

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

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VOLUME 3

JOE SERNA, JR./CALEPA BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
1001 I STREET, SECOND FLOOR
COASTAL HEARING ROOM
SACRAMENTO, CALIFORNIA

WEDNESDAY, MARCH 23, 2016

9:00 A.M.

Reported by:
PETER PETTY

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LEGEND: T = Mr. Tauriainen
 S = Ms. Spaletta
 K = Mr. Kelly
 O = Mr. O'Laughlin
 SA = Mr. Satkowski
 B = Mr. Buckman

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[www.waterboards.ca.gov/waterrights/water_issues/programs/
hearings/byronbethany/exhibits/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byronbethany/exhibits/))

THE WEST SIDE IRRIGATION DISTRICT

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P R O C E E D I N G S

1
2 March 23, 2016

9:00 a.m.

3 HEARING OFFICER DODUC: Good morning everyone.
4 Welcome back. Thank you for accommodating the various
5 changes yesterday.

6 Let me begin by reminding you of all the various
7 general announcements. If an alarm goes off we are
8 required to vacate this room. Please take the stairs
9 down, exit, and go to our meeting location. If you've
10 forgotten where that is I believe there's a sign on the
11 first floor that tells you, so I won't repeat it.

12 This is being webcasted, so please speak into the
13 microphone as you present your comments today. And begin
14 by identifying yourself.

15 And take a moment, and if you haven't done so,
16 check and make sure that your cells phones are on silent.

17 I am -- I guess I should have introduced myself
18 first. I am Tam Doduc, Hearing Officer for the BBID ACL.
19 And to my left is Vice Chair Fran Spivy-Weber, Hearing
20 Officer for the Westside Draft CDO. Assisting us today
21 are to my right, Counsel Nicole Kuenzi. To her right,
22 Jane Farwell-Jensen. To Ms. Spivy-Weber's left is Rich
23 Satkowski. And to his left is left is Ernie Mona. We
24 also have Michael Buckman over there assisting us.

1 So again, thank you for accommodating the
2 changes. And we look forward to hearing your comments
3 and arguments today with respect to motions for
4 dismissal.

5 I wanted to give you at least a heads-up that
6 what we are most interested in hearing today are --
7 because Phase 1 has been focused on the water
8 availability portion of this hearing, we are very
9 interested in hearing the Water Availability Analysis and
10 the assumptions underlying those analyses. So if --
11 you're welcome to make comments during the 45 minutes
12 allotted for each side, but that would be my area of
13 interest.

14 So with that I will invite those who would like
15 to speak in favor of the motion to present your 45-minute
16 argument.

17 Another housekeeping item is after we hear all
18 the oral arguments we will be taking a short break, and
19 that probably will be later on this morning. So as for
20 planning purposes, keep that in mind.

21 With that, Mr. Kelly?

22 MR. KELLY: Good morning.

23 THE REPORTER: Your microphone, sir?

24 MR. KELLY: Are we on now? There we go. Good
25 morning.

1 Just so you understand what we're going to do,
2 Ms. Spaletta and I and Ms. Zolezzi have prepared a
3 PowerPoint that we're going to use that outlines the
4 argument and the citations to evidence.

5 HEARING OFFICER DODUC: You're actually welcome
6 to take those seats, if you would like.

7 MS. ZOLEZZI: I think I'm fine right here.

8 HEARING OFFICER DODUC: Okay. All right.

9 MR. KELLY: And so Ms. Spaletta will speak first,
10 and then Ms. Zolezzi will pick it up, and then I'll
11 follow Ms. Zolezzi, just so you know as we're going
12 through. When Ms. Spaletta concludes her portion it
13 won't be the end then. There will be -- there will be
14 just additional speakers, but we'll all do it within
15 the -- within the 45-minute allotted time. Thank you.

16 HEARING OFFICER DODUC: Thank you.

17 OPENING ARGUMENT IN FAVOR OF THE MOTION

18 BY MS. SPALETTA

19 FOR THE WEST SIDE IRRIGATION DISTRICT,

20 SOUTH DELTA WATER AGENCY,

21 CENTRAL DELTA WATER AGENCY

22 MS. SPALETTA: Good morning. If we could get the
23 PowerPoint up on the screen?

24 And I first of all wanted to thank the Hearing
25 Officers for the opportunity to provide this argument

1 today and to outline the evidence and the burden of
2 proof. I agree that it will be very helpful to the
3 process. And, frankly, we're very thankful for the
4 opportunity to do that today.

5 Oh, there it is. Okay. I think it's a little
6 hard to see, but hopefully it will come up.

7 So the motion was a motion for nonsuit. And what
8 we thought we would do first is really talk about what
9 that means, what that motion means, and what it means for
10 the hearing officers in the context of what we've seen so
11 far in this case.

12 A motion for nonsuit or a judgment, basically, in
13 one party's favor is used after the presentation of a
14 party's case in chief when the evidence is legally
15 insufficient to meet the party's burden of proof.

16 And why is this type of motion even allowed in
17 the law?

18 You know, the big picture here is that the
19 Prosecution Team has had an opportunity to put on their
20 very best case, all of their evidence supporting the
21 elements that they have to prove. We've had some
22 opportunity to poke at that evidence with cross-
23 examination. They had an opportunity to rehabilitate
24 their case through redirect. And frankly, this is the
25 best their case is ever going to look. At this point we

1 move on and the other parties get to put on their
2 evidence, and then we do rebuttal. But they've already
3 had their opportunity to put their best evidence before
4 you. So if they haven't met their burden of proof on the
5 elements at this point, they're not going to be able to
6 do so as we move forward. So that's the purpose of the
7 motion. We've laid out the standard.

8 You have the ability as a tribunal looking at
9 this motion to weigh the evidence and make inferences and
10 determinations of the credibility of the witnesses,
11 including any experts that were put forth as part of the
12 Prosecution Team's case.

13 So what exactly is the motion?

14 Mr. O'Laughlin made the motion and it was joined
15 by the Delta agencies, as well as West Side and BBID
16 yesterday. So to get to the bottom line of what we could
17 do with this motion, the motion is for judgment or
18 dismissal in favor of BBID in its enforcement action
19 denying the proposed ACL because the Prosecution Team did
20 not prove water was unavailable during June of 2015.
21 It's the same request for West Side because they did not
22 prove water was unavailable for West Side.

23 What are the elements that they had to prove?

24 The Prosecution Team asserted the enforcement
25 actions were justified because water was unavailable for

1 West Side starting May 1st, and for BBID from June 13th
2 through the 25th. The Prosecution Team had the burden to
3 establish water was unavailable. They chose to meet
4 their burden with a global Water Availability Analysis,
5 which I'm going to nickname the WAA, from May 1st, 2015,
6 and June 12th. And this was confirmed specifically in
7 Ms. Mrowka's written testimony, and then again when we
8 cross-examined her, that they were relying on the May 1st
9 and the June 12th determinations.

10 The Prosecution Team also argued in its opening
11 statement that the enforcement actions were justified to
12 protect the rule of priority. However, you noted and we,
13 of course, pointed out that they chose not to present any
14 evidence in their case in chief of injury to a prior
15 right holder.

16 So what exactly was the burden of proof?

17 The Prosecution Team argued it was the
18 preponderance of the evidence standard, which basically
19 means they've tipped the scale. But it's more likely
20 than not that water was unavailable. Frankly, it's not a
21 real stringent standard. The other end of the spectrum
22 is criminal cases beyond any reasonable doubt.

23 We argue that the standard in this type of case,
24 when you're dealing with very important public policy
25 issues and very important private rights, is the middle-

1 ground standard which is the clear and convincing
2 evidence standard. So that means that they have to do
3 more than just barely tip the scale. They have to prove
4 that there's a high probability that they are correct.
5 There's a high probability that based on their analysis,
6 water was unavailable. It has also been described by
7 courts as "proof so clear as to leave no substantial
8 doubt, sufficiently strong to command the unhesitating
9 ascent of every reasonable mind." Respondents' contend
10 that regardless of which standard you use, the evidence
11 that the Prosecution Team presented in its case in chief
12 doesn't meet either standard.

13 So this is just a general overview of the
14 specific grounds for this motion. Now I will tell you,
15 this is not all the reasons why we think that we would
16 prevail in this case but we had to limit it due to time,
17 and we're going to focus on these five specific grounds
18 and provide you citations to the testimony and the
19 exhibits.

20 The first ground is the Prosecution Team's
21 admissions that their analysis omitted key elements of
22 water supply.

23 The second ground is their omission that the
24 analysis included excess demand.

1 The third ground is their admission that they did
2 not analyze water availability at the West Side or BBID
3 points of diversion.

4 The fourth ground is the admission that they did
5 not update their analysis for purposes of this
6 enforcement proceeding to include actual demands in
7 supplies which affected water availability and would have
8 been the best available information for enforcement
9 purposes.

10 The fifth ground is that they have presented
11 absolutely no injury to prior rights. And as we will
12 explain later, under California Law there is absolutely
13 no law that supports the concept of enforcement or
14 curtailment of a junior right holder to protect an
15 abstract senior right. You have to prove actual injury.

16 So now let's get into the specifics. The supply
17 omissions in both of the two graphs that the Prosecution
18 Team relies on, their Exhibit 47 was the graph they
19 relied on for May 1st. Their Exhibit 48 was the graph
20 they relied on for BBID on June 12th.

21 The first major omission, there was no
22 consideration of the timing for full natural flow to
23 reach the Delta. So they selected a methodology which
24 was to look at full natural flow measured at these
25 upstream gauge points and calculated by DWR to reflect

1 natural flows way up at the crest of all of these rim
2 reservoirs. That was their choice. They determined that
3 if water became unavailability -- unavailable at Redding,
4 it became unavailable at Redding the same day it became
5 unavailable at the end of the Delta for BBID. And
6 that -- there's no grounds for that analytical reasoning
7 that has been presented by the Prosecution Team. Mr.
8 Coats admitted in his testimony that it was actually
9 impossible in the real world for that to be the case.

10 The second ground is the failure to update supply
11 to account for DWR's reconciled monthly unimpaired flows
12 which were presented by Mr. Nemeth on cross-examination.
13 Those flows were higher than all of the forecasts that
14 were used in the Prosecution Team's Water Availability
15 Analysis.

16 The third ground is they omitted abandoned
17 releases of stored water. So to the extent there were
18 releases of stored water that were used for a particular
19 purpose or abandoned and made their way into the Delta,
20 they were not included at all.

21 The fourth ground is they omitted treatment plant
22 discharges which are clearly available for appropriators
23 to pick up under their appropriative rights, which was
24 admitted by the Prosecution Team witnesses.

1 Now what's, of course, ironic about that omission
2 is West Side's enforcement action is based in part on a
3 particularly measured treatment plant discharge from the
4 City of Tracy. So on the one hand, they're accusing West
5 Side of unlawfully diverting water. On the hand, they
6 didn't include that water in their supply analysis. So
7 we have a significant internal inconsistency.

8 The next ground is a complete omission of
9 Sacramento River return flows, even though there were
10 substantial return flows in the Sacramento River that
11 were included in the 1977 version of the Water
12 Availability Analysis.

13 The next ground is that the Prosecution Team's
14 analysis did not include any water present in the Delta
15 Channels. They essentially ignored the reality of the
16 Delta. They ignored the amount of water sitting in those
17 channels. And it was just completely absent from the
18 analysis, yet these two diverters who they are going
19 after in this enforcement action are located in the heart
20 of that Delta and divert from those Delta channels.

21 Lastly, they computed return flows and subbasin
22 flows that were not depicted in the daily FNF blue supply
23 lines, and we'll talk about that more as we get to the
24 graphs. But the witnesses admitted there were
25 essentially 2,000 acre feet, more or less in given

1 months, of return flow and subbasin flows that they added
2 to their spreadsheet, but they never added them to that
3 solid blue line. So we have a solid blue line that they
4 represented to the world was supply -- I'm sorry, 2,000
5 CFS. I said acre feet, it should have been CFS. We have
6 a solid blue line that the Prosecution Team and Staff
7 over the past few years represented to the world
8 reflected supply. But then if you open up the
9 spreadsheet you have 2,000 CFS of additional supply that
10 they are not adding to that blue line. So we have a
11 serious misrepresentation of supply.

12 Okay, so what were the overstatements of demand
13 that were admitted to by the Prosecution Team?

14 They admitted that in 47 and 48 they were relying
15 on projected demands, but they didn't go back for the
16 purposes of enforcement proceedings and do a specific
17 calculation based on actual diversions in 2015 that were
18 reported by diverters, which reduced demand by
19 approximately 2,000 CFS in June alone. They included
20 demands of agencies such as the North Delta Water Agency.

21 They admitted that all of the demands from that
22 entity were included, even though there is a contract
23 with DWR to provide stored water to meet the demands of
24 that agency. They included demands on watersheds that
25 could not be met from supply in that watershed. So, for

1 example. On the Tuolumne River they included all of the
2 demands in the Tuolumne system, even though the full
3 nature flows for the Tuolumne were significantly below
4 those demands, meaning that it was physically impossible
5 for all those demands to have been met. And that
6 overstatement of demand was then pulling water out of all
7 the other watersheds in the model which created a
8 physically impossible and completely misleading picture
9 of supply and demand, particularly in the Delta.

10 Next, DWR randomly assigned all joint pre-1914
11 riparian claimants to a Riparian Senior Demand. And
12 that, of course, skewed the view of which demands had
13 priority and where they fell in the demand analysis.

14 Finally, they did not include corrections to the
15 joint Board's demand of 740 CFS. Mr. Yeazell explained
16 that this correction was necessary in his spreadsheets
17 and indicated that it was insignificant. But then, of
18 course, when we brought up the graphs and cross-examined
19 him, it did make a significant difference, he was forced
20 to admit.

21 What were the -- yes?

22 HEARING OFFICER DODUC: Just for the record, on
23 the previous slide when you say DWR, you don't mean
24 Department of Water Resources, you mean the Prosecution
25 Team?

1 MS. SPALETTA: Oh, I'm sorry. Yes. It should
2 say Division of Water Rights. I'm sorry. It was late
3 last night when we were preparing this so there may be a
4 few of those in here, and I'm very sorry if there are.
5 Okay.

6 Internal inconsistencies. There are a lot of
7 internal inconsistencies in what we saw from the
8 Prosecution Team's case. And these internal
9 inconsistencies in and of themselves really cast doubt on
10 the credibility of the methodology. It's not that the
11 data itself may have been flawed in all cases, but it's
12 how they use the data to make these water availability
13 decisions.

14 So again, the May 1st Water Availability Analysis
15 that was used for West Side omits any of this return flow
16 for the Delta or the San Joaquin River that they ended up
17 adding in to the June 12th analysis. So it may have been
18 that they were refining the way they looked at supply as
19 they went in 2015. But here we are in 2016 for
20 enforcement purposes, and they knew about that refinement
21 and they didn't go back and fix it for the purposes of
22 saying when water was unavailable for enforcement
23 purposes, and that's really problematic.

24 The second internal inconsistency is, again, the
25 740 CFS of excess demand that was removed a few days

1 after the June 12th graph. Again, they didn't go back
2 and fix it for the purposes of the enforcement
3 proceeding, even though they know it was an error.

4 The next major internal inconsistency is supply
5 is depicted on a daily average time step and demand is
6 depicted as a monthly time step, and this occurs on all
7 the graphs. And it creates a very misleading picture
8 because they were actually looking at both pieces of data
9 on a monthly time step, but then graphing them on a
10 different time step. So the data becomes very hard to
11 understand, and misleading when you look at it on the
12 graph.

13 The next one is that the FNF forecast, which were
14 their dashed lines that they used on the May 1st and June
15 12th graphs, again they included 2,000-plus CFS of
16 additional supplies, but they never add those to those
17 daily FNF lines. And that gets more egregious as we go
18 through the year and we look at the after-the-fact graphs
19 that they produced in August or in October where they say
20 if you look at what happened after the fact, we were
21 right back then. Well, here you have these blue lines
22 that are still missing 2,000 CFS of supply. And they
23 never took the time to add that back in and shift that
24 whole supply line up to reflect what even they admit was
25 additional supply.

1 Probably one of the most interesting admissions
2 that came out in cross was that water availability staff
3 treated demand as hypothetical prior to May 1st, but then
4 called it the best available data on demand for purposes
5 of curtailment.

6 So Mr. Kelly asked Ms. Mrowka, "If your supply
7 line is way down here and your demand line is way up here
8 on March 1st, why weren't you doing anything about it?"

9 And after a discussion she says, "Well, if that
10 demand reflects that they were diverting," as if it was
11 hypothetical.

12 But then a couple of months later it was
13 definitely the demand and it was sufficient to do
14 curtailment. And then a year later it was absolutely the
15 demand and it was sufficient for enforcement. So we have
16 a real inconsistency about how Staff even viewed their
17 own depictions of supply and demand in this chart.

18 Finally, the after-the-fact graph show that the
19 actual 2015 diversions far exceed the Prosecution Team's
20 depicted supply, which is physically impossible and they
21 were not able to explain.

22 So at this point, Mr. Buckman, could we please
23 put up what's Water Right Exhibit 58?

24 So I questioned Ms. Mrowka about this exhibit
25 which was one of the after-the-fact analyses the State

1 Board did for the San Joaquin River. And I said we've
2 got this green line that represents your actual reported
3 2015 diversions, and this blue line that represents what
4 you say is the actual demand, and we've got, I believe,
5 it was 3,500 CFS difference, which was physically
6 impossible. The only conclusion you can reach from this
7 is that demand is -- is overstated, supply is
8 understated, or the analytical method does not capture
9 what is actually going on in the stream system.

10 And we would present to you that all three of
11 those things are happening, which is why these graphs
12 look so strange.

13 Okay, if we could go back to the PowerPoint?

14 Okay.

15 So now let's apply all of those things to the
16 graph. So here we are with the after-the-fact graph for
17 the Sacramento Basin. And we have that same odd
18 impossible reality sitting in front of us. We've got an
19 actual demand green line that's way above at the end of
20 June and July the actual supply as depicted by
21 Prosecution Team, again reflecting physical
22 impossibility.

23 We also have, as we said, a blue line that Staff
24 admitted was understated, a blue supply line that does
25 not include 2,000 CFS of return flows and subbasin flows.

1 We have, just looking at the graph, a recognition that at
2 least in the month of May and the beginning of June, even
3 that understated supply line, blue, is above the green
4 demand line. So there was more water in the system,
5 according to the Prosecution Team's own evidence,
6 necessary to meet senior demands. And yet West Side has
7 a 1916 license which would be just right above that green
8 line, and there's no explanation for this.

9 Mr. Coats actually said something completely
10 contradictory in his direct testimony. He said that this
11 graph proved that they were absolutely right in
12 curtailing West Side. Yet their own analysis, without
13 making any of the corrections we've talked about, shows
14 the blue line above the green line. So -- and again,
15 even here with this green line we have demand included
16 that was met with other sources of water. So again, that
17 graph confirms that water was available to West Side in
18 May, even without correcting all the other errors.

19 Now let's go back and see what the Prosecution
20 Team used for its case to say that water was not
21 available for West Side. They used the old graph from
22 April 29th which definitely paints a different picture of
23 the world, but this is not reality. And all the problems
24 with this graph are brought home by the one that they did
25 after the fact.

1 What about the admitted errors that misrepresent
2 water available for BBID?

3 Mr. Yeazell, the person who generated the graphs
4 and manned the spreadsheet, admitted on cross-examination
5 that after only two corrections of the many we've talked
6 about, the spreadsheet for June acknowledged the supply
7 line would exceed the demand line.

8 I point you back to the burden of proof and how
9 you review the evidence. With all of the other
10 identified errors, the Hearing Officers cannot conclude
11 it was more likely than not that water was unavailable,
12 let alone that it is so clear as to leave no substantial
13 doubt. The evidence in front of you does not allow you
14 to meet those standards.

15 This is the specific quote from Mr. Yeazell where
16 he made that admission. It's page 219, lines 8 through
17 22.

18 This is the graph, of course, that was relied on
19 for BBID's unavailability determination, and this is the
20 graph that Mr. Yeazell's admission relates to. Again,
21 we've tried to tie in here with errors all of the things
22 that I've listed before and why you've got an orange
23 demand block that's overstated, a blue supply line that's
24 understated, and a lot of other hidden errors in the
25 data.

1 Finally, the Prosecution Team put forth its panel
2 of witnesses as experts. And Ms. Mrowka, as the
3 proclaimed Enforcement Team lead, offered an expert
4 opinion that this analysis was not only appropriate, but
5 it used the best available information. She then
6 admitted, though, during her testimony that she couldn't
7 explain the specific supplies or demands used in each
8 analysis. She couldn't even tell you which spreadsheet
9 they were. She didn't review Mr. Yeazell's work. So she
10 frankly doesn't have the ability to testify as an expert
11 for the opinion that she offered.

12 I also want to point out something we pointed out
13 in our opening statement, which is Evidence Code section
14 412. It tells you how to view weaker evidence when it
15 was within the power of the presenting party to put forth
16 stronger and more satisfactory evidence. Mr. John
17 O'Hagan made the decisions about this methodology, but he
18 wasn't here to tell you why. And that is something you
19 should take into account.

