, I apologize, this morning
19 first thing I did not recognize all my co-counsel here.
20 From my immediate left is Jennifer Kalnins Temple, with the
21 Attorney General's Office.

22 To her left is Ken Petruzzelli from the Office of
23 Enforcement. And to his left is John Prager from the
24 Office of Enforcement.

25 The Attorney General's Office represents the

1 State Board in matters including, at times, provides
2 assistance in administrative proceedings, such as this one,
3 upon request.

4 Very similar to the way the prosecution and the
5 hearing sides of the State Water Board have separation of
6 functions, the Attorney General's Office sets up and
7 maintains a separation of functions for the various units
8 that are representing the Water Board in the litigation,
9 for example in this case and this administrative
10 proceeding.

11 Ms. Kalnins Temple is part of a group of Deputy
12 Attorney Generals who are assisting the Prosecution Team in
13 this enforcement proceeding, but are not participating in
14 the litigation. And that litigation team is not
15 participating in this enforcement proceeding.

16 And I'm not -- the OE is not participating in the
17 litigation, as well.

18 CO-HEARING OFFICER DODUC: Thank you for that
19 clarification.

20 MR. O'LAUGHLIN: I think we have a number.

21 MR. YEAZELL: What was your number?

22 MR. O'LAUGHLIN: My number was 1,700. What's
23 yours?

24 MR. YEAZELL: It's 1,500, the same ball park.

25 MR. O'LAUGHLIN: Oh, okay, the same ball park.

1 Horseshoes and hand grenades, thank you very much.

2 Okay, let's move on to something really quickly,
3 and if anybody feels comfortable answering these questions,
4 just raise your hand and answer.

5 Is anyone on the panel familiar with
6 Reclamation's permits at its diversion facility in the
7 Delta banks?

8 MS. MROWKA: Only in a cursory fashion. I don't
9 know the terms and conditions of the rights.

10 MR. O'LAUGHLIN: Okay. Did anybody from your
11 office look at whether or not Reclamation was allowed to
12 divert San Joaquin River flow in June of 2015?

13 MS. MROWKA: I did not direct staff to look into
14 that issue.

15 MR. O'LAUGHLIN: Do you know whether or not
16 Reclamation has the right to divert San Joaquin River flow
17 and under what conditions?

18 MS. MROWKA: Again, I have cursory knowledge. I
19 don't know the specific terms and conditions without
20 refreshing my memory on that.

21 MR. O'LAUGHLIN: So, would you agree that
22 Reclamation has the right to divert previously stored
23 Sacramento River water from Shasta or from Folsom, at its
24 diversion facility located on Old River?

25 MS. MROWKA: I believe it's an authorized point

1 of diversion.

2 MR. O'LAUGHLIN: Did you or your staff, or did
3 you ask anyone at DWR to assist you in determining what
4 amount of water the Reclamation was diverting in June, and
5 where the source of that water was from?

6 MS. MROWKA: I believe that in June, the
7 Temporary Urgent Change Petition was very directive as to
8 what could be diverted.

9 MR. O'LAUGHLIN: Okay, and at the time it said
10 that the diversion, that there would be 1,500 CFS of stored
11 water being diverted at both the CVP and SWP facilities, is
12 that correct?

13 MS. MROWKA: It's up to.

14 MR. O'LAUGHLIN: Up to, thank you, that's much
15 more.

16 Did your staff request DWR to do any particle
17 tracking model to determine whether or not Reclamation was
18 in fact diverting previously stored water in June of 2015?

19 MS. MROWKA: I could not answer for other
20 Division program functions. But in enforcement, we did not
21 do that.

22 MR. O'LAUGHLIN: Do you know if DWR has the
23 capability, based on salinity analysis, to determine
24 whether water is being taken in at Clifton Court Forebay,
25 and at Banks?

1 MS. MROWKA: Can you repeat, please? I'm sorry.

2 MR. O'LAUGHLIN: Sure. Do you know if DWR has
3 the capability, with salinity analysis, to determine the
4 source of the water coming in at either Clifton Court
5 Forebay or at Banks?

6 MS. MROWKA: I am not familiar with their
7 capabilities.

8 MR. O'LAUGHLIN: So, that would mean that you
9 didn't ask for that, then, would that be correct?

10 MS. MROWKA: I did not.

11 MR. O'LAUGHLIN: I have a hypothetical for you,
12 and anybody can answer this one. If Reclamation was
13 diverting 500 CFS of San Joaquin River water that was
14 flowing in from Vernalis flow, and they were not entitled
15 to do so under their permits, wouldn't that water be
16 available to senior appropriators in the South Delta?

17 MS. MROWKA: That hypothetical, are you assuming
18 they're taking released stored water, because that wasn't
19 part of what we're doing here?

20 MR. O'LAUGHLIN: No, no. Let me go back. Real
21 simple, water is coming in from Vernalis, Reclamation
22 diverts 500 CFS of San Joaquin River flow at their facility
23 at Banks, that under their permits they are not entitled to
24 do so. Now, this is a hypothetical, you don't have to
25 agree with that. Would that water then be available to

1 senior appropriators in the South Delta?

2 MS. MROWKA: I believe Reclamation's water rights
3 have specific end dates for their diversion period. Are
4 you assuming they're diverting outside of their diversion
5 period?

6 MR. O'LAUGHLIN: I'm going to tell you that they
7 have no ability to divert San Joaquin River water when the
8 Delta is not in excess. And clearly, you would agree that
9 the Delta was not in excess in 2015, correct, June of 2015?

10 MS. MROWKA: It was imbalanced, yeah.

11 MR. O'LAUGHLIN: Okay, so if it's imbalanced
12 conditions, I will make an offer of proof to the State
13 Board, and the Hearing Officers, and to you, that
14 Reclamation is not entitled to divert San Joaquin River
15 water at Banks. Given that, if Reclamation was diverting
16 water from the San Joaquin River, and that water -- and
17 they weren't entitled to do so, wouldn't that water be
18 available to senior appropriators in the South Delta? Oh,
19 Jones, not Banks, sorry. Sorry, slight mistake.

20 MS. MROWKA: So, you're basically asking us to
21 hypothetically decide that Reclamation was diverting from a
22 specific source. Okay, but that's outside of our scope of
23 testimony.

24 MR. O'LAUGHLIN: Yeah, but it doesn't matter if
25 it's outside the scope of your testimony because,

1 unfortunately, when I get to ask cross-examination
2 questions, and the Chair can correct me if I'm wrong, I get
3 to ask questions outside the scope of your testimony, your
4 direct testimony, to elucidate information that I can use
5 at a later date.