20 And with that, I'm going to turn this over to Ms.
21 Zolezzi.

22 OPENING ARGUMENT IN FAVOR OF THE MOTION

23 BY MS. ZOLEZZI

24 FOR THE WEST SIDE IRRIGATION DISTRICT,

25 SOUTH DELTA WATER AGENCY,

CENTRAL DELTA WATER AGENCY

1
2 MS. ZOLEZZI: Thank you. I know you were
3 interested in the Water Availability Analysis. And I
4 hope Jennifer gave you a good overview of that. But it's
5 important to note that there were two prongs that the
6 Prosecution Team had to prove. First, they had to prove
7 that there was no water available. And then even if they
8 could meet that burden, which we don't believe they have,
9 they have to prove that someone was injured because these
10 two Districts took water when there was no water
11 available. And the fact is that not only did they not
12 meet that burden, they didn't introduce any evidence of
13 that fact whatsoever.

14 Their theory is based upon a presumption. And
15 they presume that If their availability analysis proved
16 no water was available for a certain priority of water
17 right, not an individual right but a category or priority
18 of right, then if someone in that priority category
19 diverted they presumed that someone would be injured.
20 And this kind of approach, it was allowed in California
21 100 years ago. A senior water-right holder used to be
22 able to say I need all the water in that stream, so you
23 need to stop those juniors upstream from diverting so I
24 can have my pool of water.

1 But 90 years ago that approach was outlawed in
2 California when the Herminghaus Case was decided 90 years
3 ago and followed by Article 10, Section 2 of the
4 California Constitution, it abolished that common law
5 doctrine and said we don't work that way in California.
6 Water is too precious. If there is water available in
7 the stream that is not needed by that senior downstream,
8 then the junior diverter can use it. That is how we
9 operate in California. And that's why it's so important
10 to look at an individual diversion because that senior
11 downstream may have a demand on paper of 50 CFS, but he
12 may have used that yesterday and not today, or he may be
13 using 10 CFS today. And we don't stop that junior
14 upstream from diverting just because that senior might
15 use 50 CFS tomorrow. That's not the way this system
16 works.

17 So we've given you the citations of the cases
18 that clearly show that is the case in California today.
19 The Supreme Court just recently affirmed that in several
20 cases, stating that we simply don't have enough water in
21 California and we have to look at how much water is in
22 the stream and who actually needs that water.

23 And a result from that is this approach that the
24 Prosecution Team took to curtail based upon theoretical
25 injury to prior rights is not allowed. As far back as

1 decades ago the courts did not take theoretical or
2 technical infringement of senior rights as a basis for
3 curtailment. There has to be proof of injury. We've
4 required that in California since the 1930s.

5 So we've seen the standard of what they have to
6 show, which is actual injury to a senior diverter instead
7 of this theoretical. And what we've seen from the case
8 in chief is that not only do they not have evidence of
9 any injury to an individual water user, they didn't look
10 for that evidence. They didn't think it was needed.

11 Now the Prosecution Team didn't even consider
12 whether or not West Side and BBID were diverting project
13 water, so that's not an issue here. They admitted they
14 didn't do an analysis of the availability at either
15 specific point of diversion. Mr. Coats admitted that
16 they didn't evaluate water availability at the points of
17 diversion, rather they did a comparison, not a water
18 availability determination, for whatever that means.
19 They admitted that they determined availability based
20 solely on the water supply analysis on a watershed-wide
21 basis. They admitted they didn't investigate which
22 parties would have been impacted, that they didn't
23 investigate any individuals for injury, and admitted that
24 they had no evidence that the failure of the Districts to
25 stop diverting actually harmed another more senior water

1 right. Instead, Ms. Mrowka testified that they made the
2 presumption. She testified in two different locations in
3 the record that they made a presumption that there would
4 be injury.

5 So we clearly think that the Prosecution Team had
6 two burdens to meet and it didn't meet either of those.
7 And the Districts aren't disputing the importance of the
8 rule of priority during times of shortage. To the
9 contrary, we believe the rule of priority is essential,
10 particularly when the supply of water is insufficient.
11 And meeting the Prosecution's burden is also essential to
12 protect the priority of rights. That's what's important,
13 is that your priority is determined and that it is
14 determined that you do not have sufficient water under
15 that priority. That's what they failed to do here.

16 And we think in order for this case to provide,
17 as the Prosecution Team has testified it wants a good
18 test case to set precedent for the future of the Delta,
19 something more is required. The Prosecution Team didn't
20 meet the burden to impose monetary fines in the millions
21 of dollars against BBID, or to ask for a CDO against West
22 Side. And we would request that you look at this and
23 consider it carefully.

24 I'll turn the remaining time over to Mr. Kelly.

25 OPENING ARGUMENT IN FAVOR OF THE MOTION

1 BY MR. KELLY

2 FOR BYRON BETHANY IRRIGATION DISTRICT

3 MR. KELLY: And just to follow up on Ms. Zolezzi,
4 the references to the evidence that supports what she was
5 saying is included in -- in the PowerPoint, and we'd be
6 happy to make that available to the extent that you'd
7 like to reference that when you -- when you consider the
8 motions.

9 I'm going to talk a little bit about the Water
10 Availability Analysis and the rule of priority, because
11 we heard how important that is to protect the rule of
12 priority. And one of the things that I would like for
13 you all to consider as you deliberate these motions is
14 whether or not that applies only to the seniors that
15 weren't curtailed, or whether that also applies to the
16 water-right holders that -- that were curtailed or
17 that -- that theoretically had no availability pursuant
18 to the analysis that you -- that you heard on Monday.

19 Because just like a senior downstream of BBID who
20 might be injured has the right to have their senior water
21 right protected, BBID and West Side, the folks in back of
22 this room, have the right to have their water supply
23 protected as well. And that means if there's water
24 available under their priority they need to be able to
25 take it, that we -- we can't be curtailing people and

1 cutting people off based on theoretical lack of supply if
2 there's really water there. That's not how the system
3 works.

4 And so as an example of this I'm going to just
5 talk about the difference between riparian water rights
6 and appropriative water rights. Riparian water rights
7 don't exist in the abstract. Riparian water rights
8 attach to -- attach to land when they transfer from
9 government ownership into private ownership. That's
10 general when a patent is issued. So a patent is issued,
11 passes to private ownership, and that's the date that
12 riparian's water right's vest.

13 Now interestingly enough, in California there --
14 there was occasion, and there are many, many
15 circumstances where some people establish appropriative
16 water rights on water courses before land passes from the
17 government to private owners, before those riparian water
18 rights vest. In those circumstances appropriators are
19 senior to riparian's. The California case law is
20 absolutely clear that upon passing to private ownership,
21 lands contiguous to streams are vested with riparian
22 rights in the streams, subject to appropriative rights
23 already vested. That's -- that's -- that is black letter
24 law. It's in Hutchins. It's in many California cases.

1 And so when a -- when -- when property passes
2 from the government and riparian rights vest, if somebody
3 had already established an appropriative water right on
4 that water course, that appropriative water right holder
5 has a better right than the riparian. The Prosecution
6 Team's demand analysis inappropriately assumed all
7 riparian rights were senior to all appropriative rights.
8 We could go into testimony to look at that but we don't
9 have to. Pick any of the demand graphs that they used
10 for the curtailments, any of them. All the riparian
11 demand is the most senior on the bottom, and then it has
12 pre-'14 over it, and then post-'14.

13 There's no evidence at all that all those
14 riparian water rights are senior to all of the
15 appropriative water rights. There was absolutely no
16 consideration of whether any of those riparian water
17 right holders had to get behind some of those
18 appropriators. And so it really didn't protect the
19 priority system. It actually turned it on -- turned it
20 on its head because it simply assumed inappropriately
21 that everybody who had a riparian right was entitled to
22 take water before anybody with an appropriative water
23 right.

24 Another example, and I will tell you, there's
25 this one piece of evidence in the record, but this

1 happened more than just this one time, but we use this as
2 example that the Division of Water Rights -- and Tom
3 Howard told the Sacramento Municipal Utilities District
4 with a post-1914 water right when curtailment is issued
5 that they could go ahead and they could divert water all
6 summer long into storage for hydropower because it was a
7 non-consumptive use, because that water would eventually
8 be returned to the stream. Well, that doesn't matter
9 that it's going to be returned to the stream in July or
10 August to Byron Bethany Irrigation District or to West
11 Side. That real water was taken out of the system and
12 people downstream were deprived of that real water.

13 Ms. Mrowka testified that, well, the Bureau of
14 Reclamation releases water to make up for full natural
15 flow, there's absolutely no evidence that there were any
16 project operations that replaced that water for
17 downstream water-right holders, and that they were
18 actually entitled to take that. In fact, you've got a
19 lot of folks in this room that are arguing nobody's
20 entitled to take any of that stored project water. But
21 you know that the Sacramento Municipal Utilities District
22 diverted water all summer long under a post-1914 right in
23 light of curtailments. That doesn't protect the priority
24 system, it absolutely doesn't. It allows somebody to

1 jump way ahead of other senior water rights. That's not
2 protecting it.

3 As -- as Ms. Spaletta also explained, when we --
4 when we look at the -- at the graph -- and which
5 number -- 47, WR-47, slide 13. Let me back up. There.

6 When you look at this, this graph, if you look at
7 March and April and where that supply line is, Ms. Mrowka
8 testified that there was insufficient water for everybody
9 above that blue line, but all those people diverted. We
10 have the -- Mr. Yeazell put the 1950 priority line on
11 there. That was -- that was two-thirds of the way up
12 that graph. There was insufficient supply for all those
13 people, but they all diverted water. All spring long
14 they diverted water.

15 If the full natural flow supply line you see on
16 there and that demand is used to protect the priority
17 system, then -- then the Prosecution Team didn't --
18 didn't do that. And they can't explain to you how it
19 protects the priority system when you've got -- you've
20 got 80 percent of people diverting in excess of the
21 supply, according to this graph which is what they used,
22 which is what they're trying to use to prove their case.
23 It doesn't protect the priority system.

24 In addition to the graphs that show the -- the
25 riparian demand being senior, Mr. Yeazell testified to

1 that on page 246 of the transcript starting around line
2 5.

3 So in conclusion, the case in chief establishes
4 that -- that the Prosecution Team didn't consider all the
5 sources of available supply into the system. And you --
6 and you were provided no explanation through those
7 witnesses as to why the supply that was in the Delta was
8 excluded, not a word, no testimony at all as to why that
9 was excluded. They hadn't considered basic Delta
10 hydrology. They included excess estimates of demand.
11 And you heard some examples of that and they were
12 significant.

13 They didn't consider water availability specific
14 to West Side or BBID, and that's important. That's very
15 important because what we have here is we have this Board
16 and its Prosecution Team attempting to impose, again,
17 look at the ACL, a fine in excess of \$5 million on the
18 folks in this room. And don't they deserve more than
19 being prosecuted based on a watershed-wide availability
20 that has all these errors without looking at all at the
21 actual water available to them at their point of
22 diversion. They deserve that. That's how the water
23 rights' system works. They deserve that.

24 The analysis might be useful for some general
25 planning tool or some -- in some larger context. But

1 when it comes to trying to impose those kinds of
2 penalties on people, it's not good enough. You should
3 demand more. They demand more.

4 So instead of conducting that kind of analysis
5 the Prosecution Team and their witnesses simply assumed
6 that demand outstripped supply. They presumed without
7 any evidence that any diversions would injure more senior
8 water-right holders. There's no evidence that anybody
9 was injured. There's none. As Ms. Zolezzi said,
10 theoretical injuries don't do it, they simply don't do
11 it. They failed to present evidence sufficient to
12 support a finding that it was more likely than not that
13 water was unavailable for West Side and for BBID, let
14 alone that it was a high probability that there was water
15 unavailable for them, and that's their burden of proof.

16 Again, if this proceeding isn't about the notice,
17 which you have all said it's not, it's not about the
18 notice, the notice was informational only and gave people
19 an idea of what was generally happening in the watershed
20 and what the hydrologics -- what the system looked like,
21 and if that's truly all it did and if the prosecution of
22 these two actions is truly about the actual water
23 availability for these two Districts, for BBID for 12 or
24 13 days in June, if that's what this is really about,
25 you've been provided no evidence, no credible evidence,

1 no competent evidence that there was water unavailable
2 for BBID during those two weeks. There's no evidence of
3 the water that was even present anywhere near BBID.

4 So I'm asking you and I'm -- I'm pleading with
5 you on behalf of these folks to consider the context
6 within which these enforcement actions were brought and
7 to -- and to think very hard about whether or not the
8 evidence that you heard on Monday and the evidence that
9 you didn't hear on Monday is sufficient to prove the
10 allegations that are contained in the administrative
11 civil liability complaint and the draft cease and desist
12 order.

13 I will tell you that -- that there are a lot of
14 people that -- that watched that on Monday and were
15 frustrated. But we finally got to shine a light on it
16 Monday, and it's the first time in eight months these
17 people have been able to understand the analysis that
18 went into the -- into the ACL that BBID received, and
19 they were shocked. And you should be shocked. And from
20 here there should be a commitment to refine the analysis
21 to get better data and to make it more useful in the
22 future, and I think everybody in this room would commit
23 to doing that. But the analysis isn't sufficient to
24 punish these people. It's simply not.

1 And we'd like to reserve the remaining four
2 minutes, if we can, to the extent we need it for -- in
3 addition to the five for the rebuttal. Thank you.

4 HEARING OFFICER DODUC: Any questions for
5 Respondents?

6 All right, Mr. Tauriainen and all those who wish
7 to speak in opposition to the motion, you now have your
8 45 minutes.

9 MR. TAURIAINEN: Thank you. Before I begin I
10 have a point of order question. They -- I heard the
11 speakers just now offer that PowerPoint slide to the
12 Board. If the Board is going to be accepting it, I'd
13 like to get a copy, too, if the parties can all get a
14 copy. So it sounds like that will be accepted.

15 Then I would also like to, at the conclusion of
16 my presentation, submit the written version of my
17 presentation if that's okay. Thank you.

18 HEARING OFFICER DODUC: Granted, Mr. Tauriainen.

19 MR. TAURIAINEN: Thank you.

20 OPENING ARGUMENT IN OPPOSITION TO THE MOTION

21 BY MR. TAURIAINEN

22 FOR PROSECUTION TEAM

23 MR. TAURIAINEN: Good morning, Hearing Team,
24 Hearing Officers.

25

1 The Prosecution Team requests that the Hearing
2 Officers deny the motion for a nonsuit. As I will
3 discuss, this motion has no place in an administrative
4 proceeding before the Board. And this motion has no
5 place in this proceeding because on February 18th the
6 Hearing Officers specifically ruled that they would not
7 entertain such a motion during this proceeding. But even
8 if you entertain this motion, the law requires that you
9 deny it because the relevant civil procedure standards
10 that might inform this process are deferential to the
11 Prosecution Team. The Hearing Officers must disregard
12 all conflicting evidence and give the Prosecution Team's
13 evidence every legitimate inference.

14 And the Hearing Officers must allow the
15 Prosecution Team to present curative evidence on the
16 Prosecution Team's request and on offer of proof.
17 Accordingly, the Prosecution Team hereby requests that
18 should you find defects in its case in chief witness
19 testimony, that you give it an opportunity to correct any
20 such defects. As I will discuss, the Prosecution Team
21 makes this request with a specific offer of proof that
22 redirect of Mr. Yeazell and of Mr. Coats, if necessary,
23 will demonstrate that the supply inputs and the demand
24 adjustments, with or without the cross-examination
25 testimony that was put in, support a finding that there

1 was no water available to serve BBID during June 13th
2 through June 24th, 2015, and that there was no water to
3 serve West Side after May 1st, 2015.

4 The Prosecution Team requested redirect
5 examination during hearing that would have cured any
6 alleged defects, and that request was denied. The
7 Hearing Officers cannot now grant this motion for nonsuit
8 without first allowing the Prosecution Team the
9 opportunity to conduct the requested direct examination.
10 Moreover, all other anticipated defects raised by the
11 Delta parties are addressed in the Prosecution Team's
12 rebuttal. Accordingly, the Prosecution Team hereby
13 additionally offers the entire rebuttal testimony as an
14 offer of proof regarding any such defects.

15 The motion -- the motion, at least as raised by
16 Mr. O'Laughlin yesterday, is based on a number of
17 fundamental mischaracterizations, some of law and some of
18 fact. The moving parties misstate the law by imputing a
19 harm standard into Water Code section 1052's definition
20 of trespass, when there is no such standard in the
21 statute. Harm is one of the many factors that the Board
22 may consider under section 1055.3 when setting a
23 liability amount, but it is not required in order to find
24 Byron Bethany or West Side liable for trespass or
25 threatened unauthorized diversion under section 1052.

1 The liability amount is a Phase 2 issue in the BBID
2 proceedings. We're not there yet.

3 The moving parties misstate the facts by
4 mischaracterizing the key issues in this phase and by
5 focusing on evidence relating to days outside of the
6 alleged violation days. Pardon me. Ms. Spaletta knows
7 what the violation days are.

8 Yet in what can be described as a lack of candor,
9 particularly after her opening statement, she focused her
10 cross-examination entirely on full natural flow available
11 on June 7th, which is really just another attack on the
12 June 12th notice. The Prosecution Team pointed this out
13 in its request for redirect examination of Mr. Yeazell,
14 and Counsel made an offer of proof that redirect would
15 focus on the unavailability for the correct days, June
16 13th, through June 24th, but it was denied that
17 opportunity.

18 The moving parties, and particularly Mr.
19 O'Laughlin, also mischaracterized the Prosecution Team's
20 opening statement presentation. By necessity, the
21 opening statement discussed the evidence that would be
22 submitted during the case in chief and rebuttal in each
23 phase of this proceeding. When I spoke of the evidence
24 supporting the Prosecution Team's recommendations in
25 Phase 1, I was referring to all of that evidence,

1 including the Prosecution Team's, and perhaps evidence
2 that would be submitted by other parties.

3 Moreover, Mr. O'Laughlin himself displayed an
4 extreme lack of candor when he suggested to Kathy Mrowka
5 that I indicated that the Prosecution Team would
6 demonstrate injury or harm to any party. I looked back
7 over the transcript of my opening statement and I never
8 said such a thing. In fact, according to the rough
9 transcript, only Mr. O'Laughlin and Ms. Zolezzi only
10 mention the words injury or harm on the first day of
11 hearing, except for an occasion where the Hearing Officer
12 said harm while clarifying a cross-exam question.

13 But it does not even matter what I said in my
14 opening statement, it only matters what the law is.
15 Section 1052 does not require the Prosecution Team to
16 demonstrate harm in order to prove a trespass. There's a
17 long list of Board authority on this point.

18 To that end, I stated in the opening statement
19 that the Phase 1 evidence would show that there was no
20 water available for BBID's diversions from June 13th
21 through June 24th, 2015, and for West Side's actual or
22 threatened diversions after May 1st. I will describe
23 that evidence later in this presentation.

24 In thinking about this argument, a phrase echoed
25 in my mind that we heard Monday, it's why are we here?

1 These proceedings are an administrative
2 enforcement proceeding brought under Water Code section
3 1052 and section 1831. According to the most recent
4 notice of revised schedule dated January 8th, the key
5 issues for this phase are, and I want to state them for
6 the record, was -- one, was the water diverted by BBID
7 from June 13th, through June 25th, 2015, if any,
8 unavailable under its claimed pre-1914 appropriative
9 right and all other claims of right by BBID?

10 Two, was the water diverted by West Side, WSID,
11 after May 1st, 2015, if any, unavailable under License
12 1381 and all other claims of right by WSID?

13 A nonsuit has no place in a State Water Board
14 adjudicative hearing. Nonsuits and dismissals are
15 governed by Title 8 of the Code of Civil Procedure which
16 applies to actions and special proceedings. And action
17 is an ordinary proceeding in a court of justice. That's
18 section 22 of the Code of Civil Procedure. A special
19 proceeding is every other special -- every other
20 proceeding of a civil nature under the Code of Civil
21 Procedure. That's section 23.

22 And administrative proceeding by definition is
23 neither a civil action, nor a special proceeding of a
24 civil nature. The citation for that is City of Oakland,
25 the Public Employees Retirement System, 94 Cal. App. 4th

1 29, page 48. Nonsuits and dismissals do not apply in
2 administrative proceedings, but that's what this is.

3 State Board regulations incorporate certain
4 elements of the Code of Civil Procedure for discovery,
5 the Evidence Code Administrative Procedures Act, yet they
6 differ in important respects from the Code of Civil
7 Procedure.

8 For the State Water Board an adjudicative
9 proceeding means an evidentiary hearing for determination
10 of facts pursuant to which the State Board or a Regional
11 Board formulates and issues a decision. That's 23 CCR
12 section 648(a). Section 648(b) provides that, except
13 otherwise provided, all adjudicative proceedings before
14 the Board shall be governed by regulations in Title 23,
15 Chapter 1.5 of the Code of Regulations, Chapter 4.5 of
16 the APA, sections 801 through 805 of the Evidence Code,
17 and section 11513 of the Government Code, that's it.

18 The Board's regulations and applicable sections
19 of the Government Code governing the Board's adjudicative
20 proceedings do not provide for dismissals, nonsuits or
21 similar motions. Since there is no procedure for
22 dismissals and nonsuits, granting a motion to dismiss or
23 for nonsuit would be arbitrary and without basis.

24 Entertaining a motion to dismiss or for nonsuit
25 is similarly a tremendous waste of time in this

1 proceeding. We've delayed these proceedings by more than
2 one full day for this motion so far. The Hearing
3 Officers even issued a ruling on procedural matters on
4 February 18th, stating on page seven that,

5 "We will not allow the parties to submit a motion
6 for judgment as a matter of law during the hearing. Any
7 such motion may be made in writing, either in the party's
8 written opening statement or after the close of hearing
9 in the party's closing brief."

10 There was an opportunity to make these kinds of
11 statements.

12 Again, why are we here?

13 Granting a motion for nonsuit would violate the
14 hearing procedures that the Hearing Officers themselves
15 issued for this hearing. To change that ruling would be
16 arbitrary now and demonstrate that the Hearing Officers
17 may be proceeding in the absence of any procedures. If
18 there's no basis to even entertain this motion, again the
19 Prosecution asks, why are we here?

20 Well, since we were here, another phrase was
21 echoing through my mind. If we're going to do this,
22 let's do it right. There are no guiding standards for
23 nonsuit motions in these proceedings. The Code of Civil
24 Procedure and interpreting cases are instructive.

25 Now the -- the moving parties cited section

1 638 -- 631.8 of the Code of Civil Procedure. That's not
2 the standard that informs this stage of the proceeding.
3 At this stage of the proceeding the Prosecution Team has
4 not submitted rebuttal. There have been two other phases
5 that have not been -- even had any evidence entered in at
6 all. The proper standard at this stage, before rebuttal,
7 is Code of Civil Procedure section 581(c). Section
8 581(c) governs nonsuits in covered proceedings and
9 provides that,

10 "Only after and not before the plaintiff has
11 completed his or her opening statement or after
12 presentation of his or her evidence the defendant,
13 without waiving his or her right to offer evidence in the
14 motion, is not granted may move for a judgment of
15 nonsuit."

16 Now the court's power to grant a nonsuit or to
17 direct a verdict are analogous to the power to grant a
18 motion for judgment, notwithstanding the verdict. Cite
19 for that, *Beavers v. All State Insurance Company*, 225
20 Cal. App. 3d 310, page 327.

21 While made at different times, these motions are
22 analytically the same and governed by the same rules,
23 cite *Fountain Valley Chateau Blanc Homeowners Association*
24 *v. Department of Veterans Affairs*, 67403(c)(1) Cal. App.
25 4th 743 at 750. The function of these motions is to

1 prevent the moving defendant from the necessity of
2 undergoing any further exposure to legal liability when
3 there is insufficient evidence for an adverse verdict.

4 That being said, long-settled case law provides
5 that granting a motion for nonsuit is warranted, and this
6 is a quote,

7 "When and only when disregarding conflicting
8 evidence and giving the plaintiff's evidence all the
9 value to which it is legally entitled and indulging in
10 every legitimate inference which may be drawn from that
11 evidence, the result is a determination that there is no
12 evidence of sufficient substantiality to support a
13 verdict in favor of the plaintiff."

14 The citation among many is Keller v. Pacific Turf
15 Club 192 Cal. App. 2d 189 at 190.

16 Another quote,

17 "In determining whether plaintiff's evidence is
18 sufficient, the court may not weigh the evidence or
19 consider the credibility of witnesses. Instead, the
20 evidence most favorable to the plaintiff must be accepted
21 as true and conflicting evidence must be disregarded.
22 The court must give to the plaintiff's evidence all value
23 to which it is legally entitled, indulging every
24 legitimate inference which may be drawn from the evidence
25 in the plaintiff's favor."

1 The cite is Carson v. Facilities Development Co.,
2 36 Cal. 3d 830 at 838 through 39.

3 So in considering a motion for a nonsuit the
4 court and this tribunal must accept as proved all facts
5 that Counsel says in an opening statement and must
6 indulge all favorable inferences reasonably arising from
7 those facts, citation Smith v. Roach, 53 Cal. App. 3d 893
8 at 897.

9 "A court may properly enter a nonsuit only if the
10 evidence viewed most favorably to the plaintiff, with all
11 conflicts resolved and all legitimate inferences drawn in
12 the plaintiff's favor, does not support a verdict for the
13 plaintiffs," Ayer v. Boyle, 37 Cal. App. 3d 822.

14 Again,

15 "All conflicts must be resolved in favor of the
16 plaintiff. And if different conclusions or inferences
17 can reasonably be drawn from the evidence, the court
18 still must adopt those conclusions and inferences which
19 are favorable to the plaintiff," Libby v. Conway, 192
20 Cal. App. 2d 865 at 868.

21 HEARING OFFICER DODUC: Mr. Tauriainen --

22 MR. TAURIAINEN: Yes?

23 HEARING OFFICER DODUC: -- are the rest of your
24 arguments legal arguments in nature?

25 MR. TAURIAINEN: No, there's plenty of facts.

1 HEARING OFFICER DODUC: Okay. Why don't you get
2 to the facts. Since you're -- we will be receiving your
3 written statement for the record, we will examine those
4 legal arguments at that time.

5 MR. TAURIAINEN: I have one more quote that is
6 highly relevant, and I would like to state in the open
7 proceeding for the record. And then I'll go on to the
8 rest of my argument. There are facts. But again, part
9 of this motion is based on a legal interpretation of
10 1052, so a significant portion of my argument will be --
11 not a significant portion, but there will be a portion of
12 the rest of my argument dedicated to interpreting 1052,
13 which was a big part of the opening argument too.

14 So regarding the standard,

15 "The evidence most favorable to the plaintiff
16 must be accepted as true. Conflicting evidence must be
17 disregarded, including evidence brought out on cross-
18 examination of the plaintiff's own witnesses," Miller v.
19 Los Angeles County Flood Control District, 8 Cal. 3d 689
20 at page 700.

21 So if we're going to do this right, the Hearing
22 Officers must disregard any conflicting evidence
23 proffered during the cross and must be given -- must give
24 every indulgence to the Prosecution Team's case in chief
25 evidence.

1 So as I stated earlier, the Plaintiff's do have
2 the right upon request to reopen and remedy the defects
3 in this case, and I think this is an important factual
4 issue. And I'm going to make an offer of proof regarding
5 facts now.

6 The Prosecution Team hereby renews its request
7 for redirect examination of Mr. Yeazell, and requests
8 redirect examination of Brian Coats and Kathy Mrowka in
9 order to correct any alleged defects and to introduce, as
10 allowed, further evidence demonstrating that there was
11 not water available for these Defendant's rights during
12 the relevant violations period. This request I make with
13 the specific offer of proof that redirect of Mr. Yeazell
14 will demonstrate that the 740 CFS of demand reduction in
15 Ms. Zolezzi's cross-examination hypothetical is not based
16 in any fact presented by the evidence.

17 More importantly, the Prosecution Team will show
18 that the addition of 2,252 CFS to the daily full natural
19 flow calculated data, whether combined with Ms. Zolezzi's
20 proffered 740 CFS demand reduction or whether combined
21 with the actual demand reduction requested by outside
22 (indiscernible) as described by Mr. Yeazell in his
23 testimony will not provide supply to BBID's pre-1914
24 priority during June 13th through June 24th, and will not
25 provide supply to West Side after May 1st.

1 The same evidence will demonstrate that these
2 adjustments, if made to the June 7th full natural flow
3 calculation that was the subject of Ms. Spaletta's cross-
4 examination hypothetical and on which Mr. O'Laughlin
5 based this motion would not have changed the analysis or
6 the determinations regarding unavailability after June
7 12th.

8 The Prosecution makes another offer of proof that
9 its rebuttal testimony also demonstrates that using the
10 actual 2015 information order demand data provided by the
11 respondent's to that order will not move the needle
12 sufficient to show that BBID or West Side had water
13 available for their actual or threatened diversions.

14 Again, the Hearing Officers can't grant this
15 motion based on any defects alleged by the cross-
16 examining parties because those defects are all alleged
17 in the rebuttal that the Prosecution Team has not yet
18 presented.

19 But I do, as an offer of proof, offer the entire
20 rebuttal testimony regarding any such defects. I have a
21 couple of points regarding some of the fact issues that
22 were raised in the opening.

23 The first, regarding the omission of timing of
24 full nature flow, that's a rebuttal issue. The

1 Prosecution Team witnesses deal with that on rebuttal,
2 particularly Mr. Grober.

3 Regarding the allegations of excess demand,
4 that's dealt with on rebuttal by Mr. Yeazell, it hasn't
5 been presented yet, Mr. Yeazell and Mr. Coats.

6 Regarding the availability of water at the points
7 of diversion for West Side and BBID, again, that is
8 rebuttal testimony that hasn't been presented yet. The
9 update with the 2015 Information Order I just described,
10 again, that a rebuttal and it does not move the needle.

11 Finally, and I'll move now to the no injury
12 allegation, the moving parties primary, and we saw it
13 repeated several times, mischaracterization of the
14 standards governing these proceedings is the claim that
15 the Prosecution Team must demonstrate harm to some
16 specific senior water right holder in order to show a
17 trespass made by BBID or a threatened trespass or
18 unauthorized diversion by West Side. They claim that
19 trespass under Water Code section 1052 does not occur in
20 the abstract. They're right, only to the extent that
21 section 1052 requires an unauthorized diversion in order
22 for there to be a trespass.

23 One thing you did not see in that opening slide
24 show was what 1052 says, the text. 1052 section A says,
25 "The diversion or use of water subject to this division,

1 other than as authorized in this division, is a
2 trespass." The section does not talk about harm. It
3 doesn't say as long somebody downstream is harmed and you
4 can show that. It says when you divert without
5 authorization, that's a trespass. It's a trespass
6 against the State.

7 As directed in the BBID matter, the Prosecution
8 Team has already briefed the applicability of this
9 section to even pre-'14 rights. Those are the Millview
10 and Young cases. I won't go through them again. But I
11 will note that the San Joaquin Tributaries Authority
12 alleges at page six of its prehearing brief of legal
13 issues that,

14 "The Board cannot step into the shoes of a water
15 right holder and represent their interests against other
16 pre-'14 water right holders."

17 That is an iteration of this trespass argument.

18 I will note that the authority in that brief only
19 sites one page of Young v. State Water Board as support.
20 And the Young case does not support that proposition. To
21 the contrary, the very page of the opinion cited by the
22 authority in that brief, the court agrees with the Water
23 Board that, quote,

24 "Put simply, the claim that a diversion is
25 authorized under riparian or pre-'14 right is no

1 different from any other argument that there has been no
2 unauthorized diversion. The argument does not deprive
3 the State Water Board of the authority to determine
4 whether an unauthorized diversion has, in fact, occurred
5 or is threatened."

6 Now *People v. Shirokow*, which is 26 Cal. 3d at
7 301, actually stands for the proposition that the
8 unauthorized diversion or use of water is a trespass
9 against the State. No specific showing of harm against a
10 specific party is required.

11 Now we looked. There aren't any case law that
12 says 1052 requires harm to anyone else in order to show a
13 trespass. And we went back and looked at the last ten
14 years of State Board orders following hearings on
15 administrative civil liability complaints. All of them
16 have consistently held that harm or injury to specific
17 parties is not a factor in determining whether a trespass
18 occurred. Instead, harm comes into play in discussing,
19 among many factors, in setting the amount of a penalty.

20 These cases are the Lake Arrowhead Community
21 Services District case, WR-2006-0001. Here the Board
22 found that the unauthorized diversion may have resulted
23 in injury to water users downstream in the Mojave
24 Watershed, although there was no evidence of specific

1 injury in that case. The Board applied harm only -- that
2 finding regarding harm only in calculating the penalty.

3 Two cases from 2008, the North San Joaquin Water
4 Conservation District, WR-2008-0017, and the Vineyard
5 Club, 2008-0015, both held that permit term violations
6 are unauthorized diversions, and thus trespasses, even
7 though no evidence of specific injury to any party or
8 anything was offered or raised in that case.

9 Last year, 2015, the Board issued an order
10 against Robert Mann, WR-2015-0025. In that case the
11 Prosecution Team specifically alleged and argued that
12 unauthorized diversion under 1052 is a trespass against
13 the State, and the Board agreed. The Board only looked
14 to harm for the penalty calculation. And even then, this
15 is a really important point, noted that there was no
16 evidence of actual harm in that case to any senior water
17 right holder.

18 Instead, the Board itself took official notice of
19 the existence of senior rights in the watershed, and
20 here's how they did it. They noted that there were
21 records of senior rights in the watershed publicly
22 available on the Electronic Water Rights Information
23 Management System on eWRIMS. None of these cases
24 addressed injury or harm to a specific party when
25 determining liability under 1052.

1 The only relevant section addressing harm for
2 this matter is section 1055.3 which states,

3 "In determining the amount of civil liability the
4 Board shall take into consideration all relevant
5 circumstances, including but not limited to the extent of
6 harm caused by the violation, the nature and persistence
7 of the violation, the length over which the violation
8 occurs, and the corrective action, if any, taken by the
9 violators."

10 There are other factors that can play.

11 But 1055.3 is a BBID Phase 2 issue. We're not
12 even there yet. The Prosecution Team tried to present a
13 minimal showing regarding BBID's actual diversions and
14 West Side's actual and threatened diversions, but we were
15 instructed that that was unnecessary.

16 Now protecting the priority system is not just
17 something in the abstract. Protecting the priority
18 system protects all of the water right holders senior to
19 BBID and West Side, and they exist in the watershed, in
20 the Delta. It protects the State's water supply, and it
21 preserves orderly administration of water rights.

22 Now even if a motion for a nonsuit were
23 applicable to this proceeding, and it is not, the
24 relevant standard holds that such a motion the Board must
25 accept as proved, all of the facts the Prosecution Team

1 offered or expects to prove, and indulge all favorable
2 inferences reasonably arising for those facts.

3 The Prosecution Team should be allowed to
4 redirect as requested in order to cure any alleged
5 defects prior to a ruling if the Board is inclined to
6 rule. All of the evidence offered by the Prosecution
7 Team, both in its written testimony, direct and rebuttal
8 testimony, demonstrates that under any manipulation of
9 the data, as suggested by BBID and West Side, and that's
10 all those charts were where they added things to -- to
11 what the exhibits were that the Prosecution Team
12 presented, just manipulations of the data that they
13 suggested, there was still not enough water to satisfy
14 Byron Bethany and West Side's rights during the June time
15 period, and for West Side during the entire
16 unavailability period which began in May and extended
17 until November.

18 The written evidence presented demonstrates the
19 following. I want to make sure to make that really
20 clear. I did this on Monday. The written evidence is
21 the testimony. The written testimony and the exhibits
22 cited, that's the testimony. That's the evidence in this
23 case. We're guided by the hearing instructions to just
24 provide summaries here. The written testimony is what
25 guides this proceeding.

1 Mr. Coats in his written testimony, which is WR-
2 9, makes the following statements.

3 "For the supply curve in each watershed," which
4 has been a big point of contention, "Staff relies on
5 DWR's full natural flow Bulletin 120 forecasts. These
6 are forecasts that predict full natural flow of water at
7 stations that provide the largest impacts to a river's
8 supply."

9 Pardon me. I'm trying to quote the testimony
10 here. I may paraphrase slightly, but it's -- it's
11 generally true to the testimony.

12 "This is to be contrasted with DWR's daily full
13 natural flow data which are not forecasts of future
14 availability, but calculations performed by DWR on the
15 amount of available water on days past using stream gauge
16 values, known upstream diversions and reservoir data such
17 as changes in storage and posted evaporation numbers."

18 This is important.

19 "Staff only used the daily data to determine
20 which full natural flow monthly forecast is tracking
21 closest to reality for the purpose of predicting future
22 full natural flows or when the daily full natural flows
23 are higher than the monthly forecast, since a higher
24 supply is of more benefit to diverters."

1 What that means is that instead of the daily full
2 natural flow calculation being the support for the June
3 12th notice or the May 1st notice, which again isn't
4 relevant to the question of whether water was available
5 from June 13th to June 24th or from May 1st through
6 November, they used the full natural flow to determine
7 the -- the notice, not the daily trend, that's just to
8 check.

9 Mr. Coats testifies that for the --

10 HEARING OFFICER DODUC: Mr. Tauriainen --

11 MR. TAURIAINEN: Yeah?

12 HEARING OFFICER DODUC: -- stop. Let's go back.

13 Repeat that last argument again.

14 MR. TAURIAINEN: The -- the quote or what I said
15 after it? Because I have to start with the quote to get
16 back on that track of thought, I think.

17 HEARING OFFICER DODUC: Go ahead and stop the
18 time because this is my time now.

19 MR. TAURIAINEN: Okay.

20 HEARING OFFICER DODUC: Your statement regarding
21 how the full natural flow is used --

22 MR. TAURIAINEN: Yes.

23 HEARING OFFICER DODUC: -- how it's used to alter
24 the projected flow --

25 MR. TAURIAINEN: Yes.

1 HEARING OFFICER DODUC: -- go back to that and
2 repeat that.

3 MR. TAURIAINEN: Okay. Let me start just a
4 sentence above what I think is the real relevant part.
5 So Mr. Coats in his testimony contrasts the Bulletin 120
6 forecast flows with DWR's daily full natural flow data
7 which are not forecasts of future availability. They're
8 calculations performed based on a number of factors. And
9 again, I'm not quoting him exactly here. He lists the
10 factors.

11 Now here's the important part.

12 "Staff only used the daily data to determine
13 which full natural flow monthly forecast is tracking
14 closest to reality for the purposes of predicting future
15 full natural flows or" --

16 HEARING OFFICER DODUC: Stop. Repeat that
17 sentence again.

18 "Staff only used the daily data," and again, I
19 meant the DWR's daily full natural flow calculations,
20 which I must note, on the June 12th -- the WR-48 which is
21 the chart supporting the June 12th notice, the daily
22 calculations end at June 7th, that chart itself
23 explained. So June 7th is the last daily calculation
24 there.

1 "Staff only used the daily data to determine
2 which full natural flow monthly forecast," which is the
3 dashed line that curves down, "is tracking closest to
4 reality for the purposes of predicting future full
5 natural flows."

6 These notices are predictive tools and they use
7 the best predictive forecast data from DWR. They don't
8 use the daily full natural flow data unless they use it
9 as a check to see which trend line, because the DWR
10 presents several different exceedance values,
11 percentages. They look at the daily data and determine
12 which line -- which of the forecasted lines that the
13 daily data is trending to. As of June 7th it was
14 trending closest to -- and I'm going to forget because
15 there's so much information about this case without
16 looking at the chart. If it was the 50 percent, for
17 example, they saw that the June 7th -- as of June 7th,
18 daily was tracking to 50 percent. And they used 50
19 percent as their predictive tool for the notice of
20 determination that they issued on June 12th.

21 Again, that's not the evidence that supports
22 whether Byron Bethany actual diverted without water that
23 wasn't available to it from June 13th through June 24th.
24 That was just the notice that went out on June 12th.

1 Okay, the -- here's the other part of this --
2 this same quote that I think Hearing Officer wanted me to
3 say.

4 So, "Staff only uses the daily natural flows when
5 the daily full natural flows are higher than the monthly
6 forecast."

7 As a predictive tool for these notices there are
8 times when the daily full natural flows trend higher than
9 what might be the forecasted line. In that case they're
10 a predictive tool, to the extent it's a model, which I
11 don't know what that is defined as in the course. I know
12 that was subject to some testimony. But to the extent
13 that's a model, we -- the -- the division used the daily
14 numbers at times when the forecasted values were zero or
15 were lower than the daily numbers. That's a benefit to
16 the diverters. They -- as a predictive tool, that gave
17 them more water.

18 HEARING OFFICER DODUC: I think we can resume the
19 clock now.

20 MR. TAURIAINEN: Okay. I'm moving on to an
21 example of this.

22 For the San Joaquin Tributary analysis in the
23 Summer of 2015, the May Bulletin 120 forecast, which is
24 WR-109, page 4, for the Stanislaus, Tuolumne and Merced
25 Rivers in August and September was zero for the 50

1 percent through the 99 percent exceedance percentages.

2 However, the daily full natural flow was low, but it was
3 above zero for most days, some days, at least, Staff used
4 the daily full natural flow as the trend to estimate
5 future supply.

6 Now Mr. Coats also testifies -- a big question
7 that came up on Monday and has come up, I believe, in
8 these arguments is the 40 percent that -- oh, I'm
9 reminded to inform everyone that the predictive tool, the
10 percent -- the exceedance values actually include the
11 2,252 CFS return flow that Ms. Spaletta on cross-
12 examination argued should be added to the June 7th daily
13 full natural flow numbers. Those -- those are -- Mr.
14 Yeazell has already testified, that -- that return flow
15 number is in the predictive, the exceedance value, the
16 curved -- sloping curved line.