6 So, I just want an answer to the question?

7 MS. MROWKA: So in general, if a diverter is not
8 authorized to divert, if it's past their diversion period
9 and their water rights, if it's a source that's not
10 authorized in their water rights that it's an unauthorized
11 diversion.

12 MR. O'LAUGHLIN: Okay. And then, if that's the
13 case, and they diverted, whether it was 100, 200 or 300 CFS
14 of San Joaquin River water in June of 2015, if they had
15 bypassed that water, it would have been available for
16 senior diverters downstream, correct?

17 MS. MROWKA: If they had bypassed the flow,
18 instead of diverting it --

19 MR. O'LAUGHLIN: Yes.

20 MS. MROWKA: -- then it would be in the stream.

21 MR. O'LAUGHLIN: For senior diverters, correct?

22 MS. MROWKA: It would be available under whatever
23 priority of right has that season, that source.

24 MR. O'LAUGHLIN: Okay, so I have one final
25 question. In your testimony, earlier, you mentioned that

1 the complaint by the State Water Project Contractors didn't
2 go anywhere because no specific illegal diversion had been
3 listed. Yet, CalSpa filed a complaint and identified that
4 the Bureau was illegally diverting water at the Jones
5 Pumping Plan and, yet, you made no inquiry at the time of
6 June of 2015 to determine if, in fact, they were diverting
7 water illegally that would have been available to senior
8 appropriators downstream. Is that correct?

9 MS. MROWKA: As to the CalSpa complaint, I have
10 staff assigned to investigate it.

11 MR. O'LAUGHLIN: That's a nonresponsive. What I
12 wanted to know is did you look at it in June of 2015?

13 MS. MROWKA: I believe it's an ongoing
14 investigation.

15 MR. O'LAUGHLIN: Did you look at it in June of
16 2015 to determine if, in fact, Reclamation was illegally
17 diverting water they weren't entitled to, that may have
18 been available to downstream appropriators?

19 MS. MROWKA: I'm not sure. I haven't asked the
20 staff if they looked at it specifically in June. I know
21 it's an ongoing investigation. I have staff assigned and
22 that they're evaluating it.

23 CO-HEARING OFFICER DODUC: Is that a no?

24 MS. MROWKA: I don't know what work the staff did
25 in June. It's likely they were all diverted to the drought

1 effort and likely they didn't work on that one in June.

2 CO-HEARING OFFICER DODUC: Mr. O'Laughlin, is it
3 your intention to ask if, in the course of determining
4 water availability, Ms. Mrowka and her staff looked at that
5 issue in June, as they were determining that?

6 MR. O'LAUGHLIN: That was going to be my next
7 question. But since they couldn't answer the first one,
8 it's pretty hard to ask the second one, so I'm going to
9 assume --

10 MS. MROWKA: Well, I did not ask staff to look at
11 any of the complaints, materials that are pending, in their
12 work on the water availability issue.

13 MR. O'LAUGHLIN: I'm sorry, I'm just perplexed.
14 But if somebody is claiming that there is a major illegal
15 diversion occurring in the Delta, that is without right,
16 how do you make a determination that a downstream
17 appropriator is illegally diverting water without first
18 determining whether the people immediately upstream are
19 properly taking the water that might be available to them?

20 MS. MROWKA: If you recall the testimony here
21 today, the full natural flow is calculated up at the rim
22 reservoirs, and then we subtract the demands from that full
23 natural flow.

24 Now, we quickly curtailed the post-1914 right
25 holders. They did not have any basis to divert once we

1 told them there was no supply available to them. Certainly
2 in June, the post-14s had no right to divert. So, you
3 know, when we look at who was diverting, we would evaluate
4 whether those parties were out there diverting. We did
5 1,325 inspections to see if these people that we said
6 there's no water for right are diverting. And so, we did a
7 lot of inspections to try and elicit information on just
8 this question.

9 MR. O'LAUGHLIN: No, but I have one question.
10 You did 1,300 -- or, wait, was it 1,300 or 3,000
11 inspections?:

12 MS. MROWKA: 1,325.

13 MR. O'LAUGHLIN: Okay. And, yet, you have one of
14 the largest diversions occurring in the Delta immediately
15 upstream and you didn't go and inspect whether or not they
16 were illegally diverting water?

17 MS. MROWKA: Staff were assigned to inspect
18 Reclamation's diversions.

19 MR. O'LAUGHLIN: And what was the report?

20 MS. MROWKA: It is a work in progress. It's
21 confidential until such time as it's public.

22 MR. O'LAUGHLIN: I thank the Chair and the
23 Hearing Officers for the indulgence of time. Thank you.

24 CO-HEARING OFFICER DODUC: Thank you, Mr.
25 O'Laughlin.

1 Department of Water Resources.

2 MS. MC GINNIS: No questions for these witnesses,
3 thanks.

4 CO-HEARING OFFICER DODUC: State Water
5 Contractors?

6 MS. ANSLEY: I have just a very few questions.

7 CO-HEARING OFFICER DODUC: Come up.

8 KATHY MROWKA

9 CROSS-EXAMINATION BY MS. ANSLEY

10 FOR STATE WATER CONTRACTORS

11 MS. ANSLEY: Good afternoon. I'm wondering if we
12 could call up an exhibit that BBID brought in earlier, on
13 their cross, which is BBID-403. I'm wondering if the
14 witnesses still have it before them, when it was passed
15 out.

16 MR. TAURIAINEN: We would need to have BBID
17 identify where, on the flash drive, that is.

18 MR. KELLY: What's the exhibit number, 403?

19 MS. ANSLEY: And is that the same exact chart as
20 WR-47?

21 MR. KELLY: I believe -- I believe that it is,
22 but I don't know if WR-47 had the depo exhibit sticker on
23 it. And because it was the subject of deposition
24 testimony, I wanted to make sure I used it. So, it may be
25 that it's the same exhibit, but we have to look. But are

1 we getting --

2 MS. ANSLEY: If no one has any objections,
3 whatever's easiest to call up. I don't want to cause undue
4 delay. I believe that's it, thank you.

5 MR. KELLY: Madam --

6 CO-HEARING OFFICER DODUC: Mr. Kelly?

7 MR. KELLY: Thank you. So, the electronic
8 version, for whatever reason, doesn't open. I have BBID-
9 403 here. You're welcome to use my paper copy.

10 MS. ANSLEY: I have a copy here. I just wanted,
11 whichever one's easy enough just to flash up.

12 MR. KELLY: So, I'll just say it appears as
13 though it's the same exact graph, it's just simply missing
14 the deposition exhibit number. There you go, okay.

15 MS. ANSLEY: Thank you. I just have some
16 questions.

17 So, earlier today, Ms. Mrowka, Mr. Kelly was
18 questioning you about the water availability analysis, and
19 which you said was based on the full natural flow. Is that
20 correct?