17 This part is important. We're getting into the
18 Delta stakeholders request for --

19 HEARING OFFICER DODUC: Hold on. Let me ask you
20 a question.

21 MR. TAURIAINEN: Yeah?

22 HEARING OFFICER DODUC: That value is included in
23 the predictive curve, and it's the predictive curve that
24 is used by the Prosecution Team for issuing the
25 enforcement action?

1 MR. TAURIAINEN: No.

2 HEARING OFFICER DODUC: Then --

3 MR. TAURIAINEN: The predictive curve was used to
4 issue --

5 HEARING OFFICER DODUC: For the notice?

6 MR. TAURIAINEN: -- the notice that went out.

7 HEARING OFFICER DODUC: Okay.

8 MR. TAURIAINEN: That was the -- the
9 determination made by division staff that as of a certain
10 day, definitively as of a certain day -- I mean, there's
11 some argument that maybe in March and April there might
12 not have been water available for diversions too.

13 HEARING OFFICER DODUC: So then for my --

14 MR. TAURIAINEN: But definitively --

15 HEARING OFFICER DODUC: For my clarification,
16 what did you specifically use for the enforcement action?

17 MR. TAURIAINEN: Well, to -- to issue the
18 enforcement action I described the investigation that
19 went on and the determination that Byron Bethany on one
20 had was still diverting up until June 24th, and West Side
21 was diverting or threatening to divert for a number of
22 reasons after May 1st.

23 HEARING OFFICER DODUC: But your --

24 MR. TAURIAINEN: The --

1 HEARING OFFICER DODUC: Your enforcement action,
2 then, is based on the -- the inspection and the fact that
3 they were diverting. And on what basis did you make the
4 determination that they did not have -- that that water
5 was not available for them to divert?

6 MR. TAURIAINEN: I think that's -- that a really
7 important issue that is very muddy, has been
8 intentionally muddied, I would -- I would argue in this
9 proceeding. It's about -- there's -- there's a
10 difference between what is at issue when we issue --

11 HEARING OFFICER DODUC: Notice.

12 MR. TAURIAINEN: -- an enforcement action versus
13 the evidence that we proffer at the hearing. There's
14 been arguments in some of the briefing, and here in
15 hearing, that the Prosecution Team has to rely only on
16 the evidence really that we had as of June 12th, or as of
17 June 7th. That's not the case.

18 We issue actions based on our understanding based
19 on the investigations. And the June 12th notice,
20 including the conditions that were predicted in the full
21 natural flow forecast, and the May 1st notice with the
22 same kind of predictions for West Side, those were true.
23 But we have to develop and we have developed and
24 presented in our case and chief, and then there's other
25 phases to the case, evidence that demonstrates that the

1 actual diversions that took place, which is specifically
2 a Phase 2 issue, were -- that diversions happened and
3 that they were outside of the scope of their available
4 claim of right.

5 The -- and so we've developed in this proceeding,
6 and I think WR-52 is the one that -- the chart that has,
7 for the full Sacramento and San Joaquin Watersheds, has
8 the chart with the full natural flow real data that was
9 measured all the way through, I believe it was August,
10 about the middle of August some time. And that shows
11 that there was -- you know, that the predictive tool was
12 accurate.

13 So we double checked the predictive tool in these
14 nine months or so since these actions were issued and
15 have been able to verify and offered into evidence into
16 this record in this proceeding evidence that demonstrates
17 that what was actually diverted -- now we have some
18 phases, and it's hard to argue something that hasn't been
19 brought up yet, but that the diversions that they did
20 were beyond the scope of any right that they had.

21 HEARING OFFICER DODUC: Thank you. Go ahead and
22 restart the clock.

23 MR. TAURIAINEN: Okay. The -- I want to get into
24 the 40 percent demand reduction into the Delta. Mr.
25 Coats talks about how that came about, and that was the

1 subject of some cross-examination. Staff made that
2 demand reduction as an accommodation to the Delta
3 stakeholders at their own request. And essentially, as
4 we've shown, with pretty minimal backing they said we
5 think it's 40 percent. And Staff said we think, you know,
6 we'll take that for now. Okay. That may not be
7 something that happens the next time this has to be done,
8 hopefully decades from now, but we all think it might be
9 sooner than that, I suspect.

10 In order to give every benefit to the diverter
11 Staff applied this 40 percent demand reduction by either
12 increasing the available supply through an adjustment or
13 by reducing the reported demand. Staff adjusted supply
14 in other ways that they describe in their written
15 testimony in the 1987 report for the San Joaquin
16 Watershed.

17 Now there was some -- some interesting cross-
18 examination and testimony about that '77 report in
19 whether there was return flows for the Sacramento River
20 system, and it was confused in that -- by that cross-
21 examination line because it wasn't a complete cross-
22 examination line. The table in that chart talks about
23 the Colusa Basin Drain. And as was noted in some of the
24 other cross-examination, there was a presumption in the

1 '77 report that the Bureau would not claim rights to any
2 return flow from its deliveries. Now, as we heard from
3 Ms. Mrowka, the Bureau does. So the '77 report does not
4 justify including any return flows from the Sacramento
5 River into this adjustment to the supply or adjustments
6 to the demand.

7 Staff added additional supply for the smaller
8 tributaries, pursuant to the department's -- Department
9 of Water Resources Bay Delta Office 2007 report. Mr.
10 Coats testifies to that. Using the reported demands for
11 either 2014 or the information for -- pardon, for the
12 information order recipients or the 2010 through 2013
13 four-year averages for everyone else, DWR-78 shows supply
14 and demand analysis for the San Joaquin River Watershed
15 with the prorated Delta demand as of August 19th. As
16 shown, after June 12th, 2015, the daily full natural flow
17 dropped so quickly, even into the riparian levels of
18 demand, that there's no way Byron Bethany had water after
19 June 12th to divert that was its own. There was water in
20 the channel, sure, and we haven't gotten to what that
21 might be. Other parties are going to talk about that.
22 But it wasn't theirs.

23 WR-47, which is dated April 29th, that's the
24 notice supporting the May 1st notice, shows that there's
25 insufficient supply to serve all post-'14 rights, between

1 the 90 and 90 percent forecasts. That's really
2 significant. The daily full natural flow at that time
3 trended closer to the 99 forecasted line, which means
4 there was only a 1 percent chance that the forecast might
5 be wetter than what the conditions were showing at the
6 time.

7 Number 48, which is the June -- the data -- or
8 the chart supporting the June 12th notice, shows that the
9 combined daily full natural flow data trended downward at
10 around 11,000 as of June 7th. And the Bulletin 120
11 forecast was even lower, it was around 9,000 on that
12 chart. The daily full natural flow was higher. Staff
13 used the daily full natural flow to base its decision to
14 issue the notice on that supply -- the daily supply
15 trend, even though it includes the 2,252 return flow CFS.
16 It was still 2,000 CFS less than the demand reported
17 through 1902's priority, let alone the 1914 priority that
18 BBID claims.

19 And again, the full natural flow data on that
20 chart ends on June 7th. And Ms. Spaletta in her cross-
21 examination argues that adding CFS to June 7th data and
22 manipulating the demand data otherwise somehow
23 demonstrates that there was no water starting nearly a
24 week later on June 13th. Now what I wanted to do on
25 redirect was show how adding, even with Ms. Spaletta's

1 assumptions, adding all that CFS, which really isn't
2 justified but for -- for the purpose of argument we were
3 going to entertain it, you add the -- that amount to
4 the -- to the actual trend line as shown on WR-52, you're
5 still nowhere close to BBID's 1914 priority right.

6 So WR-52, the one dated August 19th, shows that
7 the daily full natural flow dropped precipitously in mid-
8 June, down to riparian levels of demand, even before July
9 1st. That is really bad. This -- this is the chart I
10 was going to add the 2,252 to. And we weren't -- if
11 offered the opportunity, I'll visually demonstrate that
12 there's no way we were even close to BBID's supply from
13 June 13th through June -- BBID's right priority from June
14 13th through June 24th.

15 WR-81, which is the October 7th, 2015 chart,
16 that's the one with the -- with the actual flows measured
17 at Vernalis, measured by a gauge, compares that to the
18 prorated downstream senior Delta demand which includes
19 Byron Bethany and West Side, including 1902 and earlier
20 pre-'14 users, those are senior to Byron Bethany and West
21 Side. That comparison shows that the measured flow, the
22 actual flow, regardless of whether it was full natural
23 flow or not at Vernalis was insufficient to serve the
24 prorated remaining senior demand for at least June 13th
25 through June 24th.

1 That same chart demonstrates that there wasn't
2 any water available for West Side at any time after May
3 1st. Mr. Coats's written testimony will confirm that --
4 all this, and that their criticisms offered by their
5 witnesses, which we haven't heard yet, aren't
6 substantial.

7 The daily full -- and as an offer of proof
8 regarding the rebuttal testimony, I want to talk about
9 that. The daily full natural flow values used by Staff
10 to determine whether the Bulletin 120 forecast -- which
11 Bulletin 120 forecast to use and which are not ordinarily
12 used as supply data does not provide a forecast of water
13 to be expected. The exception is in the case, as I've
14 described, when the daily flow is greater than the
15 forecasted value. And that's when Staff used the daily
16 trend for its predictive tool, which benefits the
17 diverters.

18 This is another key point. Staff may not have
19 had a downstream contributions to full natural flow
20 values, but Staff also didn't subtract from those values
21 downstream depletions such as evapotranspiration, seepage
22 losses. Thus, while Ms. Spaletta, or Mr. Bonsignore in
23 particular, argued that additions should be made to the
24 daily full natural flow values, they ignore the reality
25 that nature also requires depletions to be accounted for,

1 which Staff omitted from the accounting to benefit
2 diverters as well. We didn't include what might be
3 additional supply, but didn't include additional losses
4 or a kind of demand, not -- not a water-users demand.
5 Staff could have adjusted the daily full natural flow
6 levels with a daily average return flow credit. It would
7 have also had to counter that with a daily average
8 depletion loss. Since the data --

9 MS. SPALETTA: Hearing Office Doduc, we would
10 like to object to this portion of the argument. Mr.
11 Tauriainen is providing testimony to explain what the
12 staff did, which his staff should have been able to
13 explain for themselves. Mr. Tauriainen is not under
14 oath, and so he is providing substantive explanatory
15 testimony without citation to the record, which is highly
16 improper.

17 HEARING OFFICER DODUC: Thank you, Ms. Spaletta.

18 MR. TAURIAINEN: This is --

19 HEARING OFFICER DODUC: I will --

20 MR. TAURIAINEN: This is an offer of proof
21 regarding what we will describe, which is allowed under
22 what should be the guiding procedures for this motion. I
23 mean, this is a very serious motion the Prosecution is
24 facing.

1 HEARING OFFICER DODUC: Thank you. Objection is
2 noted. Response noted.

3 MR. TAURIAINEN: For the record, Mr. Coats's
4 rebuttal testimony is WR-2010. I'm citing from it. I've
5 cited so far pages three, six and seven.

6 Going back to why the staff didn't include return
7 flow credits, since the daily full natural flow was
8 trending for the most part between 50 and 90 percent of
9 the forecast, and Staff based its decisions using the
10 more generous 50 percent supply forecast, any net
11 adjustments to the daily full natural flow, after taking
12 into consideration downstream depletion losses, would
13 likely be greater than the next higher Bulletin 120
14 supply forecast, which is the 25 percent exceedance which
15 is really generous, given the way the water year was last
16 year.

17 With respect to ag return flows, Mr. Coats will
18 testify that Mr. Bonsignore provided no additional data
19 to augment supply, and that the evidence of prominent
20 Sacramento River diverters shows that the Sacramento
21 receives minimal return flows as tailwater is often
22 restricted or recirculated in the Sacramento in reality
23 in 2015.

24 Mr. Coats will testify that for a true demand
25 reduction of 40 percent to be warranted as the result of

1 pumping excess diverted water back into the source, which
2 was the basis for the Delta stakeholders' request, that
3 returned water must be of the same water quality or
4 better than that diverted so that it is useable by
5 another party. Mr. Bonsignore merely assumes that all
6 the return flow is of sufficient quality to be useable
7 without a basis. That's Water Right 2010, page seven.

8 Mr. Coats provides two appendices in his rebuttal
9 testimony. Appendix A shows that the May 2015 analysis
10 applicable to WSID would, as Mr. Bonsignore argued, show
11 in excess of 426 CFS at West Side's diversion point only
12 if the 40 percent return flow credit, which is
13 hypothetical, is applied. Without that credit there
14 would be a shortfall of water at West Side's point of
15 diversion or for West Side of 647 CFS.

16 Appendix B is the June 15th analysis applicable
17 to BBID. Even with all of the alleged excess demands
18 there is still not enough supply to satisfy Delta demand
19 through a 1913 priority, with or without the Delta 40
20 percent return flow credit. Byron Bethany is junior to a
21 1913 priority. Water supply was that bad.

22 With respect to return flows, Mr. Coats will
23 testify that if return flows were so substantial there
24 should be evidence of a larger return flow component
25 registered at a downstream gauge and available for use,

1 but there was not. Citing his testimony, from 210, page
2 eight, also citing water at 251.

3 Mr. Yeazell, turning back to his -- the direct
4 testimony, he testifies that he was part of the -- the
5 division to analyze the data and generate water supply
6 graphs, citing Water Right 11. He created WR-47. He
7 created WR-48. Both graphs show respectively that by May
8 1st or June 12th, water was insufficient to meet the
9 demands of either post-'14 appropriative rights
10 throughout the Sacramento River Watershed and Delta for
11 the May 1st, or the demands of appropriative rights with
12 priority dates of 1903 and later throughout the
13 Sacramento and San Joaquin River Watershed, and the Delta
14 for June 12th. He's testified that the demand data used
15 in the analysis was collected from the diverters
16 themselves and run through a rigorous quality control
17 analysis to remove excess demand due to overreporting for
18 power-only use for duplicate data.

19 Up to date demand for 2014 was collected from the
20 diverters themselves, some of them, through the
21 information order in 2015 and was incorporated into the
22 analysis.

23 Supplements to the full natural flow forecast, he
24 describes, were made by adding various tributary
25 contributions under the DWR's 27 report and certain

1 credits described in the 1977 report, as described in Mr.
2 Yeazell's testimony.

3 Now as an offer of proof regarding his rebuttal
4 testimony, Water Right 211, he confirms that every single
5 one of the criticisms raised by the experts hired by West
6 Side or Byron Bethany failed to move the needle. They
7 don't change the end analysis regarding water
8 availability, which is the subject of this testimony
9 because supply in the summer of 2015 was that low.

10 Now really important, they've made a lot of
11 argument so far about the fact that there was 2015
12 information order data at some point in 2015 that became
13 available. Mr. Yeazell describes and Ms. Mrowka
14 testifies on rebuttal that adding that information order
15 data doesn't move the needle to the benefit of West Side
16 or to Byron Bethany. It does not provide water for their
17 priorities in -- in 2015. Now to some extent that could
18 be considered an after-the-fact, as Mr. Kelly described,
19 confirmation by us. But I would just say it's a
20 confirmation. You use the data as you get it, as you can
21 incorporate it, and verify that the notice, the
22 conditions that -- that the staff anticipated as of June
23 12th were reality. So substituting the 2015 information
24 order data made no difference to the end result. This is
25 going to be written rebuttal testimony.

1 Mr. Yeazell also includes every alleged excess
2 demand identified by Bonsignore and Young and removes
3 them from his spreadsheets and reruns all the analysis
4 for purposes of considering whether they would have
5 changed the results relied on by Staff when making
6 decisions concerning unavailability, including alleged
7 duplicate demands, data entry mistakes, demands that
8 could not be met with supply in local or subwatersheds,
9 which -- which was a subject of some cross-examination.
10 His rebuttal testimony shows that even when Mr. Young's
11 identification of alleged excess demands are removed,
12 there's not enough water to meet demand for either West
13 Side or Byron Bethany.

14 I'm done -- I'm going to be done in a moment.

15 So the exercise engaged in during cross-
16 examination of Mr. Yeazell was really an attempt by those
17 aligned with the diverters to manipulate the data to show
18 that water might have been available to diverters at some
19 time period before the relevant time period, June 7th in
20 particular using Water Right 48. Had the Hearing
21 Officers allowed a redirect examination of Mr. Yeazell,
22 it would have been shown that both the water supply
23 forecast, as well as the daily full natural flow data,
24 dropped so precipitously after June 7th. And June 7th
25 was not that different from June 12th. After June 12th

1 it dropped off so far that even adding 2,252 CFS of
2 return flow to supply would have made no difference to
3 the analysis or the conclusions today, even if you
4 reduced demand by 740 CFS.

5 The Prosecution Team's rebuttal evidence will
6 show and does show that all the critiques offered have no
7 effect on the bottom line. Water supply during the
8 drought was that low.

9 For all these reasons the Prosecution Team
10 respectfully request that the Hearing Officers reject the
11 motion for a nonsuit.

12 HEARING OFFICER DODUC: Questions of Mr.
13 Tauriainen.

14 MS. KUENZI: I just have one question that I
15 wanted to ask because I want to see if I can be clear and
16 specific about this.

17 For purposes of the enforcement action, and let's
18 look at the BBID ACL action, so let's -- I'm talking
19 about June 13th through 25th. Is the best evidence that
20 you're relying on for supply that was available or -- to
21 diverters and the evidence that you're relying on to show
22 that water was unavailable to BBID during that time
23 period, is that the daily full natural flow data or is
24 that the projected forecast?

1 MR. TAURIAINEN: Daily full natural flow data
2 confirms the projected forecasts. They actually trend
3 very close to the lines that the -- that Staff picked.
4 But the -- I think it's Water Right 52 shows the daily
5 full natural flow data. So in terms of best, I suppose
6 in -- in a manner of speaking the daily data is the best
7 information. That's what actually was there, according
8 to the way the Department of Water Resources calculates
9 that. But it validates almost exactly, I mean, very --
10 as far as exact can be in statistical, you know, type
11 analyses, that the -- the exceedance forecast that Staff
12 chose on the days June 12th and May 1st were -- were
13 correct.

14 MS. KUENZI: So I guess that brings up another
15 question. So I'm not sure, and you -- and you -- we've
16 heard this testimony that there's validation, why are we
17 talking about the predictive trend line? If what
18 we're -- the question before us is whether or not BBID
19 actually had water available to them under their priority
20 of right or no, wouldn't we look to the best available
21 data, which I think I heard you say was the daily full
22 natural flow --

23 MR. TAURIAINEN: Well --

24 MS. KUENZI: -- in terms of supply?

1 MR. TAURIAINEN: -- I think that gets into -- you
2 know, Board Member Doduc asked a question earlier about
3 what is the -- the complaint based on and what is the
4 draft cease and desist order based on? And that's based
5 on the information that we have at the time. And at the
6 time that we issued the complaint what we had was the
7 June 12th notice and the -- the May 1st notice. And then
8 we did a whole bunch of discover and other Staff
9 continued this task they had, Mr. Yeazell and Mr. Coats,
10 of gathering the data and putting it together and
11 eventually coming up with a determination of when their
12 water -- when water was going to be available again,
13 right, using kind of the same -- the same process.

14 But I think more to your question, we -- we have
15 to describe the Prosecution Team's burden is -- is to
16 show why we issued the complaint, and then what evidence
17 supports the finding that we propose in both actions as
18 of the day of the hearing, right, or the several days of
19 the hearing. And so we include and have to describe,
20 which opens to attack the methodology underpinning the
21 June 12th and May 1st notice. And then we have described
22 and included the after-the-fact confirmation based on the
23 best data that -- that we can get, which includes the
24 daily full natural flow.

1 There's other adjustments that Staff made that's
2 described in their testimony to things like demand. And
3 we put on our case about that and then we were
4 challenged. And the rebuttal will show why those
5 challenges don't add up either, so they don't move the
6 needle. When I say move the needle I mean get -- bring
7 supply up to where either of these right holders would
8 have their priorities served.

9 HEARING OFFICER DODUC: So make sure I
10 understand. After issuing the draft enforcement order,
11 Staff did a retrospective look at the period of alleged
12 violation and determined, according to what you tell me,
13 that water was not available. And was that determination
14 based on full natural flow as reported or on the
15 forecast? I just -- I won't tell you what I think it is.

16 MR. TAURIAINEN: Yeah, it's -- it's the full
17 natural flow.

18 HEARING OFFICER DODUC: It's the full natural --
19 okay. Stop.

20 MR. TAURIAINEN: Yeah.

21 HEARING OFFICER DODUC: And did that full natural
22 flow include return flows?

23 MR. TAURIAINEN: Full natural flow for the -- the
24 water at 52? I think just one graph that has the daily
25 full natural flow.

1 HEARING OFFICER DODUC: Yes.

2 Mr. Buckman, could you put that up

3 MR. TAURIAINEN: So one thing about this is this
4 chart -- and this is testimony that really the witnesses
5 should be giving, and I may be describing my
6 understanding differently from them; right? This is what
7 I was going to ask Jeff to -- to demonstrate on redirect.

8 HEARING OFFICER DODUC: Forget the chart. Okay,
9 let's forget the chart. Just --

10 MR. TAURIAINEN: Yeah.

11 HEARING OFFICER DODUC: -- answer the question
12 for me. When the Prosecution Team staff did this
13 retrospective look in order to develop the evidence upon
14 which to present to us for the enforcement action, did
15 the supply analysis include return flows that the demand
16 analysis included actual demand as reported as a
17 consequence of the information order?

18 MR. TAURIAINEN: The answers are yes. And I'm
19 going to have to have the witnesses, you know, give
20 their -- describe as why. But I want to -- I want to
21 give a slight preface to that answer. And I think you're
22 presuming to some extent that the -- the staff undertook
23 specific analyses regarding these two diverters, which
24 has been argued by the parties that we need to do. Staff

1 kept doing their job after we issued these -- these cease
2 and the -- and the draft and the complaint.

3 HEARING OFFICER DODUC: No, I'm not presuming
4 that you took action specific -- specific to this
5 Discharger. I'm trying to understand based on your
6 watershed-wide analysis of water availability what
7 analysis you conducted after the enforcement orders were
8 issued?

9 MR. TAURIAINEN: They did several. Mr. Coats and
10 Mr. Yeazell provide a number --

11 HEARING OFFICER DODUC: I know they did several.

12 MR. TAURIAINEN: -- of different examinations.

13 HEARING OFFICER DODUC: I'm trying to understand
14 what parameters, what consideration went into those
15 analyses?

16 MR. TAURIAINEN: Well, they kept looking at
17 the -- at the full natural flow and --

18 HEARING OFFICER DODUC: Unadjusted full natural
19 flow?

20 MR. TAURIAINEN: -- making adjustments to the
21 supply, the full natural flow, as -- as described in
22 different ways, and adjustments to the demand as -- as
23 they --

1 HEARING OFFICER DODUC: One of the things I kept
2 hearing on Monday was that Prosecution Staff did not make
3 adjustment to the full natural flow.

4 MR. TAURIAINEN: So again this --

5 HEARING OFFICER DODUC: But now you're telling me
6 they did?

7 MR. TAURIAINEN: The -- so the full natural flow
8 I think -- are you asking about daily or the monthly
9 forecasts?

10 HEARING OFFICER DODUC: No, no. I'm talking
11 about the daily full natural flow.

12 MR. TAURIAINEN: Because they kept using the
13 monthly forecast as available, too; right? The charts
14 that they prepared were still -- still there. Those --
15 those -- the -- those forecasts include the full natural
16 flow --

17 HEARING OFFICER DODUC: Then why would you use --

18 MR. TAURIAINEN: -- the monthly amounts.

19 HEARING OFFICER DODUC: -- the forecast looking
20 backwards if you had data?

21 MR. TAURIAINEN: Because their job still -- so
22 after they determined that water was not available, they
23 needed to continue the analysis to determine when water
24 was available. And to -- to, you know, make the notice
25 that water was -- their job didn't end once the -- once

1 they did the June 12th notice. They continued, as
2 they've described, to collect data really daily or, you
3 know, multiple times a week and update this analysis.
4 That's part of why we're accused of having so many
5 different spreadsheets and so many different charts that
6 it's confusing is because Staff kept updating this
7 information constantly in order to determine when water
8 was going to be available again. And that involves the
9 same kind of predictive tool, their predictive analysis
10 which includes -- that is what includes the full -- the
11 return flows, the 2,252, okay?

12 HEARING OFFICER DODUC: The predictive curves?

13 MR. TAURIAINEN: Yeah. And then the daily full
14 natural flow is really an after-the-fact validation;
15 right? But after the fact comes very quickly, but a day
16 at a time, as you go -- go through time. So that's why
17 we have a chart from August where they -- they looked at
18 what the conditions were and how close the daily full
19 natural flows were trending to their -- their predictive
20 lines, and they saw that they were. And in that -- that
21 case, to my mind, that -- that graph that shows the daily
22 full natural flow, even if you add the 2,252 CFS to that,
23 it's still nowhere close to where BBID's right would be,
24 and certainly not where -- where West Side's right would

1 be for the month of June. And the -- that's the -- the
2 update.

3 Now the -- the information order demands, the
4 demand adjustments, some of those weren't made until a
5 few months after, even a month or two after we issued
6 these -- these complaints. But again, it was part of
7 doing Staff's job. The information demands, as they were
8 made available, and by August, they were all included in
9 the demand. That's why we have later graphs. The August
10 graph has a demand adjustment that includes actual data
11 and some other information order demand data and some
12 other comments that Mr. Yeazell described.

13 And then for the purpose of this proceeding, and
14 it's probably -- it's indicative of the burden that's put
15 on the Division of Water Right staff when we're accused
16 of not doing what would be a permitting Water
17 Availability Analysis for these points of diversions, but
18 instead relying on -- what we're accused of being is, I
19 don't know if they would say pie in the sky or watershed-
20 level conceptual models, but that's what the Division's
21 job one is, right, to figure -- that's what -- at least
22 this unit was -- was to figure out when water was not
23 available for water right priorities, and then through
24 the summer and into the fall, figure out when it was
25 going to be available again. And that's what they kept

1 doing. And that's why there's, you know, different
2 analyses from different points in time that we presented.

3 If I had technical staff that was available to
4 just prepare a case and not do their job, too, maybe the
5 evidence would look different and we would do a site-
6 specific watershed availability analysis, but we don't
7 have that Staff and we're not burdened to do -- that's
8 not out burden. The methodology that Staff used in 2015
9 is both a predictive and a validated methodology that --
10 using the actual data that became available since. So --

11 HEARING OFFICER DODUC: Thank you.

12 Any other questions?

13 MR. TAURIAINEN: I will email --

14 HEARING OFFICER DODUC: No, Mr. Buckman, did you
15 have questions?

16 MR. BUCKMAN: I do.

17 And you may not be able to answer these.
18 Specifically, you mentioned WR-52. Is there data to
19 support WR-52? And if so --

20 MR. TAURIAINEN: In a spreadsheet?

21 MR. BUCKMAN: Yes. And if so, which one is it?

22 MR. TAURIAINEN: Well, I -- WR-53 is -- is -- has
23 the predictive tool data and the demand data. What it
24 doesn't include but which is included in the record, and
25 Mr. Yeazell, as part of his redirect, could describe how

1 he puts it together and show how he put it together, it
2 doesn't include, unfortunately, the full natural flow
3 data through the middle of August. But that is available
4 in the record. I don't know off the top of my head
5 the -- the exhibit for that, but it's in the record.

6 MR. BUCKMAN: A couple more, just to clarify.

7 I believe you mentioned that when using the 99
8 percent exceedance value you said there was only a 1
9 percent chance that the weather would be wetter; is that
10 correct?

11 MR. TAURIAINEN: So you're asking me almost a
12 statistics question and I'm an attorney, and it's been
13 awhile --

14 MR. BUCKMAN: Okay.

15 MR. TAURIAINEN: -- with those classes. But 99
16 percent exceedance means 99 percent of the time that much
17 flow is going to be available. So, yes, 1 percent of the
18 time there would be more flow available. That's my
19 understanding, at least.

20 MR. BUCKMAN: And my last question. You talked
21 about the 40 percent credit. And is it your
22 understanding that you used the 40 percent credit?
23 Because it sounded to me like you were trying to say that
24 absent the 40 percent credit, of course, the water

1 conditions would be different. But you did use that in
2 your calculations; correct?

3 MR. TAURIAINEN: It was used, well, not for May
4 1st because the credit came in -- I think the meeting was
5 May 12th. That's in the record, described by Mr. Coats,
6 where the stakeholders, you know, just proffered this
7 number, so the analysis after that. And I believe the
8 reduction or the -- the adjustment was to demand within
9 the Delta, which in effect increased supply by reducing
10 the demand. But the -- the -- I believe that's the
11 adjustment. They may have, in different, you know,
12 different ways of looking at the same data, may have
13 adjusted it differently, and Staff will have to testify
14 to that. But it was not part of the May 1st notice
15 because it hadn't been proffered yet. It was part of the
16 subsequent analyses the various times.

17 And also, you know, I think you're referring to
18 the offer of proof I made about Mr. Coats's rebuttal
19 testimony where he said with -- if you assume this 40
20 percent, even with all of these assumptions that one of
21 the other sides' witnesses makes, you still have to
22 assume the 40 percent return flow credit in order to --
23 to move the needle above West Side for May, I believe is
24 the -- the argument that was made.

1 MR. BUCKMAN: But you did include that 40 percent
2 in your analysis in June?

3 MR. TAURIAINEN: In the -- in -- well, in -- for
4 the June 12th analysis, yes. Everything after, you know,
5 that May 12th meeting or whenever Staff go to include it
6 in the -- in their different databases.

7 MR. BUCKMAN: One more question. And I am trying
8 not to beat a dead horse here. But Mr. Coats in his
9 testimony regarding the Bulletin 120 forecasts says that
10 beginning in -- when you look back prior to April, that
11 the data for the different exceedance curves are all the
12 same. And the reason for that is what's done is done.
13 So looking at August in WR-52, I'm a little confused, and
14 maybe you could explain it to me, why the forecasting
15 data for the different forecasts, the different
16 percentage of exceedance forecasts are still different?
17 Because it would seem like at that point what's done is
18 done and there should be an actual dataset of what was
19 actually the supply at the time.

20 MR. TAURIAINEN: I can only offer you my
21 understanding about that. You'll have to confirm that
22 with Staff. But it's -- it was a validation of the
23 exceedances that they chose to use.

24 The Bulletin 120 forecasts are only that. And
25 Mr. Nemeth described or in his written testimony at least

1 describes that once the month goes by and they get the
2 actual data, that that's where their tables -- all the
3 numbers become the same in the tables that we -- there's
4 several tables, right, but for each watershed that
5 there's a forecast done for.

6 Yeah, the -- the after sort of the fact review of
7 their analysis and of their methodology, I believe Staff
8 just left the original predictive lines there. The
9 predictive lines do shift over as -- with some of these
10 later charts; right? But they leave them there, I think,
11 to validate so that the daily full natural flow, they can
12 see where the trend line was and whether it -- whether
13 their analysis correctly -- you know, they correctly
14 chose the right forecast line.

15 So it's not so much an ex post factor
16 rationalization of what they chose. The -- the full
17 natural flow, you know, is what it is once it's measured
18 and they use that to compare to what they had used as a
19 predictive tool in the past. And then that helps
20 determine whether it's a good predictive tool in the
21 future. All of this is, you know, in the -- in the
22 testimony and on rebuttal.

23 MR. BUCKMAN: Well, sorry, if I may, this is WR-
24 52, and this is through September, it looks like. And
25 I'm looking at the forecast for the adjusted 50 percent

1 in June, and it looks like it's under 10,000. And then
2 I'm looking at WR-48 and it looks like the adjusted is
3 definitely over 10,000 CFS. And I guess that's where I'm
4 a little confused.

5 MR. TAURIAINEN: Staff will have to describe. I
6 think their testimony describes that -- that June 8th
7 data point from DWR.

8 But if you go back to the 52, you see that the
9 trend line was -- that the actual readings were nowhere
10 close to what that DWR proceeding was.

11 MR. BUCKMAN: I guess my question is what you're
12 saying is the trends lines, once you adjusted it, are the
13 same looking backwards. Then shouldn't that be
14 reflected?

15 MR. TAURIAINEN: I would -- you know, at this
16 point, and I've done this in my -- in my argument,
17 suggest that maybe you should be asking the witnesses
18 this. There was an opportunity for Hearing Team
19 questions at the close of their case in chief
20 presentation. And maybe some of these issues weren't
21 exposed on cross-examination; right? But under the
22 applicable standard, that's all the more reason to deny
23 the motion and maybe call them back up and ask them these
24 questions themselves.

1 I am not testifying. I have not taken the oath
2 and I won't. And I can only describe to you my
3 understanding, which at times might be fuzzy when I'm
4 standing up here for an hour presenting.

5 HEARING OFFICER DODUC: All right.

6 MR. TAURIAINEN: So --

7 HEARING OFFICER DODUC: All right. Thank you,
8 Mr. Tauriainen.

9 MR. TAURIAINEN: And I understand that the
10 attorney for the Department of Water Resources would like
11 the remainder of the time, or a portion of it.

12 HEARING OFFICER DODUC: All right.

13 And then, Mr. Kelly and Ms. Spaletta, I know
14 you're eager to provide your rebuttal, but I'm going to
15 have to take a five minute humanity break after this.

16 MS. MCGINNIS: Are you sure you don't want to do
17 that before?

18 Robin McGinnis for the California Department of
19 California Department of Water Resources.

20 DWR joins the Prosecution Team's arguments,
21 especially the proper standard and the correct section of
22 the Code of Civil Procedure here. CCP 871(c) and related
23 case law provide the standard. The Prosecution Team's
24 evidence gets every credible inference on this motion.

1 The point of the hearing, all phases of the
2 hearing, is for the parties to present their evidence and
3 allow the Hearing Officers to weigh all the evidence.
4 The point of this motion is for the Hearing Officers to
5 view the Prosecution Team's opening statement and the
6 evidence that has been admitted -- that was admitted on
7 Monday.

8 The moving parties are asking the Hearing
9 Officers to consider evidence that's not in the record,
10 including a right to divert project releases that have
11 been abandoned, and that the Delta is a source of water,
12 points which DWR and other parties dispute and haven't
13 been given an opportunity to submit evidence on.

14 DWR's written exhibits that we submitted show
15 there is no water stored in the Delta. It is not a
16 source of water. DWR's testimony also shows that illegal
17 diversions during extraordinarily dry conditions like
18 2015 cause DWR and Reclamation to release more water from
19 reservoirs than --

20 MR. O'LAUGHLIN: Ms. Doduc?

21 MS. SPALETTA: We object.

22 MR. O'LAUGHLIN: Tim O'Laughlin, San Joaquin
23 Tributaries Authority.

24 HEARING OFFICER DODUC: Mr. O'Laughlin?

1 MR. O'LAUGHLIN: I'd like to object to this
2 statement right now. Because the witness yesterday, Ms.
3 Mrowka, said that nothing having to do with DWR or
4 Reclamation's stored water releases was the basis of this
5 complaint. So therefore this offer or proof or testimony
6 is entirely irrelevant to these proceedings.

7 MS. SPALETTA: Central --

8 HEARING OFFICER DODUC: Ms. Spaletta?

9 MS. SPALETTA: Central Delta joins the objection.
10 This was actually the subject of one of our motions in
11 limine to strike the Marshall testimony. And, in fact,
12 this was the only portion of the motions in limine, as I
13 understand it, that was granted. And the rationale for
14 granting the motion was the DWR had an obligation to put
15 forth any evidence regarding alleged injury in a case in
16 chief, which it failed to do.

17 HEARING OFFICER DODUC: Mr. Kelly?

18 MR. KELLY: Yes, Hearing Officer Doduc, thank
19 you. Daniel Kelly, BBID.

20 I join on that objection. Not only did Ms.
21 Mrowka testify that stored water was not involved in this
22 proceeding at all, we have -- also that is confirmed by
23 her deposition testimony, and we can provide that to you,
24 where she also swore under oath that this -- in this
25 proceeding that the Byron Bethany Irrigation District was

1 accused only of taking water that was needed for more
2 senior pre-'14 water right holders and riparians, and
3 that stored water was not at issue in this proceeding.

4 And so I also object to any offer of proof or
5 testimony or evidence with respect to stored water.

6 HEARING OFFICER DODUC: Thank you, Mr. Kelly.

7 Ms. McGinnis, response?

8 MS. MCGINNIS: This is not an offer of proof.
9 I'm responding to arguments the parties made this
10 morning. If we look at the slides that were presented,
11 on one of the first slides there they mentioned stored
12 water that has been abandoned, which DWR and other
13 parties argue, we just don't abandon water. And we
14 haven't been given an opportunity to argue this.

15 HEARING OFFICER DODUC: Go ahead and proceed, and
16 I'll take all the objections under consideration.

17 MS. MCGINNIS: So let's see. I'll skip the other
18 factual arguments that I was going to make and hit on
19 procedure instead.

20 These enforcement actions are about whether BBID
21 and West Side diverted water illegally. They are not
22 about the Board's Water Availability Analysis that
23 supported the curtailment notices. The Water
24 Availability Analysis was part of the Board's
25 investigation, the administrative civil liability

1 complaint to BBID, and the draft cease and desist order
2 to West Side, but that's not all these actions are about.

3 We haven't yet heard from key witnesses, the
4 engineers with the Division of Water Rights who were
5 assigned to investigate the diversion of use -- diversion
6 and use of water by BBID and West Side.

7 On Monday the Prosecution Team agreed for
8 convenience to call these witnesses, Paul Wells and Kathy
9 Bare, in Phase 2. Quoting from Monday's transcript,

10 "If the parties are willing to agree not to
11 object to us putting on evidence about how much Byron
12 Bethany or West Side diverted during the relevant periods
13 during Phase 1, we can skip the rest of our Phase 1
14 presentation."

15 And last, as a policy matter I would request that
16 if nonsuit is granted the Board begin immediately the
17 task of creating a rule for determining water
18 availability for water right holders within the basin,
19 and that it include water for meeting downstream
20 objectives.

21 Thank you.

22 HEARING OFFICER DODUC: Thank you, Ms. McGinnis.

23 Mr. Kelly?

24 MR. KELLY: Hearing Officer Doduc, if I can --

25 HEARING OFFICER DODUC: Hold on.

1 MR. KELLY: -- very briefly --

2 HEARING OFFICER DODUC: Stop the clock.

3 MR. KELLY: -- save the 20 seconds.

4 For the purpose of this, BBID I will stipulate
5 that it diverted water in the period of the alleged
6 violation for the purposes of what's going on here,
7 because I don't want that to confuse the issue. So I'm
8 fine if you assume that BBID diverted water during that
9 window for the purpose of the consideration of the
10 pending motions.

11 HEARING OFFICER DODUC: Thank you, Mr. Kelly.

12 Ms. Ansley?

13 MS. ANSLEY: This is just a brief objection to
14 follow up with what Ms. McGinnis was just saying.

15 We solely want to object to the allegations that
16 I believe Ms. Spaletta brought up earlier, which have
17 been now kind of carried through these whole arguments --

18 MR. O'LAUGHLIN: Excuse me, Chairman?

19 MS. ANSLEY: -- that stored water should --
20 excuse me.

21 HEARING OFFICER DODUC: Mr. O'Laughlin?

22 MR. O'LAUGHLIN: Yes. Is this part of the total
23 45 minute time period?

24 MS. ANSLEY: Yes. That's fine.

1 HEARING OFFICER DODUC: This is part of their 45
2 minutes --

3 MS. ANSLEY: I'm fine with this.

4 HEARING OFFICER DODUC: -- which is down to like
5 20 seconds now.

6 MS. ANSLEY: I've got one sentence --

7 HEARING OFFICER DODUC: Okay.

8 MS. ANSLEY: -- so I'll start over.

9 What we object to was the allegation that stored
10 water supply should have been supplied in the calculation
11 for water supply. It's not a part of available water
12 supply to these parties. Thank you.

13 HEARING OFFICER DODUC: Thank you. All right,
14 for humane reasons we're going to take a five minute
15 break.

16 (Off the record at 11:01 a.m.)

17 (On the record at 11:11 a.m.)

18 HEARING OFFICER DODUC: Now we are back on the
19 record.

20 MS. SPALETTA: Thank you. First of all, I'm
21 going to address --

22 HEARING OFFICER DODUC: Put on the microphone --

23 MS. SPALETTA: Thank you.

24 HEARING OFFICER DODUC: -- and timer.

1 MS. SPALETTA: First of all, I'm going to address
2 just some basic legal issues.

3 There was an argument that the proper standard
4 that applies to this case is in CCP 581(c) and that
5 there's a variety of deference afforded. There is some
6 deference afforded, but that is not the correct standard.
7 That is the standard that applies to a motion for nonsuit
8 made after a party's opening statement in a jury trial.

9 The proper standard in this proceeding at this
10 point is the motion that's made after a party has put on
11 their case in chief, and that is the one that we cited
12 which is CCP 638.1. Historically, both were called a
13 nonsuit. In modern times, the one we're using now is
14 actually more appropriately referred to as a motion for
15 judgment. Mr. O'Laughlin used the old-fashioned term
16 when he asked for it yesterday. But it is actually --
17 the terminology is not controlling, and there is case law
18 on that point which is Commonwealth Memorial, and the
19 case is 1976 63 Cal. App. 3d 867. So again, standard was
20 not cited correctly.

21 There's also two other cases that Mr. Tauriainen
22 cited about the impropriety of using the nonsuit in this
23 context. Both cases are incorrect. I'll note for you
24 that Mr. Knapp from the City of San Francisco was kind
25 enough to point to me California Public Utilities

1 Commission decision recognizing the use of nonsuit in
2 administrative proceedings. That's re: Southern
3 California Edison company, decided July 1987, 25 CPUC 2d
4 91.

5 And, in fact, the case that Mr. Tauriainen cited,
6 City of Oakland case, was not a case that said nonsuit
7 was inappropriate. It said that in that case a statute
8 of limitations defense was inappropriate in an
9 administrative proceeding. And the defense was raised in
10 a motion for nonsuit. So the case was about whether you
11 could plead statute of limitation as a defense, not
12 whether you could use nonsuit.