21 MS. MROWKA: Yes, that is.

22 MS. ANSLEY: And the full natural flow did not
23 include stored water, is that correct?

24 MS. MROWKA: That is correct.

25 MS. ANSLEY: And then he was questioning you with

1 regards to -- I think the graph is shown a little low here,
2 but he was questioning you with regards to a full natural
3 flow. And I believe he used the number -- he was pointing
4 at the 15,000 CFS mark. He was questioning you about the
5 demand that was above the full natural flow level. Do you
6 recall that?

7 MS. MROWKA: Yes, I do.

8 MS. ANSLEY: Did some of the diversions, as
9 indicated by the demand shown in the upper part of the
10 graph had been partially composed of stored water supplies?

11 MS. MROWKA: As to the -- I'm sorry, the demand,
12 itself?

13 MS. ANSLEY: Yes.

14 MS. MROWKA: Yes, the demand could be for stored
15 water.

16 MS. ANSLEY: Okay.

17 MS. MROWKA: And then, the March period is when a
18 lot of reservoirs are still collecting to storage. You
19 know, it is that time window, right, typical for storage
20 periods?

21 MS. ANSLEY: So, looking at the graph then, above
22 the full natural flow line and the forecasted full natural
23 flow line, let's say, mid-March forward, the demand that is
24 above those levels could have been partially comprised or
25 satisfied by stored water leases. Is that correct?

1 MS. MROWKA: Yes, it could have.

2 MS. ANSLEY: Okay. I'm going to hand you what's
3 been submitted already, so it is already submitted to the
4 Board as SWC-007, which is a joint letter from the DRW and
5 the Bureau of Reclamation to the Division of Water Rights,
6 dated July 23rd, 2014.

7 (Discussion off the record)

8 MS. ANSLEY: And take a moment and look it over,
9 if you like. Are you ready?

10 And I just have a couple of just very, very basic
11 questions. Do you recognize this letter?

12 MS. MROWKA: Yes, I believe so.

13 MS. ANSLEY: And you have reviewed this letter as
14 a member of the Division of Water Rights, Program Manager
15 for Water Enforcement?

16 MS. MROWKA: That type of material is generally
17 referred to my section.

18 MS. ANSLEY: Okay. Does this appear to be, and
19 please your time looking it over, does this appear to be a
20 true and correct copy of this letter that was received by
21 the Division of Water Rights?

22 MS. MROWKA: I believe so.

23 MS. ANSLEY: Then my final question, and like I
24 said, please feel free to take your time. I don't mean to
25 flop a large letter on you. But in this letter, is it your

1 understanding that the DWR and the Bureau are asserting
2 circumstances under which unauthorized diversions of stored
3 water may be occurring, just generally?

4 MS. MROWKA: Yes. And I do recall the letter
5 better, now, thank you.

6 MS. ANSLEY: I don't have any further questions
7 for the witness, thank you.

8 CO-HEARING OFFICER DODUC: Thank you.

9 Westlands?

10 KATHY MROWKA, BRIAN COATS AND JEFFREY YEAZELL

11 CROSS-EXAMINATION BY MS. AKROYD

12 WESTLANDS WATER DISTRICT

13 MS. AKROYD: Thank you. Rebecca Akroyd for
14 Westlands Water District. I'd like to start with just a
15 few questions for Ms. Mrowka.

16 Earlier today, when we were looking at various
17 graphs with Ms. Spaletta, you referred to -- or she
18 referred to, I believe, as abandoned releases of stored
19 water. I'd like to discuss that with you a little bit.

20 Now, I'd like to specifically ask a few questions
21 regarding releases from Central Valley Project and State
22 Water Project storage.

23 When previously stored water is meeting specific
24 fishery requirements in the Delta, the State Board does not
25 treat that water as abandoned, correct?

1 MS. MROWKA: I am not aware of any decisions that
2 would say that was abandoned flow. In fact, what I'm aware
3 of is State Water Board decisions requiring flow standards
4 to be met at specific locations.

5 MS. AKROYD: Is it true as well, then, when
6 releases are meeting water quality standards in the Delta,
7 that water is not treated as abandoned, either?

8 MS. MROWKA: I don't believe it's abandoned.

9 MS. AKROYD: And reservoir releases are traveling
10 through the Delta for export from the South Delta and the
11 State Board does not treat that water as abandoned either,
12 correct?

13 MS. MROWKA: Correct.

14 MS. AKROYD: So, is it correct to say that while
15 releases from Central Valley Project and State Water
16 Project storage are fulfilling the requirements of a State
17 Board order, are being conveyed through the Delta for
18 export, they are not treated as available for
19 appropriation?

20 MS. MROWKA: That is my understanding.

21 MS. AKROYD: I'd like to turn to Mr. Coats.
22 Good afternoon. I'd like to start by asking you a few
23 questions regarding Delta return flow.

24 MR. COATS: Okay.

25 MS. AKROYD: Earlier today you summarized the

1 treatment of Delta return flow. And specifically, I
2 believe, you explained that the 40 percent Delta return
3 flow credit was first proposed during a May 12th, 2015
4 meeting. Is that right?

5 MR. COATS: That's the meeting date that it was
6 proffered by the stakeholders and then from that point
7 forward we ended up incorporating that into our analysis,
8 yes.

9 MS. AKROYD: Return flow in this context refers
10 to water pumped off of the irrigated islands in the Delta
11 that results in a net consumptive quantity less than that
12 diverted. Is that right?

13 MR. COATS: Correct.

14 MS. AKROYD: I understand that there are a number
15 of factors that may be relevant to calculating return
16 flows. Would you consider the quantity of water being
17 diverted and applied on the Delta islands a relevant factor
18 to the calculation of return flow?

19 MR. COATS: Correct.

20 MS. AKROYD: And the quantity of water being
21 pumped off or drained off of the Delta islands would be
22 another relevant factor to the calculation of return flow?

23 MR. COATS: Yes.

24 MS. AKROYD: And data regarding consumptive use
25 or evapotranspiration could also be another relevant factor

1 to the calculation of return flow, is that correct?

2 MR. COATS: Yes.

3 MS. AKROYD: Historical records, or trends in
4 drainage of pumping off of Delta islands would also be a
5 relevant consideration in the calculation of return flow?

6 MR. COATS: Correct.

7 MS. AKROYD: Now, prior to applying the 40
8 percent Delta return flow credit, you didn't consider any
9 quantity, historical or consumptive use data for 2015, did
10 you?

11 MR. COATS: Could you rephrase the question?

12 MS. AKROYD: No quantity, historical or
13 consumptive use data was used to calculate the 40 percent
14 Delta return flow credit?

15 MR. COATS: Correct.

16 MS. AKROYD: And you're not aware of Mr. Yeazell
17 or any other State Board staff considering any of those
18 types of data in the calculation of Delta return flow for
19 the unavailability determinations?

20 MR. COATS: We just applied the 40 percent
21 factor blindly.

22 MS. AKROYD: Thank you.

23 So then no other data was provided or -- excuse
24 me, no other data was considered to inform the 40 percent
25 return flow credit, is that right?

1 MR. COATS: Right.

2 MS. AKROYD: No data was provided to support the
3 40 percent return low credit during the May 12th meeting,
4 is that also right?

5 MR. COATS: Correct.

6 MS. AKROYD: And there hasn't been any data
7 subsequently provided to support the 40 percent Delta
8 return flow credit, is that right?

9 MR. COATS: Not to my knowledge.

10 MS. AKROYD: Excuse me. Excuse my laryngitis.

11 I'd like to turn, now, to the topic of supply
12 from unimpaired flow sub-basins. Is it possible to get WR-
13 47 on the screen, please? Thank you.

14 Earlier today, I believe that you confirmed
15 monthly adjusted FNF forecasts were used to determine water
16 availability. Is that correct?

17 MR. COATS: The unimpaired flow from the sub-
18 basins was added to the monthly FNF forecast, correct.

19 MS. AKROYD: And during the cross-examination by
20 Ms. Spaletta, you confirmed that the adjusted FNF lines, on
21 the graphs underlying the May 1st notice, and also the June
22 12th notice, included supply from the unimpaired flow sub-
23 basins, correct?

24 MR. COATS: Yes, because they're referenced in
25 the legend so, yes.

1 MS. AKROYD: Looking again at the -- looking at
2 that legend for the analysis that was underlying the May
3 1st notice, we can see the adjusted FNF included supply
4 from 7 of 13 sub-basis. Is that right?

5 MR. COATS: One through 5, 7 and 10.

6 MS. AKROYD: Turn to Exhibit WR-48, please.
7 And looking at the legend there, it indicates that the
8 adjusted FNF included supply from 8 of the 13 sub-basins,
9 is that right?

10 MR. COATS: I'm showing in the legend, UF sub-
11 basins 1 through 5, 7, 1 and 17.

12 MS. AKROYD: Now, I understand that in the
13 written testimony, submitted by other parties, Mr.
14 Bonsignore has criticized the State Board analyses for
15 failing to consider supply from the unimpaired flow sub-
16 basins. Based on what we've just read in the legends, that
17 isn't correct, is it?

18 MR. COATS: He critiqued that there were
19 additional sub-basins that we did not include.

20 MS. AKROYD: But we just confirmed that there was
21 consideration of flow from 7 and 8 of the sub-basins,
22 respectively.

23 MR. COATS: Correct.

24 MS. AKROYD: Switching again to a different
25 topic, I'd like to speak about agricultural return flows.

1 Now, earlier today, there's some brief discussion in our
2 direct summary of the State Board's treatment of
3 agricultural return flows.

4 You testified, and I'm paraphrasing, that your
5 treatment of return flows on the San Joaquin and Sacramento
6 Rivers was guided by the 1977 Dry Year Report appendix,
7 correct?

8 MR. COATS: The actual, there was monthly figures
9 for the San Joaquin, and then I think page 6 of the Dry
10 Year Report indicated that nothing was added for the
11 Sacramento so, correct.

12 MS. AKROYD: Can you please pull up what has been
13 marked as Exhibit WR-79, it's the Dry Year Report.

14 And can you please turn to page 13 of the report?
15 I think it's 24 of the exhibit. Thank you. And scroll up
16 so we can see the whole page. Thank you.

17 So, beginning on page 13, the report identifies a
18 number of assumptions that were made in estimating the
19 water supply available to pre-1914 appropriators in the
20 Sacramento River Basin. Do you see that?

21 MR. COATS: Yes.

22 MS. AKROYD: I'd like to look at the fourth
23 assumption, which is toward the bottom of the page.

24 MR. COATS: Okay.

25 MS. AKROYD: The fourth assumption reads, "The

1 estimation of return flow was based on the assumption that
2 the United States Bureau of Reclamation does not assert
3 claim of right to recapture return flow originating from
4 the use of Project stored or imported water". Do you see
5 that?

6 MR. COATS: Yes, I do.

7 MS. AKROYD: So, now, please turn page 18 of the
8 report, which is marked as page 29 of the exhibit. And
9 there we can just see that we're beginning to discuss San
10 Joaquin River supply.

11 Now, on the next page, you can go to the
12 assumptions similar. Thank you. We begin seeing, again,
13 assumptions that were relating to San Joaquin River supply.

14 And I'd like to go to the fourth assumption, so
15 one more page forward, please. Thank you.

16 There, similar to what we just read a moment ago,
17 the third sentence reads, "The calculations assumed that
18 the Bureau does not assert a claim of right to recapture
19 return flows originating from the use of Central Valley
20 Project Water in the upper San Joaquin River Basin".

21 MR. COATS: I see that.

22 MS. AKROYD: Now, when the State Board staff
23 incorporated the 1977 Dry Year Report's treatment of return
24 lows, it didn't change that treatment in response to the
25 assumptions about Project Water that I just read, is that

1 right?

2 MR. COATS: We used the assumptions that were
3 based on a different page within that report.

4 MS. AKROYD: But for the treatment that did
5 occur, including returns for the San Joaquin River, or the
6 Sacramento River, although I understand it was zero, but
7 for the San Joaquin there was no backing out or specific
8 treatment, change of treatment for Project return flows, is
9 that right?

10 MR. COATS: Correct.

11 MS. AKROYD: Today, the State Board recognizes
12 that the Bureau does assert a claim of right to Project
13 return flows?

14 MR. COATS: No, I don't have an answer to that.

15 CO-HEARING OFFICER DODUC: Time.

16 MS. AKROYD: Thank you. I have read some of the
17 Bureau of Reclamation contracts where they make such
18 claims. So, to the extent I'd like to -- I understand I'm
19 out of time. Is it possible for me to ask just a few more
20 questions on one additional topic?

21 CO-HEARING OFFICER DODUC: On what additional
22 topic?

23 MS. AKROYD: Well, I'd like to ask Mr. Coats a
24 few questions regarding the treatment of demand for the San
25 Joaquin River exchange contractors. I can be more

1 specific.

2 CO-HEARING OFFICER DODUC: More specific.

3 MS. AKROYD: To establish that the State Board
4 treated the demand of the San Joaquin River exchange
5 contractors consistent with how that demand was reported by
6 the exchange contractors.