13 Okay, let's talk about the substance.

14 Mr. Tauriainen has basically stood up in front of
15 you and said my witnesses did not present to you a
16 complete case of why water was unavailable and why their
17 methodology was appropriate. We're going to do that
18 later in rebuttal. That is a huge procedural problem.
19 These parties and their counsel have been working for
20 over a year to understand the basis of this methodology.
21 And here we are after the case in chief and we're being
22 told we haven't heard all the evidence. They want to put
23 that evidence on through rebuttal, in which case we have
24 no opportunity for our experts to review it and respond

1 to it. That is a serious procedural due process
2 violation.

3 We could rest our case today, West Side and BBID
4 could rest our case today and they would have no right to
5 put on a rebuttal case, and you would be stuck with what
6 they've put in front of you already. That's how the
7 procedural rules work.

8 The other argument Mr. Tauriainen made to you was
9 that you don't have the ability to use this motion to
10 control these proceedings. That's a very dangerous
11 argument for him to make. You're the State Board.
12 You're designated as the Hearing Officers for the State
13 Board. You have the discretion to control how these
14 proceedings work. And you have a public policy duty to
15 do them in a way that's fair and logical and gets to
16 meaningful results.

17 If this case is not going to meet that public
18 policy duty, then you should tell the Prosecution Team
19 the job wasn't good enough and they should try harder
20 next time. You should not waste the time of all of the
21 people in this room for the next two weeks. You have the
22 discretion to use the motion. We were thankful that you
23 gave us the opportunity to explain why it should be used,
24 and we urge you to use it to do the right thing.

1 Finally, I want to talk about the evidence. You
2 asked point blank, many of you, what was used to
3 determine unavailability for the purposes of these
4 enforcement proceedings? You did not get a straight
5 answer.

6 They are now saying that it was daily FNF that
7 was plotted on the after-the-fact graphs. That's what
8 Mr. Tauriainen just explained. They -- their witnesses
9 admitted that that daily line, even on the after-the-fact
10 graphs, never included any of the adjustments. And we've
11 given you those citations. It didn't include the
12 adjustments for flows, not return flows but flows in the
13 unimpaired flow subbasins in DWR's 2007 report, just
14 basic regular flows that are designed to meet demand.
15 They admitted they include all the demand from those
16 subbasins and none of the flows in that blue line.

17 They've also admitted they didn't include the
18 return flows in any of those blue lines. So if that's
19 the reason, then that blue line is still a major problem
20 based on their own testimony.

21 What's also really scary about what Mr.
22 Tauriainen just explained to you is it directly
23 contradicts with the Prosecution Team's written testimony
24 on direct. Kathy Mrowka's written testimony on page
25 three says she is the Prosecution Team lead and the water

1 unavailability determinations for the purposes of the two
2 enforcement actions are based on the May 1st and the June
3 12th analyses. That's what she put in her written
4 testimony.

5 Now Mr. Tauriainen tells you, oh, well, not
6 really. That's when we were just still kind of learning,
7 so we -- we have some after-the-fact stuff. And I want
8 my witnesses to be able to come up in rebuttal and kind
9 of explain the nuances to you. No. That would
10 contradict with their Prosecution Team lead said was the
11 basis for these enforcement actions. We cannot have
12 meaningful and legitimate enforcement proceedings in this
13 forum where someone gets to hide the ball. That's wrong.

14 These people deserve to know what the evidence is
15 against them. It should have been presented at the time
16 the draft CDOs were sent to them. If the evidence wasn't
17 ready at that time, they shouldn't have been sent. There
18 was no reason for those letters to go out in July if the
19 evidence didn't support it. Staff should have taken the
20 time to do the right analysis, send the analysis to these
21 people with the draft CDOs saying this is what your draft
22 CDO is based on, and given the parties a meaningful
23 opportunity to review whatever the evidence is that
24 they're going to rely on.

1 But they waited. And in January we finally got
2 the first written explanation, and it says based on May
3 1st and June 12th, and that's what they put on in their
4 direct case. And now they want to come in and say, well,
5 not really. We have stuff after the fact that we can
6 explain to you too. That is a huge procedural problem.
7 And I urge you not to let the Prosecution Team conduct an
8 enforcement action in that fashion.

9 Finally, I'm going to point you to what Mr.
10 Tauriainen accused me of being less than truthful with
11 you about, which is page 219 of the transcript. That's
12 when Mr. Yeazell made the admissions about what happens
13 to the daily full natural flow line when you make the
14 adjustments, just the two adjustments we were talking
15 about, not including all the other issues.

16 My specific question had nothing to do with June
17 7th. I asked him, "Let's look at the graph, Exhibit 48.
18 We just went through an exercise where we established
19 that if the blue line had been adjusted to reflect your
20 return flow of 2,252 CFS, it would actually be hovering
21 right there along the top of what you depicted as the
22 demand in June."

23 And he answered, "Yes."

24 And this brings up the whole issue of why these
25 graphs are so misleading. Demand was depicted as a

1 monthly time step block. Supply was actually calculated
2 as a monthly time step but then graphically depicted
3 differently to make it look like there was a discrepancy.
4 If you take that full natural flow line that absolutely
5 does drop off after June 12th and you average it out onto
6 the monthly time step, it proves our case.

7 But that should not be your job here. That was
8 the job of the Prosecution Team. It was their job to
9 present you with credible, logical evidence, and they
10 didn't do that.

11 HEARING OFFICER DODUC: Thank you, Ms. Spaletta.

12 Thank you all. We will now take a break. I
13 can't predict what time we will come back, but we will
14 certainly let you know by noon what -- what the next
15 steps are.

16 Mr. Kelly?

17 MR. KELLY: If I may, very briefly. I talked to
18 Mr. Tauriainen a bit this morning, and to -- to Ms.
19 Ansley about witness availability. We've been thrown for
20 a little bit of a loop by the delay.

21 As I explained to you on Monday morning, Dr.
22 Paulsen is unavailable tomorrow. And I understand that
23 Dr. Hutton is unavailable Friday and all of next week.
24 And as it turns out, Dr. Paulsen is probably also not

1 available next week. And so we now have some very
2 significant scheduling problems.

3 I promised Mr. Tauriainen and Ms. Ansley that --
4 that I would confer with them in good faith to kind of
5 see what we can do about at least the rest of Phase 1.
6 But I -- but I'm -- I'm concerned that -- that because
7 some witnesses need to be here to hear others, I know Dr.
8 Hutton wants to be here to hear Dr. Paulsen, and we want
9 Dr. Paulsen to be here to hear Dr. Hutton, that matching
10 their availability now is going to be near impossible for
11 the rest of this week. And given Dr. Hutton's
12 unavailability next week, we have real serious scheduling
13 difficulties.

14 And so I'm committed to work with Mr. Tauriainen
15 to try to resolve that. But I wanted to let you all know
16 that -- that we do have those pretty significant problems
17 now with the scheduling. Thank you.

18 HEARING OFFICER DODUC: Just for my information,
19 are both -- I see Dr. Paulsen. Are both Dr. Paulsen and
20 Dr. Hutton here today and will be here the rest of the
21 today?

22 MS. ANSLEY: Yes, we can have Dr. Hutton here the
23 rest of today and, yes, he'll be here today.

1 HEARING OFFICER DODUC: But -- but Dr. Paulsen
2 will not be here tomorrow? Not tomorrow morning? But
3 you can be here tomorrow afternoon?

4 MR. KELLY: Since she doesn't have a
5 microphone --

6 HEARING OFFICER DODUC: Yes?

7 MR. KELLY: -- Dr. Paulsen has indicated she can
8 probably get here by around two o'clock tomorrow
9 afternoon, given the flight schedules.

10 HEARING OFFICER DODUC: And Dr. Hutton will be
11 available tomorrow? Okay. But not next week?

12 MS. ANSLEY: No, not next week.

13 HEARING OFFICER DODUC: And not Friday?

14 MS. ANSLEY: And not Friday.

15 HEARING OFFICER DODUC: Thank you.

16 (Off the record at 11:23 a.m.)

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

18 HEARING OFFICER DODUC: Let's go back on record.
19 Is that -- thank you everyone.

20 Oh, the Prosecution Team is late.

21 (Pause)

22 HEARING OFFICER DODUC: Are you here for the
23 Prosecution Team?

24 MR. PRAGER: Yes. The rest of the Prosecution
25 Team is on their way, if you could please --

1 HEARING OFFICER DODUC: But since you are here
2 representing the Prosecution Team, I am going to proceed.
3 All right.

4 We recognize the gravity of the request made by
5 the moving parties. And we have the flexibility to
6 structure our proceedings and adapt as the proceedings
7 develop.

8 In reading the transcript it's now clear to me
9 that there was some confusion about the offer of proof
10 for redirect. So before considering the request we think
11 it is appropriate to allow redirect and recross. We will
12 begin promptly at 1:00 p.m. And we are most interested
13 in this one issue: What is the best evidence of actual
14 supply and demand available now during the period of
15 alleged illegal diversions?

16 We will allow the Prosecution Team time for
17 redirect, the parties, other parties time for recross --
18 and, actually, let me clarify that, for redirect and
19 recross as a group, not per individual party. And at the
20 conclusion of those arguments we will allow for each side
21 to have five minutes of concluding comments before we
22 take this matter under advisement.

23 And please let the Prosecution Team leader know
24 we will begin promptly at 1:00 p.m.

25 Ms. Spaletta?

1 MS. SPALETTA: I'm sorry, I may have missed it.
2 Did you say how much time each group has for the redirect
3 and the recross?

4 HEARING OFFICER DODUC: I'm not setting a time
5 limit at this time. It's important for us to fully
6 understand this issue.

7 MS. SPALETTA: Thank you.

8 HEARING OFFICER DODUC: But we do, as always,
9 expect efficiency.

10 With that, we will all --

11 MS. MCGINNIS: Hearing Officer, Robin McGinnis
12 for DWR.

13 HEARING OFFICER DODUC: Ms. McGinnis?

14 MS. MCGINNIS: I'm just -- you said the groups.
15 I'm wondering who is in each group?

16 HEARING OFFICER DODUC: The groups that presented
17 their arguments this morning in favor of the motion and
18 objections to the motion.

19 Not seeing any other hands, we will reconvene at
20 1:00 p.m. Thank you.

21 (Off the record at 12:06 p.m.)

22 (On the record at 1:00 p.m.)

23 HEARING OFFICER DODUC: It is one o'clock. I'm
24 resuming. All the previous announcements standard,
25 including making sure your cell phones are on silent.

1 We will begin with the Prosecution Team and their
2 redirect. Again, I will remind you that we're focused on
3 the issue of the best evidence available of actual supply
4 and demand during the period of the alleged illegal
5 diversions.

6 Mr. Tauriainen?

7 MR. KELLY: Hearing Officer Doduc, can I just get
8 a clarifying question.

9 HEARING OFFICER DODUC: MR. KELLY: ?

10 MR. KELLY: Is it the best evidence that was
11 contained within their direct testimony submittal? In
12 other words, if they -- if they think there is better
13 evidence now that was not provided as part of the direct,
14 are you asking to understand that, as well, or is this
15 just the best evidence that was contained in their
16 submittal?

17 HEARING OFFICER DODUC: I will ask them to
18 clarify when they present their evidence.

19 MR. KELLY: Thank you.

20 MR. TAURIAINEN: Thank you, Hearing Officers and
21 Members of the Hearing Team.

22 First of all, I want to apologize for missing the
23 noon update. I was tardy, I take full responsibility for
24 that, and it won't happen again.

25 I've called Ms. Mrowka. Please come up.

1 As I understand the scope of the redirect, based
2 on the question that you presented I've brought all three
3 of the relevant witnesses back up for redirect.

4 HEARING OFFICER DODUC: And for the record, they
5 did take the oath on Monday.

6 BRIAN COATS

7 Called by THE PROSECUTION TEAM

8 REDIRECT EXAMINATION BY MR. TAURIAINEN

9 BY MR. TAURIAINEN:

10 Q. Okay, so do the three of you understand the --
11 the question presented? And if I may paraphrase the
12 Hearing Officers, what is the best available evidence
13 that you would look to today to determine supply and
14 demand during the relevant violations' periods?

15 Hearing Officers, have I -- have I conveyed that
16 correctly?

17 HEARING OFFICER DODUC: What is the best
18 available information for us to consider in determining
19 the actual supply versus demand during the period of the
20 alleged illegal diversions.

21 BY MR. TAURIAINEN:

22 Q. Okay. Let's start with the end point first, Ms.
23 Mrowka, what -- or anyone on the panel, what are the
24 dates of the alleged violations for each matter, just so
25 we can --

1 A. (Mr. Coats) So for West Side it would be any day
2 after May 1st, so May 2nd through November 2nd. For
3 Byron Bethany, June 13th, through 24th of 2015.

4 Q. Thank you. Let's turn first to supply. And for
5 anyone, what would the best available supply data for
6 those days be?

7 A. Okay. So as of today's date, that would be the
8 daily FNF data.

9 Q. FNF data from --

10 A. June 13th through 24th for Byron Bethany, and
11 from May 2nd through November 2nd, 2015 for West Side.

12 Q. Where would you go to find it?

13 A. DWR's CDEC website.

14 JEFFREY YEAZELL

15 Called by THE PROSECUTION TEAM

16 REDIRECT EXAMINATION BY MR. TAURIAINEN

17 BY MR. TAURIAINEN:

18
19 Q. And this question may be for Mr. Yeazell. I
20 believe your testimony on the case in chief was that you
21 are the person who goes and gets that data?

22 A. (Mr. Yeazell) Correct.

23 Q. How often --

24 HEARING OFFICER DODUC: I'm sorry. Could you
25 repeat that last question? I didn't hear you.

1 MR. TAURIAINEN: And maybe let me phrase it as an
2 open-ended question, too, appropriately.

3 BY MR. TAURIAINEN:

4 Q. How do you obtain the supply data?

5 A. (Mr. Yeazell) on a frequent basis I go to the
6 appropriate station IDs at the CDEC website and gather
7 the daily FNF data and compile it into a spreadsheet.

8 Q. A frequent basis, how often is that?

9 A. Anywhere from daily to once or twice a week to
10 weekly, depending on when the data is updated.

11 Q. How often have you been doing that?

12 A. Pretty continuously since -- since well before
13 April, and I'm still doing it on a frequent basis.

14 Q. Well before April?

15 A. Of 2015.

16 Q. Of '15. In your experience with the Department's
17 full natural flow daily data, is it updated once posted?

18 A. Occasionally. It's not more -- it's less often
19 or not or very infrequently.

20 Q. Very infrequently.

21 A. When -- and so you have observed updates or
22 you've noted that --

23 Q. I've seen changes in the number on a given day,
24 yes.

25 A. How long does it take for updates to happen?

1 Q. Usually after a two-week period they're --
2 they're pretty steady after that. I don't see any
3 changes after two weeks, meaning if after -- anything two
4 weeks previous or after two weeks later it's consistent.
5 I don't see any changes.

6 Q. And when you do your updates, what you've
7 described as frequent, how much data do you gather?

8 A. I usually verify those previous two weeks. So we
9 usually -- I'll go back and double check, you know, two
10 week -- if I get -- for instance, if I got data today I
11 would also review the previous two weeks to see if
12 anything changed, and I would add those, make those
13 changes.

14 Q. Say that last part again, just a little louder.
15 I want to make sure the record clears it.

16 A. As an example, if I collected data today, usually
17 it's a two -- there's a two -- if I collected data today
18 there's usually a couple days lag. So I would get
19 data -- so the data on the website would maybe be, you
20 know, available for two days prior, so I would check. I
21 would gather that day's data, plus just confirm that
22 nothing has changed for the previous two weeks' worth of
23 data.

1 Q. Okay. For -- let's look to the Byron Bethany
2 violation period, which we just heard June 13th through
3 June 24th of 2014.

4 Roughly, when would you have expected the last
5 updates to the Department of Water Resources daily full
6 natural flow data for that period?

7 A. Within two weeks, definitely any time after
8 that --

9 Q. So on the --

10 A. So the 20 --

11 Q. -- calendar-wise --

12 A. I don't have a calendar in front of me, so 14
13 days after the 24th.

14 Q. July?

15 A. Sometime in July, yes.

16 Q. Were you getting updates in July of 2015?

17 A. Specify updates.

18 Q. Oh, pardon. Were -- you described, a few moments
19 ago, your frequent updates of the full natural flow
20 daily -- would you call it a database that you keep or a
21 spreadsheet?

22 A. That's a spreadsheet.

23 Q. You describe that you update it frequently. Were
24 you updating it during July of 2015?

25 A. I was adding new data to it, yes. Yes.

1 Q. And when did -- I don't want to speak for you,
2 but I recall a few minutes ago you said since about April
3 of 2015 you were obtaining the daily data?

4 A. Correct. And it's probably earlier, but I'm --

5 Q. Okay.

6 A. Oh, I'm sorry, it would have to be at least
7 March, because at least the -- our tables go -- our
8 graphs through the beginning of March.

9 Q. And from that April or March period that you just
10 described to now, did you have any periods where you
11 weren't updating the data?

12 A. No. I have a complete daily record from them
13 until today.

14 Q. Take any vacations in that time?

15 A. Oh, I come back and I, you know -- yeah.

16 Q. Not relevant, I'm sorry. But I believe you
17 answered -- repeat the answer though.

18 A. Yeah. I have a daily record, a complete daily
19 record from March until, well, actually, I think more
20 like the 20th of this month.

21 Q. But based on your updates?

22 A. Yes.

23 Q. In this proceeding or these proceedings you've
24 submitted written testimony; correct?

25 A. Yes.

1 Q. What phases or what segments, I guess, have you
2 submitted written testimony?

3 A. Primarily describing how I compiled --

4 Q. I'm sorry. My question really was -- maybe I'll
5 be more direct, but leading slightly.

6 Did you submit testimony for -- for Phase 1,
7 which is --

8 A. Yes.

9 Q. And did you submit case in chief testimony for
10 Phase 1?

11 A. Yes.

12 Q. Rebuttal testimony for Phase 1?

13 A. Yes.

14 Q. Not offered that. That's the lawyer part.
15 That's not a question.

16 In your submittals, and I'm talking about the
17 universe of the submittals that you've made, have you
18 included a database of the full natural flow daily
19 calculation -- daily calculations?

20 A. Yes.

21 Q. And whether it's case in chief or rebuttal, what
22 would the most recent date be of the full natural flow
23 calculation updates?

24 A. As far as this -- the spreadsheet that I've
25 submitted?

1 Q. Yes.

2 A. It's in -- sometime in August. I don't know the
3 exact date.

4 Q. Sometime in August? Have you submitted anything
5 with full natural flow data for after August?

6 A. Yes.

7 Q. How far?

8 A. That would be through October 31st. That's --

9 Q. October 31st?

10 A. Yes.

11 Q. Okay. Do you recall -- I won't ask you to
12 remember the exact exhibit number, but do you remember
13 whether it was case in chief or rebuttal?

14 A. Which?

15 Q. For the daily full natural flow through October
16 31st?

17 A. Through October 31st, that's in my rebuttal.

18 Q. Your rebuttal.

19 And for your case in chief, did you submit a
20 database of daily full natural flow calculations?

21 A. Yes.

22 Q. And how late did that go?

23 A. That is through around August. I'm not too sure
24 of the exact date.

1 Q. Okay. But between the evidence that you've
2 submitted, you have through October 31st?

3 A. Yes.

4 Q. Do you have any reason to -- to believe that
5 there would have been additional updates to any of that
6 information for the period through October 31st?

7 A. No.

8 Q. So the general question is: What would the best
9 available supply data be for June 13th through June 24th?

10 And, Mr. Coats, I believe, I don't want to speak
11 for you, but you've answered the daily full natural flow
12 calculations.

13 A. (Mr. Coats) Correct.

14 Q. Are those based on what Mr. Yeazell has just
15 said, or anyone can answer, including you, is that
16 information in the record for Phase 1 that -- that we've
17 submitted but not submitted for the record yet?

18 A. Yes, it is.

19 Q. Let's talk about demand -- oh, pardon me.

20 Let's talk about West Side. I believe one of
21 you, maybe it was Mr. Coats, testified that the relevant
22 violations' period for West Side was what again please?

23 A. May 2nd, 2015 through November 2nd, roughly,
24 2015.

1 Q. Through November 2nd, 2015. So do we have that
2 entire record for daily full natural flow in -- in the --
3 in the record?

4 A. Through October 21st, as Jeff Yeazell just said.

5 Q. So we're -- we're missing some days?

6 A. A couple, November 1st and 2nd.

7 Q. Okay. Thank you. Are the daily full natural
8 flow readings available on a public website?

9 A. Yes, they are.

10 Q. That website?

11 A. The Department of Water Resources CDEC website.

12 Q. Have you provided the URL for that website in
13 your testimony, either of you or any of you?

14 A. (Mr. Yeazell) I have. This is Jeff Yeazell.

15 Q. Does your testimony describe -- do you just go to
16 one page to get it?

17 A. At the time there was a separate web page for
18 each river station, each CDEC station.

19 Q. I don't want you to restate your testimony, but
20 does your testimony describe the process that you take
21 to -- to get each of those stations' data?