7 CO-HEARING OFFICER DODUC: And how does that
8 relate to -- make the connection for me, in terms of how
9 that relates to the key issues that are before us.

10 MS. AKROYD: In terms of looking at whether the
11 calculation of demand was correct. There have been
12 criticisms that San Joaquin River exchange contractor
13 demand on the San Joaquin River shouldn't have been
14 included and that it should have been backed out of that
15 demand. And I'd like to establish that it's a proper
16 demand on the system because it's consistent with how the
17 San Joaquin River exchange contractors reported that
18 demand.

19 CO-HEARING OFFICER DODUC: All right, I'll allow
20 it.

21 MS. AKROYD: Earlier today, I believe, and I
22 think this was Mr. Coats, that you were testifying about
23 this. You testified that the demand included in the water
24 availability analyses incorporated the demands report in
25 response to the 2014 and 2015 Informational Orders.

1 MR. COATS: The 2015 Informational Order, in
2 response to that order, which gave us the 2014 use, as well
3 as the projected 2015 use, correct.

4 MS. AKROYD: Thank you for the clarification.

5 Now, the Water Board initially used reported
6 demands from the San Joaquin River exchange contractors
7 responses for 2014 demand, correct?

8 MR. COATS: Correct.

9 MS. AKROYD: And are familiar with the specific
10 reported demand of the San Joaquin River exchange
11 contractors?

12 MR. COATS: I briefly remember looking at the
13 submittal that they submitted and replied to the
14 Informational Order, which indicated what their 2014 uses
15 were. And then, as far as the 2015 projected use, I ended
16 up having to call them to find out what their uses were,
17 since they failed provide a response to that. And the
18 gentleman I spoke to on the phone had indicated that their
19 2014 uses would best represent their 2015 uses.

20 MS. AKROYD: And the exchange contractors'
21 responses to the Information Order included reported demand
22 on the San Joaquin River, is that right?

23 MR. COATS: Yes.

24 MS. AKROYD: Now, going back to the State Board's
25 analysis, I understand that to assess demand the State

1 Board relied on information provided by water users, is
2 that right?

3 MR. COATS: Correct.

4 MS. AKROYD: So then, in the water availability
5 analyses underlying the May and June Notices of
6 Unavailability, the State Board treated the demand of
7 statement holders consistently with how they reported that
8 demand, correct?

9 MR. COATS: Correct.

10 MS. AKROYD: Turning back to the San Joaquin
11 River exchange contractors, the State Board treated their
12 demands consistently with how they reported it, is that
13 right?

14 MR. COATS: They reported in their submittal that
15 it would be very difficult to separate out the riparian
16 from the pre-14 uses.

17 MS. AKROYD: But in terms of they reported demand
18 on the San Joaquin River, the State Board then treated
19 their demand on the San Joaquin River consistent with how
20 it was reported, is that right?

21 MR. COATS: Correct.

22 MS. AKROYD: Thank you. I have no further
23 questions.

24 CO-HEARING OFFICER DODUC: And that concludes the
25 cross-examination of the Prosecution Team's witnesses.

1 Mr. Tauriainen, are you requesting redirect? And
2 if so, for what purpose?

3 MR. TAURIAINEN: Yes. Brief redirect on two
4 specific points, which will involve just a few questions
5 and a few minutes each, not much time at all.

6 CO-HEARING OFFICER DODUC: What are the points?

7 MR. TAURIAINEN: The first is generally
8 addressing what most of the cross-examination today focused
9 on, the methodology and the analysis underlying the June
10 12th and May 1st notices.

11 That's not the subject of this proceeding. The
12 proceeding is whether there was water available for Byron
13 Bethany and West Side during certain periods.

14 I'd like to redirect Jeff Yeazell, very briefly,
15 to focus or refocus some of the questioning that Ms.
16 Spaletta asked him regarding water availability. Instead
17 of on June 12th, to focus it on the actual period of June
18 13th through June 24th.

19 It will take me less time to ask him the
20 questions than it just took me to explain that. Very
21 close, don't --

22 CO-HEARING OFFICER DODUC: And what's your second
23 point?

24 MR. TAURIAINEN: I'd like Ms. Mrowka to discuss a
25 little bit more how investigations and enforcement actions

1 REDIRECT EXAMINATION BY MR. TAURIAINEN

2 FOR THE PROSECUTION TEAM

3 MR. TAURIAINEN: Okay, we can go. First, Ms.
4 Mrowka, Kathy, I'd like to redirect you to the BBID-401
5 Exhibit, which is an e-mail. It's an e-mail chain from
6 you.

7 MS. MROWKA: Okay.

8 MR. TAURIAINEN: The first question. Who has the
9 delegated authority to commence enforcement actions in the
10 Delta?

11 MS. MROWKA: The Delta Water Master.

12 MR. TAURIAINEN: The Delta Water Master on this
13 e-mail chain?

14 MS. MROWKA: No.

15 MR. TAURIAINEN: The second, broader question,
16 and can we bring up -- I believe it's WR-47. It's the one
17 that BBID and the others have Exhibit 10 on, for their
18 BBID-43. But Number 47, we can go with.

19 Okay, earlier today you had -- you heard cross-
20 examination, face cross-examination suggesting that there
21 might be a number of potential violations in the March and
22 April period.

23 CO-HEARING OFFICER DODUC: Are you trying to get
24 into your first point on Ms. Mrowka?

25 MR. TAURIAINEN: I thought this was my second

1 point.

2 CO-HEARING OFFICER DODUC: This is your second
3 point. So, you're going to go -- ask your question.

4 MR. TAURIAINEN: My first point was about Mr.
5 Yeazell, and I thought that was the one you said that I'd
6 already addressed.

7 CO-HEARING OFFICER DODUC: Your first point --
8 okay, go ahead. Ask your question. My apologies.

9 MR. TAURIAINEN: I'll talk to Mr. Yeazell, if
10 that's what --

11 CO-HEARING OFFICER DODUC: No, go ahead, ask your
12 question of Ms. Mrowka.

13 MR. TAURIAINEN: Just generally describe, how
14 does the enforcement process work, from the beginning, what
15 triggers and enforcement action?

16 MS. MROWKA: An enforcement action can be
17 triggered in different manners. We can evaluate whether a
18 water right holder is in compliance with their water
19 rights, on our own motion. We can evaluation whether
20 there's a violation because we've received a complaint.

21 Or, in the case of the drought inspections, you
22 know, we did a large field effort to validate whether
23 persons had stopped diverting when there was no water under
24 their priority of right. And so, we started investigations
25 based on those and field investigations, also.