22 A. Yes.

23 Q. As a technical person would -- would -- would you
24 expect another like -- like-minded technical person to be

1 able to review your testimony and go to that public
2 website and get the data for November 1st and 2nd?

3 A. I believe so, yes.

4 Q. Let's turn to demand for a moment. Again, not to
5 restate, but the relevant persons we're interested in
6 are, for Byron Bethany, June 13th through June 24th, and
7 May 1st through November 2nd for West Side. Let's focus
8 on Byron Bethany. Again, this has been offered before,
9 but I'd like somebody to answer.

10 What -- what right priority is -- is the Byron
11 Bethany claimed right?

12 A. (Mr. Coats) They have, I think it's an August or
13 a May 1914 priority. I can't remember exactly which
14 month.

15 Q. Would that be considered a pre-'14 right or a
16 post-'14 right?

17 A. It's a very junior pre-'14 right.

18 Q. Okay. So in the -- in the universe of pre-'14
19 right priority, what are we concerned with in terms of
20 the Byron Bethany right for -- what rights would be
21 senior to Byron Bethany?

22 A. That would be anyone with an earlier priority on
23 pre-'14.

24 KATHY MROWKA

25 Called by THE PROSECUTION TEAM

1 REDIRECT EXAMINATION BY MR. TAURIAINEN

2 BY MR. TAURIAINEN:

3 Q. Priority.

4 A. (Ms. Mrowka) And also I'd like to add, and
5 riparian rights.

6 Q. And riparian. That raises an interesting
7 question that -- that I'd like -- like answered. And I
8 don't know if you can answer very specifically but I know
9 you folks have had some experience looking at this
10 database.

11 Have you run across any riparian rights with a
12 priority date junior to 1914? And this can be outside of
13 the scope of this proceeding, just ever in your
14 professional career.

15 A. (Mr. Coats) I'm not familiar with any.

16 (Ms. Mrowka) And I have not yet. We received a
17 lot of deeds and other information in response to the
18 informational order, but we haven't completed our review.
19 So as the status of that review is right now, I'm not
20 aware of it.

21 Q. You say informational order.

22 A. Yes.

23 Q. What -- what do you mean specifically?

24 A. The informational order that was issued to 90
25 percent of the larger senior diverters in the Delta. We

1 asked that they submit their information to document
2 basis of right, and that included extensive information.
3 It was gigabytes of information. So there may be
4 materials in there that are responsive and describe, you
5 know, the seniority of the rights. But because it's
6 gigabytes and we were occupied with the Delta -- the
7 drought work, we haven't finished our review. So we may
8 have such information but we haven't reviewed it.

9 Q. When did you issue that order?

10 A. May; right?

11 (Mr. Coats) No. The informational order was
12 issued in February 2015.

13 Q. When did you receive the data that you just
14 described, the deeds? I don't want to --

15 A. We started receiving -- all of that data was due
16 by March 6th, but there was some parties that received
17 the order that indicated they wouldn't have a complete
18 submittal. But I would think by April 6th, we got most
19 of that information.

20 Q. April 6th of 2015?

21 A. 2015, correct.

22 Q. And, Ms. Mrowka, I think you started describing
23 this. Have you set up a process or assigned Staff to
24 review the -- the data that came in?

1 A. (Ms. Mrowka) Yes, I have. And so as my staff was
2 relieved from their field inspection duties for the
3 drought, I have had them move to reviewing the
4 informational order materials. Earlier than that, I
5 borrowed Staff from somebody else and had them putting
6 all those materials into spreadsheets and doing other
7 tasks that didn't require a lot of technical knowledge
8 and technical background. But now that my technical
9 staff were coming out of the field, I had them working on
10 the technical aspects of that review.

11 Q. So that review is underway?

12 A. It is.

13 Q. Hypothetically speaking, might you find a
14 riparian right that is junior to a pre-'14 right?

15 A. I may.

16 Q. Do you expect to find?

17 A. It's very possible. I don't know the likelihood
18 though. I couldn't --

19 Q. Do you expect to find a significant number?

20 A. No, I would not.

21 Q. Okay. Let's get into more specifics about
22 demand. And I think to do this I want to start by a
23 reference, and that is the demand that was used. Let's
24 talk about the June 12th date, but we'll talk about the

1 rest of the demand or how that gets updated soon, but
2 just for a reference part.

3 On the chart, it's WR-48 as I recall, there's a
4 list of -- for demand. What -- what was included in
5 that, so we can talk about how you maybe updated or might
6 update it now?

7 A. (Mr. Yeazell) June 12th.

8 Q. That was the -- the riparian and the pre-'14
9 demands. The -- the average 2010 through 2013 demands,
10 plus the 2014 demands for those that reported under
11 the -- the 2015 Information Order. Yes.

12 A. Can one of you, maybe it's Mr. Coats --

13 HEARING OFFICER DODUC: I'm sorry. Let me -- let
14 me stop and make sure I understand.

15 Put your -- go ahead and put that up, Mr.
16 Buckman.

17 So you're saying the demand reflected on this
18 chart is a demand as reported from the informational
19 order?

20 MR. COATS: May I answer that? Okay.

21 So the informational order required them, the
22 recipients, to complete their 2014 actual uses in advance
23 of the June 30th, 2015 date. So that was done.

24 In addition, it also asked them to project their
25 2015 entire year, along with once an actual amount of

1 water had been used for a month, the following month on
2 the 6th in arrears they were required to report that.

3 HEARING OFFICER DODUC: Okay.

4 MR. COATS: So this graph has their 2014 actual
5 use, which was due March 6th. So by this time we had all
6 of that data incorporated in there.

7 HEARING OFFICER DODUC: Actual demand from 2014?

8 MR. COATS: 2014, which was the last year's use,
9 correct.

10 BY MR. TAURIAINEN:

11 Q. I just want to make sure to clarify, what
12 recipients -- who received the informational order
13 that --

14 A. So the informational order was sent to, I think
15 around 1,061 statement holders which are riparian and
16 pre-'14 claims of right in the Sacramento, San Joaquin
17 and Delta Watershed, the top 90 percent being the amount
18 of reported use.

19 Q. Of 90 percent by volume?

20 A. Correct.

21 Q. So as -- as this reference, maybe for the next --
22 Mr. Yeazell, you've described a number, and I won't ask
23 you to restate them and I won't restate them, but your
24 testimony describes adjustments to demand.

25 A. Correct.

1 Q. And would this -- this demand information have
2 been subject to adjustments? I won't specify. I won't
3 ask you to specify.

4 A. Yes.

5 Q. Can we see WR-52?

6 HEARING OFFICER DODUC: Sorry. Before you move
7 off this chart, the demand reflected here is demand from
8 2014 as reported as a consequence of the informational
9 order, and this demand has also been adjusted?

10 MR. YEAZELL: I can -- okay. So the -- the
11 original demand was the average 2010 through 2013 for --
12 for everything. That -- that was a starting point as the
13 original demand. For this particular graph -- just for
14 the -- those who reported under the -- under the
15 information order, their demands, their average 2010
16 through 2014 demands were replaced with the actual 2014
17 demands that represent -- that -- so --

18 HEARING OFFICER DODUC: What is on this chart
19 that reflects demand?

20 MR. YEAZELL: The shaded areas.

21 HEARING OFFICER DODUC: And that demand is the
22 demand from 2014?

23 MR. YEAZELL: It's -- it's a hybrid. It's -- for
24 those, because it's --

25 MR. COATS: So again --

1 MR. TAURIAINEN: So I think I might be able to
2 ask a clarifying question.

3 BY MR. TAURIAINEN:

4 Q. Brian, you just said that only the top 90 percent
5 by volume got the information order?

6 A. (Mr. Coats) Correct.

7 Q. Where did the data for the rest of the -- the
8 seniors come from? And by seniors, I mean pre-1914 and
9 riparian?

10 A. That was there for your average.

11 Q. What four years?

12 A. From 2010 to 2013.

13 Q. Where did you get that from?

14 A. That was from eWRIMS.

15 Q. So this data includes for the bottom nine --
16 bottom ten percent by volume of those senior demand
17 claimants, this -- this four-year rolling average from
18 eWRIMS?

19 A. Correct.

20 Q. And it was -- describe then what you did with the
21 2014 demand data from the information order.

22 A. (Mr. Yeazell) Then I replaced -- those who
23 reported for the 2014 Information Order, I replaced
24 their -- their average demands with the 2014 reported
25 demands.

1 Q. One -- one -- another clarifying point. When do
2 the senior right holders, and, Brian, I think a minute
3 ago you mentioned they're -- they're called statement
4 filers.

5 A. (Mr. Coats) Correct.

6 Q. When do they file their statements?

7 A. Those statements are due every three years. And
8 they're due on June 30th of that particular year.

9 Q. All of them submit a statement on the same year?

10 A. No.

11 Q. A third submit on one year for those three years
12 past, and then it rolls every year for the next
13 successive three.

14 Q. But the top 90 percent by volume that receive the
15 information order, is that -- was that sent out to people
16 based on when their next statement was due?

17 A. No.

18 Q. Got it. So whether they needed -- I don't want
19 to be testifying or asking too leading questions, but
20 the -- the -- would every one of the top 90 percent by
21 volume of the -- the senior right holders have been
22 expected to submit that data in 2015 --

23 A. Yes, if they were --

24 Q. -- pardon, pardon -- without the information
25 order.

1 A. No, just a third. Correct.

2 Q. Another third?

3 A. But even then, those that submitted on the third
4 weren't expected to submit it in advance of the June 30th
5 deadline.

6 Q. Without the information order?

7 A. Correct.

8 Q. With the information order you got more demand
9 faster?

10 A. Exactly.

11 Q. That 2014 demand data for those recipients who
12 received it, and let me risk paraphrasing some of your
13 testimony, who received it and had responded by this
14 date, is that -- that's what's included in the demand?

15 A. Yes.

16 Q. Jeff, when -- when you say other adjustments, I
17 think your -- your testimony talk about, you know,
18 removing duplicates in power and things like that?

19 A. Correct.

20 Q. This demand database that this information was
21 pulled from, is that the same database that you would
22 have the post-'14 rights in?

23 A. (Mr. Yeazell) Yeah. The entire data is -- set is
24 there.

1 MR. TAURIAINEN: So in theory you could put post-
2 '14 -- let's, for example, bring up WR-47.

3 BY MR. TAURIAINEN:

4 Q. And then what's the big -- the big dark shaded
5 area?

6 A. That represents the post-'14 demand.

7 Q. So you pulled it from the same type of database?

8 A. Correct.

9 MR. TAURIAINEN: Back to the 48 please.

10 BY MR. TAURIAINEN:

11 Q. Okay, so now we have, I think, hopefully a good
12 basis for -- for what the demand was for June 12th. And
13 let's talk about how you would -- would have -- would be
14 able to update it today.

15 Would -- Brian, I think you mentioned it but I
16 want to make sure we're clear, what actual diversion data
17 after 2014 did the information order recipients need to
18 submit?

19 A. (Mr. Coats) So they were required to submit two
20 things, one was their projected use, and then their
21 actual use on a monthly basis.

22 Q. What is their projected use and when? Compound
23 question. But what -- what is their projected use?

24 A. So by March 6, those in -- in receipt of the
25 information order were required to submit the 2015

1 projected use by month for the entire year. And then as
2 a qualifier to make sure they report their actual use, a
3 month in arrears due on the 6th of every month.

4 Q. You say a month in arrears that's due on the 6th.
5 What month would they be submitting the data for?

6 A. So if they had actual March data, they were
7 required to -- to actually report that by April 6th.

8 Q. By data, you mean their diversions for March?

9 A. Correct.

10 Q. So you received -- talk about what -- maybe, I
11 don't know if you have a percentage-wise, but did the
12 information order get a big response?

13 A. I think we had a very large response, yes.

14 Q. Percentage-wise?

15 A. Not the exact percentage, but I want to say over
16 90 percent.

17 Q. And with the monthly ongoing diversion data
18 reporting, did that level of -- of reporting percentage
19 continue?

20 A. I'll have to let Jeff answer that.

21 (Mr. Yeazell) I believe so, yes. There may have
22 been a month here or there missing, but, yes --

23 Q. Now I'm specifically --

24 A. -- on individual.

1 Q. -- talking about May 1st through November 2nd,
2 and then specifically within that June 13th through June
3 24th.

4 A. Yes.

5 MR. TAURIAINEN: Okay. The -- now I'd like --
6 could we look briefly, unless there are any other
7 questions on this one, can we look at WR-52? Okay.

8 BY MR. TAURIAINEN:

9 Q. And I think this question is for Mr. Yeazell.

10 Mr. Yeazell, is the -- first of all, let's --
11 what does the dark shaded area represent in this?

12 A. (Mr. Yeazell) The upper dark shaded area, that's
13 the -- that represents the pre-'14 demand.

14 Q. And below it is the lighter shaded area.

15 A. That's the riparian demand.

16 Q. Is the demand -- we're going to -- I'm going to
17 talk about it graphically, but I think we're talking
18 about the database that underlies the graph.

19 Is the demand the same on this chart as it was on
20 the -- the June 12th notice chart that is WR-47?

21 A. No.

22 Q. It's different?

23 A. It's different.

24 Q. What is different about it?

1 A. That, as I stated in my testimony on Monday, that
2 incorporates some additional adjustments that were
3 missing from the June 12th data spreadsheet.

4 Q. Adjustments from -- relative to what?

5 A. Oh, from stakeholders' requests. And also I
6 removed some revoked or inactive demands that have
7 been -- that were identified as revoked or inactive since
8 I created the previous WRUDS dataset.

9 Q. Did it -- did it -- and when did you make this?
10 When did you make this demand database?

11 A. The underlying demand database?

12 Q. Yeah.

13 A. That was the June 15th version, I believe.

14 Q. Okay. So even though this chart is -- is marked
15 as August 19th? And I'm looking in the lower right-hand
16 corner of it.

17 A. Right. But the underlying demand data is the
18 June --

19 Q. Well --

20 A. -- June 15th.

21 Q. Pardon. Okay. Oh, June 15th. And you --
22 forgive me.

23 Why is it the June 15th database?

24 A. That supersedes the June 9th dataset that I used
25 for the June 12th graph.

1 Q. And I believe you explained this, but what --

2 A. I explained this in my testimony on Monday.

3 Q. Yeah.

4 A. Yes.

5 Q. I just -- I don't want to quote you, but it was
6 overwritten by June 15th?

7 A. Correct.

8 Q. But other than these adjustments that -- that you
9 did to this, was it different in any way from June 9th?

10 A. The demand side? I don't believe so.

11 MR. TAURIAINEN: The -- what I'd like to do now
12 is asked Mr. Yeazell to eyeball what it would look like
13 if we added 2,252 CFS to this. And what I would first of
14 all talk to Mr. Yeazell.

15 When you were cross-examined on Monday regarding
16 WR-47 -- can we go back to 47, just briefly -- 48, that's
17 right. You had it right. I'm sorry. I was wrong.

18 BY MR. TAURIAINEN:

19 Q. What is the -- the latest day that this daily
20 full natural flow plot has?

21 A. June 7th, 2015.

22 Q. Can you roughly estimate where that is, the --

23 A. It was 11,000-ish, somewhere --

24 Q. Add 2,252 to 11,000.

1 A. I can't do math under pressure. 11,000? About
2 13,250.

3 MR. TAURIAINEN: And can you -- I know we're
4 eyeballing. And maybe, Mr. Buckman, if you can zoom in
5 on the part of June where it says "Pre-'14 demand through
6 1902?"

7 BY MR. TAURIAINEN:

8 Q. Can you eyeball where that red dashed line is?

9 A. (Mr. Yeazell) Just around 13,070-ish, somewhere
10 between 13,000 and 14,000.

11 Q. Say 13,750 maybe? I don't want to speak for you,
12 but --

13 A. I'm going to -- I -- yeah.

14 Q. Okay. Very roughly then, Ms. Spaletta asked you
15 to subtract, I believe it was 740 CFS from that demand
16 amount.

17 A. From --

18 Q. The red dash.

19 A. -- the red? Okay. Do you want me to do the math
20 or are you asking me to --

21 Q. If you -- if you need to. But you said, I think,
22 between 13,000 and 14,000 --

23 A. Right.

24 Q. -- or 13,500 and 14,000, I think is what you -- I
25 don't remember exactly what you said, but --

1 A. I would say 13,000 minus 750 --

2 MR. KELLY: I actually think I might have lost
3 the question. Can I get a clarification on the question?

4 MR. TAURIAINEN: Let me -- let me go --

5 HEARING OFFICER DODUC: Yeah. And I think the
6 pointer is in the wrong spot.

7 MR. TAURIAINEN: Yeah. Yeah.

8 HEARING OFFICER DODUC: So that's confusing
9 things.

10 MR. TAURIAINEN: Well, what we're looking at is,
11 if you could zoom in on -- center on that, where that
12 little arrow that says "Pre-'14 demand through 1902" is
13 coming down?

14 BY MR. TAURIAINEN:

15 Q. What month is that -- does that represent?

16 A. (Mr. Yeazell) That is June.

17 Q. So where the -- where the chart says pre-'14
18 demand through 1902.

19 And, Mr. Buckman, would you scroll down just a
20 little bit so we can see white above the top of the --
21 the burnt orange? Other direction please. There we go.

22 BY MR. TAURIAINEN:

23 Q. Let's -- let's -- let's look at this from a
24 different direction. What is the red dashed line?

1 A. (Mr. Yeazell) That's the line that represents the
2 demand up through the 1902 priority.

3 Q. So what demand would be right above that line,
4 that red dashed line?

5 A. 1903 priority demand.

6 Q. What demand would be at the very top for June of
7 the dark shaded area?

8 A. That would be 1914.

9 Q. What right priority is Byron Bethany?

10 A. 1914.

11 Q. Okay. Let's -- and I want -- I want to do this
12 because I think it's important to clarify what your
13 cross-examination was on Monday. If -- so earlier, a
14 couple minutes ago, you added 2,252 to what I think you
15 said was roughly 11,000 CFS for the June 7th plot point,
16 the June 7th daily full natural flow?

17 A. Correct.

18 Q. Which, just for clarification, that's the end of
19 that blue line?

20 MS. SPALETTA: Clarify for the record which graph
21 we are adding this to, what the name of the exhibit is.

22 MR. TAURIAINEN: WR-48.

23 HEARING OFFICER DODUC: It's 50. Oh, go ahead.

24 MR. TAURIAINEN: This is 48.

25 HEARING OFFICER DODUC: Okay.

1 MR. TAURIAINEN: This is the one that was the
2 subject of the cross-examination by Ms. Spaletta on
3 Monday.

4 MS. SPALETTA: Yes. I think the prior exhibit
5 you referenced was 52, so the record was confusing. So I
6 just want the record to reflect that this testimony is
7 relating to Exhibit 48.

8 MR. TAURIAINEN: Thank you.

9 BY MR. TAURIAINEN:

10 Q. Can you eyeball where the top of the dark orange
11 chart is in CFS?

12 A. (Mr. Yeazell) 16,000.

13 Q. Okay. So can you eyeball what the rough
14 difference is in CFS between the red dashed line and the
15 top of the burnt orange chart?

16 A. Somewhere over 2,000 CFS.

17 Q. 2,000 CFS? So that represents the what?

18 A. The -- the amount of demand of 1903 and junior
19 rights' claims.

20 Q. Up to 1914?

21 A. Up to -- up to 1914.

22 Q. Okay. So if you were to reduce, and I believe
23 you said roughly 16,000 for the top of the 1914 -- pre-
24 '14s, Ms. Spaletta asked you to subtract 740 from that,
25 so use -- please use 16,000?

1 A. That would be 15,260.

2 Q. Roughly 15,250 or 15,260.

3 A. Correct.

4 Q. I appreciate your engineer precision.

5 What was the -- please remind me, for the June
6 7th full natural flow point I believe you said it was
7 11,000 plus 2,252 CFS, which is what Ms. Spaletta asked?

8 A. Correct.

9 Q. What is that?

10 A. That was --

11 Q. Can you do that just --

12 A. -- 13,252.

13 Q. Okay. So what is the rough difference between
14 what you just calculated as the adjusted demand for 1914
15 and this adjusted supply for June 7th?

16 A. About 2,000 CFS.

17 Q. 2,000 CFS. Would you expect that the adjusted
18 supply to reach a 1914 priority date?

19 A. No.

20 Q. Are these the adjustments that Ms. Spaletta asked
21 you to make?

22 A. No.

23 Q. And what is the last day of full natural flow on
24 this chart?

25 A. June 7th.

1 Q. June 7th. Okay.

2 MR. TAURIAINEN: Let's go, please, to WR-52. Now
3 can we zoom in again on June? And I'll say for Mr.
4 Buckman, it's the -- it's the column that has the
5 straight horizontal line through it -- vertical, pardon
6 me. A little flustered. And zoom in towards the top
7 there.

8 BY MR. TAURIAINEN:

9 Q. What does, Mr. Yeazell, what does that purple
10 vertical line represent?

11 A. That represents June 12th, the day the water
12 unavailability notices were issued.

13 Q. Okay. And then what did the -- I want to draw
14 your attention to the -- the sloping dashed lines that
15 are to the right of the vertical line. What do the big
16 dots on those lines represent?