1 MR. TAURIAINEN: How many investigations,
2 disregarding the drought, would you estimate are ongoing,
3 now, in your Enforcement Unit?

4 MS. MROWKA: Oh, my goodness. Right now, the
5 number of investigations each staff has got, I would say
6 anywhere from four to ten active cases that they're working
7 on, and there's 25 or so staff, so quite a few.

8 Yeah, we had four this past year, about 125
9 coming out of our Complaints Branch that we're
10 investigating. And then we have also got -- we did the
11 1,325 field inspections. And out of that, I would say that
12 we're doing -- and some of these are 2014-2015 combined
13 investigations, where we've had issues both years.

14 We're doing a minimum of 30 ongoing
15 investigations right now. Some stuff is queued up, where
16 staff hasn't yet become available to finish out work, or to
17 make recommendations to me whether to move cases forward.

18 So, I'd say at least 30 actives on that portion.

19 MR. TAURIAINEN: And what does it take to turn an
20 investigation into an issued enforcement action?

21 MS. MROWKA: It takes a quite a bit of effort.
22 Basically, we have to evaluate whether there was in fact a
23 violation of the Water Code, or whether there's a
24 threatened unauthorized diversion. So, we would have to,
25 you know, basically decide is there a threatened

1 unauthorized diversion or is there an actual unauthorized
2 diversion? Is it an action which we have sufficient data?
3 There's just a huge amount of data we have to collect to
4 bring a matter forward because we have to make the case
5 that there was a violation or a threatened unauthorized
6 diversion.

7 MR. TAURIAINEN: Everyone forgive me for putting
8 words in my mouth, but you're describing evidence?

9 MS. MROWKA: I am describing evidence, that's
10 correct.

11 MR. TAURIAINEN: It takes evidence to --

12 MS. MROWKA: It takes a lot of evidence to bring
13 a case forward.

14 MR. TAURIAINEN: Okay. Do you know whether there
15 are any investigations ongoing for potential unauthorized
16 diversions from the period that Mr. Kelly was so enamored
17 with? But, certainly, you can go across the entire year in
18 post-1914 demand?

19 MS. MROWKA: Yes, there are investigations
20 ongoing with that.

21 MR. TAURIAINEN: You can't comment on those?

22 MS. MROWKA: Well, they're confidential until
23 such time as we issue an enforcement item, such as a Draft
24 Cease and Desist Order, or the ACL complaint.

25 MR. TAURIAINEN: Let's go back for a second to

1 the BBID-401. There's a letter -- the e-mail chain has a
2 letter attached to it. Is there any language in that
3 letter that clearly indicates to you that BBID is still
4 diverting on June -- the letter is dated June 23rd?

5 MS. MROWKA: It indicates that they have
6 discussed obtaining alternate supplies and they intend to
7 continue to provide minimal water supplies to lands within
8 BBID. It talks about a lot of these efforts.

9 Hang on a minute while I look through it. It
10 says that the notice is not an actual curtailment of BBID's
11 pre-1914 appropriative water right and was issued solely
12 for informational purposes to BBID and the general public.
13 Because the curtailment notice does not actually require a
14 cessation in diversions and does not, as the State Water
15 Board's opposition provides, mandate any action by BBID,
16 BBID will independently assess the water supply situation
17 and determine appropriate next steps.

18 Moreover, because the curtailment notice is
19 solely a courtesy --

20 CO-HEARING OFFICER DODUC: Could you please stop?
21 There's no need to read the entire letter.

22 MR. TAURIAINEN: Is this the kind of evidence
23 that might trigger an investigation?

24 MS. MROWKA: Yes.

25 MR. TAURIAINEN: Is this evidence -- are the

1 statements in this letter as clear and as definitive -- I
2 mean, it took you -- you had to leaf through the whole
3 thing. Are they as clear and definitive as the quote from
4 Mr. Gilmore that we put on the slide in my opening, in
5 which it's part of my exhibits?

6 MS. MROWKA: No, Mr. Gilmore's was more clear.

7 MR. TAURIAINEN: Okay. Again, don't speak to any
8 investigations that might be ongoing, but just ballpark,
9 what sort of evidence, along the nature of either the
10 letter that came from BBID's lawyer on June 23rd, or the
11 statement by Mr. Gilmore on June 25th, might be comparable,
12 if any, to any evidence that you might have -- oh, 47 is
13 the one I would want to point out right now.

14 But is there any evidence comparable, that you're
15 aware of, alleging unauthorized diversions by any of the
16 post-14s that Mr. Kelly accused of unlawfully diverting?

17 MS. MROWKA: As to that, if there was information
18 coming from the complaints process, then we're evaluating
19 it under that process.

20 But under this process, we hadn't yet issued any
21 notification to parties that there was lack of water for
22 them. And so, you know, we had not yet issued those
23 notifications.

24 MR. TAURIAINEN: So, there might be, but
25 investigations are ongoing. Again, pardon me for

1 paraphrasing the witness's testimony.

2 MS. MROWKA: We didn't really begin a lot of the
3 curtailment inspections until the June 1st date. That's
4 when we really sent the troops out in the field to look and
5 see what's going on.

6 CO-HEARING OFFICER DODUC: You're about out of
7 time so --

8 MR. TAURIAINEN: Oh, I want to make sure we know,
9 too, regarding the evidence leading to the West Side
10 diversions. We heard in my opening and in our exhibits,
11 could you describe just generally what the nature of that
12 evidence was?

13 MS. MROWKA: For West Side, we had information
14 came in through our complaints process, with respect to use
15 of treated wastewater that --

16 MR. TAURIAINEN: Can I scratch that and so I can
17 ask you one more, different question?

18 We heard earlier today that there had been no
19 discussion between the Board or the Enforcement Unit, and
20 West Side, regarding whether or not West Side had a right
21 to divert under the Tracy Water Agreement. Was there any
22 discussion about that?

23 CO-HEARING OFFICER DODUC: Actually, your time is
24 up. And that, actually, was not part of what you outlined
25 to me as the point that you were going to make with Ms.

1 Mrowka. So, I will stop you right there.

2 MR. TAURIAINEN: Okay.

3 CO-HEARING OFFICER DODUC: And I will hear from
4 Mr. Kelly.

5 MR. KELLY: Thank you, Hearing Officer Doduc. I
6 actually don't think I -- I don't think I have any recross
7 based on what just happened. I'll let the letter, the
8 June 23rd letter speak for itself.

9 I do, though, ask for three minutes to allow,
10 perhaps, the witnesses to clarify their testimony for the
11 benefit of the record. And I'm going to make an offer of
12 proof to you right now that there was some testimony that
13 came out on what I would consider kind of a friendly cross,
14 about the demands shown on this chart, including demands
15 on stored water. And that's inconsistent with everything
16 we've been told for the past six months. That the demands
17 in this chart were demands on the flow of the river and not
18 demands on stored water.

19 And I just want to make sure that the witnesses
20 intended to say what they actually said in response to Ms.
21 Ansley's question about what was in that demand.

22 CO-HEARING OFFICER DODUC: Well, thank you for
23 your offer, but that's not cross. It's not recross. So,
24 we'll -- any suggestion, Ms. Kuenzi, on this legal request?

25 MR. KELLY: And if I can say, everybody --

1 CO-HEARING OFFICER DODUC: Mr. Tauriainen, since
2 they are your witnesses, do you have any objections?

3 MR. TAURIAINEN: I would object that this isn't
4 within the scope of anything that you would consider
5 recross at all. It wasn't within the scope of my redirect.

6 MR. KELLY: I appreciate that. So for the record
7 then, I will just say that BBID had to cross-examine these
8 witnesses first. And the parties that followed BBID were
9 entitled to ask questions about BBID's questions to the
10 witnesses. And I've not been given a chance to ask
11 questions of these witnesses about the questions that
12 followed me. And so, I'm at a disadvantage here.

13 And like I said, I think the record is now
14 inaccurate and it's not inaccurate from my witnesses, it's
15 inaccurate from these witnesses. These aren't my
16 witnesses. And I'm just trying to make sure that the
17 record is clear.

18 If you don't want me to ask the questions, I
19 won't ask them.

20 CO-HEARING OFFICER DODUC: All right, repeat your
21 question again, for me.

22 MR. KELLY: The question is, demands shown in
23 that dark orange shading, demands -- water right demands on
24 the full natural flow of the system or do they include the
25 demands on stored water, contract demands on stored water.

1 CO-HEARING OFFICER DODUC: All right, I will ask
2 for an answer.

3 MR. COATS: As far as the water right demands,
4 that's the demands that are reported to us in our system.
5 If a diverter elects to report stored water, under their
6 water right, then that demand could potentially include
7 stored water. It just depends --

8 CO-HEARING OFFICER DODUC: What is --

9 MR. COATS: What's that?

10 CO-HEARING OFFICER DODUC: What is it reflected?

11 MR. COATS: It depends on each diverter and how
12 they report the water that they divert, if it's from full
13 natural flow and stored water, or one or the other. Every
14 single water right diverter is independent.

15 CO-HEARING OFFICER DODUC: That's enough. That's
16 all I will entertain on this.

17 MR. TAURIAINEN: I would like to just follow up
18 very briefly.

19 CO-HEARING OFFICER DODUC: All right, Mr.
20 Tauriainen.

21 MR. TAURIAINEN: And just ask that in the future,
22 if the Delta parties want to reserve a portion of their
23 cross-examination time which, by any definition has been
24 ample, so that they can do what he just did, which is
25 recross after other party cross-examinations, that he make

1 that request and do that request in the future, and maybe
2 give an offer of proof for it.

3 CO-HEARING OFFICER DODUC: Okay.

4 MR. TAURIAINEN: But, otherwise, I would object
5 to any attempt by the Delta parties to recross after cross-
6 examination.

7 CO-HEARING OFFICER DODUC: I appreciate that.
8 And I understand. But he raised an interesting question
9 that I was curious about.

10 Ms. Ansley?

11 MS. ANSLEY: I'd just like to lodge an objection
12 that I merely asked a simple question, which the witnesses
13 understood, which now I feel is slightly mischaracterized.
14 So, I wanted to lodge that objection for the record, that I
15 do believe that my question was simply, you know, there had
16 been much discussion about how the -- how there were so
17 many diversions, how there was so much demand above a very
18 low-looking full natural flow line. And my simple question
19 was, could not some of that demand, during that time period
20 that Mr. Kelly was asking, you know, in a sense how were
21 they diverting, I just simply asked could some of those
22 people in the upper part of the chart --

23 CO-HEARING OFFICER DODUC: Thank you. I was
24 there, I heard your question.

25 Mr. O'Laughlin?

1 MR. O'LAUGHLIN: I have a simple question. Are
2 we allowed to keep our materials here overnight or shall we
3 take them home?

4 CO-HEARING OFFICER DODUC: I believe you should
5 take them home.

6 MR. O'LAUGHLIN: Thank you.

7 CO-HEARING OFFICER DODUC: We are not going to
8 assume responsibility for anything taken from this room.

9 MS. SANTOS-AGUIRRE: We were told we could leave
10 our supplies here and the room would be locked.

11 CO-HEARING OFFICER DODUC: This room is never
12 locked.

13 Mr. Buckman?

14 MR. BUCKMAN: Can I ask who told you that?
15 Because our standard response is this room is never locked.
16 You are free to leave your equipment here. You are free to
17 leave your books, your bindings. But just know that there
18 is security, so the access into the building is restricted
19 to some degree. But these rooms are never locked.

20 CO-HEARING OFFICER DODUC: All right.

21 MS. SANTOS-AGUIRRE: Actually, I had spoken to
22 Jane on Friday and she clarified that.

23 CO-HEARING OFFICER DODUC: Well, whoever you -- I
24 don't think we're finished here. Is this the time for me
25 to ask the Prosecution Team to enter their exhibits?

1 So, before we get to the mundane stuff, let me at
2 least wrap up this proceeding.

3 Mr. Tauriainen, would you like to enter your
4 exhibits, including your Power Point presentation or
5 whatever else you produced today?

6 MR. TAURIAINEN: Just produced the Power Point
7 presentation, in addition to the witness statements and the
8 exhibits going with them.

9 The Power Point presentation, I believe was
10 marked as Exhibit WR-253, and I've served that via e-mail
11 to all the parties and to the Hearing Team, and provided a
12 copy of the Power Point to the Hearing Team here, and then
13 a PDF version of it. So, we would offer that into the
14 record.

15 As well as the -- given that Ms. Bare and Mr.
16 Wells were essentially asked not to testified today, I
17 won't seek to submit their witness statements as relevant
18 to the Phase 1 issues. But I would ask to enter Ms.
19 Mrowka, Mr. Coats, and Mr. Yeazell, and Mr. Nemeth's
20 witness statements, which they identified in their
21 testimony, and the Phase 1 exhibits relating to those
22 witness statements into the record at this time.

23 CO-HEARING OFFICER DODUC: All right. As I noted
24 earlier, we have already received some objections and we've
25 ruled that we will consider your objections in weighing the

1 evidence based on the whole record. So, I don't want to
2 hear the same objections again.

3 Are there any other objections to the Prosecution
4 Team's exhibits, as just specified by Mr. Tauriainen?

5 Ms. Spaletta?

6 MS. SPALETTA: My objection is really more a
7 request for clarification of which numbered exhibits he is
8 requesting to enter? Because there are many exhibits
9 listed on his exhibit list and not all of them were
10 referenced in his witnesses' testimony.

11 MR. TAURIAINEN: I would ask to know which ones
12 weren't referenced? Because it's the Prosecution Team's
13 position that the witnesses referenced all of the exhibits.

14 MS. SPALETTA: Well, I can give an example.
15 There were -- there are numerous additional spreadsheets
16 and graphs that I believe were probably prepared by Mr.
17 Yeazell, that represent alternative analyses, that were not
18 discussed during testimony today.

19 So, is it the Prosecution Team's position that
20 they are admitting into evidence, as relevant to this
21 proceeding, every single spreadsheet and graph in this
22 list?

23 MR. TAURIAINEN: Our witnesses had 90 minutes.
24 They couldn't speak to everything. And, in fact, were
25 directed not to speak to everything in their written

1 testimony. These were summaries today. We submitted
2 something like 252 exhibits before today and there's --

3 CO-HEARING OFFICER DODUC: So, is it your
4 intention to move everything, except the testimony and
5 statement of qualification for Paul Wells and Katherine
6 Bare?

7 MR. TAURIAINEN: I can actually go from the other
8 direction probably a little more simply. And that is, Mr.
9 Coats, which is WR-9. All of his exhibits, with the
10 exception of the ones he references at the very, like the
11 last two pages of his testimony relate to Phase 1.

12 CO-HEARING OFFICER DODUC: All right.

13 MR. TAURIAINEN: Mr. Yeazell, all of his exhibits
14 related to Phase 1. Ms. Mrowka -- and so, his testimony is
15 WR-11.

16 Ms. Mrowka is WR-7. She has a mixture. She
17 discusses some Phase 2 issues in her testimony, as well.

18 I'm prepared to list all of the exhibits that
19 they reference, but without taking a little more time to go
20 through their witness statements and specify which ones are
21 specifically Phase 1, which is identified on the --

22 CO-HEARING OFFICER DODUC: It is.

23 MR. TAURIAINEN: -- on the exhibit index, I
24 wouldn't be able to read the entire list. I can read the
25 entire list of all the exhibits that they reference in

1 their testimony, in their written testimony, and that
2 would take some time. I don't know if that's necessary,
3 either.

4 I would just suggest that we submit the witness
5 statements as drafted. And the ones that are relevant to
6 Phase 1 issues, the exhibits that are referenced within
7 should be pretty self-explanatory as to which ones are
8 relevant.

9 And then, by the end of each Phase 2, when I
10 resubmit the relevant witness statements for Phase 2
11 purposes, that will capture all the rest of the exhibits
12 for the proceeding. And then by the end, you know, the
13 entire witness statements and all of the exhibits will have
14 been submitted.

15 CO-HEARING OFFICER DODUC: All right, so that
16 would be Water Rights 7, Water Rights 8, as appropriate to
17 Phase 1. Water Rights 9, Water Rights 10, Water Rights 11,
18 Water Rights 12, and all the other exhibits mentioned
19 within those exhibits.

20 MR. TAURIAINEN: In addition, Mr. Nemeth's
21 testimony, which is Water Rights 17, and his statement of
22 qualifications, which is Water Rights 18. Oh, and all of
23 his testimony and exhibits that he references are Phase 1,
24 as well.

25 CO-HEARING OFFICER DODUC: And I will assume

1 you'll also want to enter Water Rights 1 and Water Rights
2 2?

3 MR. TAURIAINEN: That's correct. And as
4 referenced by --

5 CO-HEARING OFFICER DODUC: And 5, okay.

6 MR. TAURIAINEN: -- I think, Mr. Coats and Ms.
7 Mrowka both discussed Water Rights 1 through 6, actually,
8 are all addressed in that testimony.

9 CO-HEARING OFFICER DODUC: All right, thank you.

10 And Ms. Spaletta, your objection is noted.

11 MS. SPALETTA: I honestly just need to have a
12 list of numbers for the record at some point. So, maybe
13 after we get through a few days of testimony, we can have a
14 time where we designate that everyone kind of comes and
15 compares numbers, just so that we're clear in the record at
16 the end.

17 CO-HEARING OFFICER DODUC: Thank you.

18 MR. TAURIAINEN: I'd be happy to do that at the
19 end of the West Side Phase 2 proceeding, which is when all
20 of it will be --

21 CO-HEARING OFFICER DODUC: All right.

22 Mr. Kelly?

23 MR. KELLY: Yes, I was just going to make sure
24 that we move the cross-examination exhibits into evidence,
25 as well, BBID-400 through BBID-405, that were all marked

1 and used on cross-examination.

2 CO-HEARING OFFICER DODUC: Yes, I have a pile
3 right here.

4 MS. ANSLEY: I would also ask the same exact
5 thing for the one exhibit that I also submitted.

6 CO-HEARING OFFICER DODUC: That was Ms. Ansley?

7 MS. ANSLEY: Which was SW -- I'm also asking the
8 same thing as Mr. Kelly, that the one exhibit, SWC-007,
9 also similarly used on cross, also be admitted at this
10 time.

11 CO-HEARING OFFICER DODUC: All right.

12 MS. SPALETTA: The additional exhibits that were
13 moved in by West Side and the Delta Agencies, it was West
14 Side Exhibit 181 and 182.

15 CO-HEARING OFFICER DODUC: Yes, I have 181, 182.
16 I have BBID-400, BBID-401, 402, 402, 404 --

17 MR. KELLY: 405 was the revised spreadsheet that
18 Mr. Yeazell prepared and saved with his initials on it, on
19 Mr. Buckman's computer.

20 CO-HEARING OFFICER DODUC: Yes, all right. Thank
21 you very much for that.

22 (Whereupon, the above-referenced exhibits were
23 admitted into evidence by the Hearing Officer.)

24 CO-HEARING OFFICER DODUC: And with that, we are
25 concluding today's session. We will resume at 9:00

1 tomorrow, when we will hear -- when we will hear from Mr.
2 Kelly, presenting BBID's case in chief.

3 * * *

4 (Thereupon the hearing recessed at
5 5:23 p.m.)

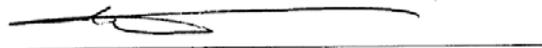
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REPORTER'S CERTIFICATE

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of April, 2016.



PETER PETTY
CER**D-493
Notary Public

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I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were transcribed by me, a certified transcriber.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of April, 2016.



Barbara Little
Certified Transcriber
AAERT No. CET**D-520