17 A. Those represent the adjustments.

18 Q. Which day?

19 A. Pardon me? Oh, I'm -- June 15th. Those are the
20 15th. Those are plotted on the 15th of each month.

21 Q. So for -- for this chart, that big dot on either
22 one of the sloped lines that's just to the right of the
23 vertical purple line is June 15th?

24 A. Correct.

25 Q. Okay.

1 MR. TAURIAINEN: I want to do very quickly,
2 because this was not done on Monday, can we zoom in just
3 a little bit more at the top part of this chart, Mr.
4 Buckman? Thank you.

5 BY MR. TAURIAINEN:

6 Q. And looking again at the June column, eyeball
7 please roughly, what is the top of the demand represented
8 by the dark orange?

9 A. Just over 15,000 CFS.

10 Q. Over 15,000. And then there's been an
11 adjustment, I believe you described already, I won't ask
12 you to do that again, to the demand.

13 Would that adjustment, as you understood Ms.
14 Spaletta's questioning on Monday, the adjustment that you
15 did you on this chart incorporate the adjustment she
16 asked you to do?

17 A. I can't -- I can't confirm the exact number she
18 used, but that did incorporate adjustments discussed by
19 her, yes.

20 Q. So this chart represents adjusted demand?

21 A. Yes.

22 Q. So let's look, let's start with June 12th. And
23 can you roughly eyeball where the dark blue daily full
24 natural flow line is?

25 A. 12,000 CFS.

- 1 Q. Is it 12 or is it --
- 2 A. Oh, I'm sorry, what date?
- 3 Q. June 12th, where the horizontal line is.
- 4 A. I don't -- 12,000 CFS. Ask me the question
- 5 again.
- 6 Q. For June 12th --
- 7 A. Yes.
- 8 Q. -- where is the daily full natural flow amount in
- 9 CFS?
- 10 A. Approximately about 12,000, just under 12,000.
- 11 Q. Under 12,000. Okay.
- 12 And then where is the red dashed line?
- 13 First of all, does the red dashed line mean the
- 14 same thing here as it did on the previous chart?
- 15 A. Correct. Yeah. That's the --
- 16 Q. That is --
- 17 A. -- the demand through the 1902 priority.
- 18 Q. Can you eyeball where that is for June?
- 19 A. Between 1,370-ish, 1,375.
- 20 Q. Thirteen or --
- 21 A. 13,750, I'm sorry. Oh, I'm sorry, I'm looking at
- 22 the wrong month.
- 23 Q. Maybe, Mr. Coats, if you could help --
- 24 A. Over --
- 25 Q. -- because we're just reading this chart.

1 A. (Mr. Coats) so it looks like the 1902 priority
2 level for June, you're looking at extrapolating over to
3 about 14,800 CFS.

4 Q. 14,800. And then -- and then where would the top
5 of the -- the 1914 priority be, pre-'14s?

6 A. I want to say about 15, a little bit less than
7 15,600.

8 Q. So that's -- that's a different -- difference
9 than on the last chart.

10 What is the difference between the most junior
11 pre-'14, and then the most senior 1903 that we talked
12 about? Last time was roughly 2,000 CFS. What is it
13 here? And again, just eyeballing.

14 A. I'm trying to -- I can't -- one more time.

15 Q. How far apart are the red dashed line and the top
16 of the --

17 A. The red and the top? About -- it looks to be
18 about --

19 (Mr. Coats) From 14,800 on the 1903, and then
20 we're going up to about 15,600, so about 800 CFS.

21 Q. Okay. We can round it to 1,000.

22 A. (Mr. Yeazell) Okay.

23 Q. Okay. Let's go back. So the -- for June 12th
24 the daily full natural flow blue line is at what? I
25 think you said 11,000?

1 A. I want to say about 11,000, maybe 400 or so?

2 Q. Okay. If -- if you add 2,252 --

3 HEARING OFFICER DODUC: Hold on. I'm hearing
4 someone.

5 Mr. O'Laughlin?

6 MR. O'LAUGHLIN: Tim O'Laughlin, San Joaquin
7 Tributaries Authority.

8 I normally don't do this in these proceedings
9 because I understand the relaxed rules and how we're
10 trying to get information out. But the -- the leading
11 questions are getting a little over much. And if the --
12 if -- and if you continue, I mean, I just as soon have
13 the Prosecution testify rather than the witnesses because
14 the questions are all leading at this point. And the
15 witnesses are supposed to be testifying, not the
16 Prosecution.

17 HEARING OFFICER DODUC: Your objection is noted,
18 Mr. O'Laughlin. Let --

19 MR. TAURIAINEN: I'll make every effort to ask
20 open-ended questions. I apologize.

21 HEARING OFFICER DODUC: I appreciate that, but I
22 am most interested in understanding this and
23 understanding this as quickly and efficiently as
24 possible. To the extent that leading questions are
25 necessary to improve my understanding, I will allow that.

1 MR. TAURIAINEN: Much appreciated.

2 HEARING OFFICER DODUC: But I need you to move
3 things along.

4 MR. TAURIAINEN: Understood, and we will. I
5 think the --

6 HEARING OFFICER DODUC: And, actually, before you
7 do I actually have two questions.

8 When you say the demand has been adjusted, what
9 adjustments are you talking about?

10 MR. YEAZELL: Excuse me. That -- that -- the
11 adjustments from -- I guess the adjustments from the --
12 between the two graphs or all of the adjustments in
13 general? There's --

14 HEARING OFFICER DODUC: All of the adjustment in
15 general.

16 MR. YEAZELL: In general, I reduced --

17 HEARING OFFICER DODUC: Yes.

18 MR. YEAZELL: I --

19 HEARING OFFICER DODUC: As explained in your
20 testimony.

21 MR. YEAZELL: As explained in my testimony.
22 Okay.

23 HEARING OFFICER DODUC: But I thought I heard Mr.
24 Tauriainen ask you whether it included the adjustment

1 that Ms. Spaletta asked for in her cross. And your
2 answer to that was?

3 MR. YEAZELL: Yes, or the -- the adjustment was
4 that was before the -- in the June -- the analysis
5 associated with the June 12th notice there were demands
6 that were omitted -- or not omitted, but they were --

7 MR. COATS: You want me to answer that?

8 MR. YEAZELL: You answer it.

9 MR. COATS: Okay. So basically on the -- the
10 previously graph in WR-47, you notice how in June we have
11 a top pre-'14 demand at 16,000 CFS? You'll notice here
12 that on WR-48, or whatever this is, WR-52, that you'll
13 notice at the top of the pre-'14 demand for the same
14 month is now at about 15,200. Coincidentally, equal to
15 about 800 or the 740 that she was referring to.

16 BY MR. TAURIAINEN:

17 Q. Okay. I'm going to ask this as not leading as I
18 can.

19 What's the difference in CFS in the dark
20 horizontal lines? We can speed this along if you just
21 note that, on the horizontal access.

22 A. (Mr. Coats) Yeah. That's what we just described,
23 so it's a difference of 800 CFS.

24 Q. No. In -- on the left-hand axis, the dark
25 horizontal lines are how -- how many CFS?

1 A. (Mr. Yeazell) 2,000.

2 Q. So --

3 A. -- increment. Okay.

4 Q. -- the little -- the little hashes in between,
5 how far apart are they?

6 A. Those are 400 CFS a pop.

7 Q. (Off mike.)

8 THE REPORTER: Your microphone is not on.

9 MR. TAURIAINEN: Oh, I'm sorry.

10 BY MR. TAURIAINEN:

11 Q. (Mr. Yeazell) What I would -- what I would like
12 you to do is starting from June 12th and going to June
13 13th you can eyeball, but add 2,252 CFS to each plot
14 point for the daily full natural flow and qualitatively
15 please describe where you would expect that adjusted
16 supply, I'll call that adjusted supply for this question,
17 to be relative to the 1902 red hashed line?

18 A. (Mr. Yeazell) They would both be below that.

19 Q. Adjusted would be below?

20 A. Below, yes.

21 Q. Just stating your answer, and I'll ask you to say
22 it more clearly next time.

23 So if we -- you've testified earlier that the big
24 dot is June 15th, so we know that that's about two days.

1 The end of the violations period is what for Byron
2 Bethany?

3 A. June 24th.

4 Q. In using your -- your eyeball, if you add 2,252
5 to any of the days between June 13th and June 24th, what
6 is the qualitative result relative to the 1902 red dashed
7 line?

8 A. It's all going to be below it.

9 Q. And the red dashed line is itself -- how is --
10 where is that relative to the 1914 priority -- pre-'14
11 priority?

12 A. That's the -- that's the demand through 1902.

13 Q. So 1914 is above?

14 A. Yes.

15 Q. Now I want to get back onto the main question,
16 which is what is the best demand data you can put
17 together today? And we had a long colloquy about the
18 February 2015 Information Order. Today it is March of
19 2015 [sic]. What have you received from the February
20 Information Order, February 2015 Information Order?

21 A. We have the entire year of 2015.

22 Q. 2015. So that includes May 1st through November
23 2nd?

24 A. Correct.

1 Q. In your exhibits, anywhere have you submitted a
2 database that includes the February 2015 Information
3 Order actual diversion amounts?

4 A. Yes.

5 Q. Qualify it by saying, did everyone report?

6 A. There was -- it was at least a 90 percent
7 reporting rate.

8 Q. Where is that database?

9 A. That is presented in my rebuttal testimony.

10 Q. Okay. And do you have in your rebuttal testimony
11 a graphic representation of that demand database?

12 A. Yes.

13 Q. Does that graphic representation include the full
14 natural flow?

15 A. Yes.

16 Q. Pardon me if I clarify the question. The daily
17 full natural flow --

18 A. Yes.

19 Q. -- for that period?

20 A. Yes.

21 Q. I --

22 HEARING OFFICER DODUC: I'm sorry, while you're
23 thinking, let me ask a question.

24 Why was that information submitted in your
25 rebuttal testimony and not your case in chief?

1 MR. YEAZELL: I -- that was more --

2 HEARING OFFICER DODUC: Added --

3 MR. YEAZELL: That was prepared in response to my
4 rebuttal to comments received from other testimony from
5 the defense.

6 HEARING OFFICER DODUC: And why was it --

7 MR. YEAZELL: I have no answer --

8 HEARING OFFICER DODUC: -- there in response --

9 MR. YEAZELL: -- for that.

10 HEARING OFFICER DODUC: -- and not part of your
11 case in chief?

12 MR. YEAZELL: I was not directed to.

13 MR. TAURIAINEN: I would, at this point, given
14 that I think the motion to -- for nonsuit is still
15 pending, I'd like to make an offer of proof to put up
16 that figure, to talk about it and have -- have the
17 witness talk about it, because we might not get a chance
18 to do rebuttal if the motion is granted.

19 HEARING OFFICER DODUC: Do I hear objections, Mr.
20 Kelly?

21 MR. KELLY: Yes. Yeah. Dan Kelly for Byron
22 Bethany Irrigation District.

23 I do object, and here's why. You asked for the
24 best available evidence to show actual supply and actual
25 demand during these periods for these two folks. And

1 they put on their case in chief and they were supposed to
2 put their best evidence forward in their case in chief,
3 period. There's no exceptions to that requirement. The
4 fact that they didn't do it is perhaps a little bit
5 troubling.

6 But as Ms. Spaletta, I think, or Ms. Zolezzi
7 said, Byron Bethany Irrigation District and the West Side
8 Irrigation District are not required to put on a case in
9 opposition to the Prosecution Team's case. They are
10 required to prove all of the element with sufficient
11 evidence in their case in chief. And if we chose to rest
12 today, none of their rebuttal testimony would be part of
13 the record.

14 And so for a motion for judgment or directed
15 verdict at this point in the proceeding, I think that it
16 wouldn't be proper to consider their rebuttal testimony,
17 which they would not be entitled to present, should we
18 choose to not put on a case in chief and defense.

19 HEARING OFFICER DODUC: Mr. O'Laughlin?

20 MR. O'LAUGHLIN: Tim O'Laughlin, the San Joaquin
21 Tributaries Authority.

22 I have a more fundamental due process problem
23 with putting on the rebuttal testimony. The complaint --
24 or the cease and desist order and the administrative
25 civil liabilities, when they are presented to both BBID

1 and West Side Irrigation Districts, are supposed to set
2 forth the factual basis and the legal arguments for why
3 the ACL and the CDO is occurring. Now think about this
4 in a time sequence. Those are being issued last summer.

5 We are now into the case in chief, and now at
6 this point in time what we're hearing from the
7 Prosecution Team is forget the complaint we sent out
8 early on, forget how you were preparing your case, forget
9 all that, we're not going to tell you the basis for --
10 the factual basis for why you were illegally diverting
11 water until we put on our rebuttal case.

12 Now I don't -- I'm not going to get into -- I
13 know there's -- the rules are relaxed here and
14 everything. But think about any quasi preliminary action
15 being brought against somebody, have you ever -- and I'll
16 ask any attorney in this room if they can cite me one
17 case where a prosecutor has said in front of a judge, I'm
18 going to present my case -- I'm not going to present my
19 case in chief. I'm not going to tell you why this guy is
20 guilty until I present my rebuttal testimony. And you've
21 never heard of it and you never will.

22 And so the West Side and BBID, and we pointed
23 this out in our brief, have been denied fundamental due
24 process rights. And not only that, as this continues on

1 in this fashion, a fundamental right to a fair hearing in
2 front of the State Board.

3 Thank you.

4 HEARING OFFICER DODUC: Others? Ms. Zolezzi?

5 MS. ZOLEZZI: Yes, Hearing Officer. I agree with
6 the statements that have already been said. But just
7 to -- to reiterate, this is two levels above what should
8 be allowed. The enforcement actions that were sent out
9 were very expressed. They stated that they were based
10 upon the curtailment notice and the information that
11 supported that notice as of that date. For BBID, that
12 was the June 12th document that we were looking at.

13 So what we've heard today is that, no, there's a
14 little bit better information. And what Mr. Tauriainen
15 is saying now is, wait, in my rebuttal there's even
16 better information. But Ms. Mrowka testified, and our
17 enforcement actions state that they are based upon one
18 document and one document only. And we can only go so
19 far away from that document. And rebuttal testimony,
20 with better evidence, should have been presented in a
21 case in chief or not allowed at all at this point.

22 HEARING OFFICER DODUC: Any other comments? All
23 right. I will --

24 MR. TAURIAINEN: I have --

25 HEARING OFFICER DODUC: Mr. Tauriainen?

1 MR. TAURIAINEN: -- a very brief response.

2 Regarding the evidence, the -- the Board makes a
3 decision based on the evidence presented at the hearing,
4 not the evidence that was developed at the time of the --
5 of the issuance of the order. There was a lengthy
6 discovery process in this case that went both ways. And
7 the Prosecution developed additional information based on
8 the ongoing collection of data for the violations period
9 that was just described. And, frankly, the other side
10 got all of that six months ago or so or close to that,
11 five months.

12 And the perception, I think, that I'm hearing
13 described from the attorneys is that we're somehow locked
14 in. Ms. Mrowka in her deposition, and this is really a
15 closing brief argument, but she described the basis for
16 the issuance of the complaint, not the basis for the
17 issuance of an order, which is based on evidence that's
18 developed, you know, really up until the evidentiary
19 submittal deadlines, and that's what we've done. We --
20 you know, this was a -- there was a motion to dismiss or
21 a motion to exclude all evidence after June 12th which,
22 you know, was mindboggling.

23 So I think there's kind of a fundamental, I'll
24 say misunderstanding of the -- of the -- of hearing
25 process here and the development and the submittal of

1 evidence, and then what the Board would -- would rule on.

2 So --

3 HEARING OFFICER DODUC: Thank you.

4 MR. TAURIAINEN: And that's what we're talking
5 about.

6 HEARING OFFICER DODUC: All right. Thank you,
7 Mr. Tauriainen.

8 And Mr. Kelly?

9 MR. KELLY: Yeah. Thank you. Dan Kelly for
10 BBID.

11 I -- we're getting sidetracked. And I appreciate
12 that we need to get through this, but I will say that --
13 and to the extent that we need to brief this and provide
14 this information, that when we actually conducted our
15 discovery and depositions, I will tell you that these
16 witnesses were unable, even at the time of the
17 depositions, to tell us specifically which spreadsheets
18 and which charts were used to support this enforcement
19 action. It was incredibly frustrating and took a long
20 time, and we wrestled with it.

21 MR. TAURIAINEN: They asked for it too early.
22 We've had this argument.

23 HEARING OFFICER DODUC: Enough. One at a time.

24 Mr. Kelly?

1 MR. KELLY: And we wrestled. And we -- we didn't
2 take these depositions, I think, until November. And so
3 that was many, many, many, many months after the
4 administrative civil liability complaint had issued. And
5 we were up against tight deadlines and holidays, and so
6 we did our best to get those -- those depositions done.

7 These folks are expert witnesses. They've been
8 offered, at least, as expert witnesses. And an expert
9 witness is supposed to be prepared at the time of a
10 deposition to testify with respect to the testimony that
11 they expect to provide at trial.

12 So we have a fundamental objection with the fact
13 that none of these witnesses were able to testify with
14 respect to any of this when we took their depositions.

15 HEARING OFFICER DODUC: Mr. Kelly, I read those
16 depositions. And they informed you at that time that
17 they were working on their testimony. So let's --

18 MR. KELLY: No, I understand. But I guess what
19 I'm saying is, but they're supposed to be prepared and
20 they weren't. And rebuttal testimony now is the first
21 time that we hear about any of this. They never updated
22 that information and said, hey, we continued our work
23 and, actually, here's the facts that support what we're
24 doing. It wasn't until after we submitted our direct
25 testimony, after we paid our experts to analyze what was

1 in the ACL. And then when we got rebuttal, now we're
2 being told it's something different.

3 I think that's what Mr. O'Laughlin is talking
4 about as being fundamentally unfair. When somebody files
5 a complaint they're supposed to plead the facts that
6 support the complaint, and then they prosecute those
7 facts. That's -- that's an element. That's -- that's
8 fundamental fairness, that a defendant be entitled to
9 understand exactly what they're being accused of and why.
10 And we weren't provided that now until rebuttal.

11 HEARING OFFICER DODUC: Thank you. I --

12 MR. TAURIAINEN: I would just suggest that these
13 evidentiary arguments, and I've said this a couple times
14 the last minute or so, these are closing brief issues of
15 evidence to argue on closing, and we should probably
16 leave them for there.

17 I will say, though, that I would ask, you know,
18 Counsel to point to any portion of the -- the complaint
19 that doesn't make factual allegations that are --

20 HEARING OFFICER DODUC: We're --

21 MR. TAURIAINEN: -- related to the evidence.

22 HEARING OFFICER DODUC: We are not going to do a
23 back and forth on that.

24 MR. TAURIAINEN: I do -- I have one final
25 question regarding the demand data in the 2015 demand

1 data. And it -- it gets to testimony that Ms. Mrowka has
2 already made with respect to what is in our case in chief
3 and why the case in chief itself supports the findings
4 that we asked the Board to make. In which case --

5 HEARING OFFICER DODUC: So --

6 MR. TAURIAINEN: -- I would recommend that the --

7 HEARING OFFICER DODUC: So --

8 MR. TAURIAINEN: -- that the parties --

9 HEARING OFFICER DODUC: -- let me understand
10 this.

11 MR. TAURIAINEN: -- you know, withdraw --

12 HEARING OFFICER DODUC: You are no longer
13 pursuing redirect --

14 MR. TAURIAINEN: One -- one --

15 HEARING OFFICER DODUC: -- of your witnesses --

16 MR. TAURIAINEN: One more.

17 HEARING OFFICER DODUC: -- with respect to their
18 rebuttal testimony?

19 MR. TAURIAINEN: I was -- I was asking them
20 questioning on both their case in chief and rebuttal.
21 But then when we were getting into the specifics about
22 where is the most up to date demand and supply data
23 relative to the entire unavailability period?

24 HEARING OFFICER DODUC: And that answer is in the
25 record.

1 MR. TAURIAINEN: Yeah.

2 HEARING OFFICER DODUC: Your objections are in
3 the record, which I will take notice of and consider very
4 carefully.

5 MR. TAURIAINEN: And then --

6 HEARING OFFICER DODUC: And now I will allow you
7 to ask your remaining questions.

8 MR. TAURIAINEN: Very quick.

9 BY MR. TAURIAINEN:

10 Q. Ms. Mrowka, prior to the submittal of the case in
11 chief did you review the February 2015 Information Order
12 submittal data?

13 A. (Ms. Mrowka) I reviewed it in a cursory fashion.
14 I was curious to see how many respondents we had.

15 Q. And did you look to see whether that demand data
16 changed the demand in --

17 A. I had discussions with Mr. Yeazell regarding that
18 because he's my technical expert on the demand data. And
19 I wanted to be advised as to whether his review indicated
20 that there was any reason to be concerned about updating
21 from 2014 demand data to 2015 demand data. And he
22 indicated that there was not a large difference. Given
23 the very poor flow conditions it would not change any of
24 our conclusions with respect to water availability.

25 Q. Water availability for?

1 A. For purposes of the drought analysis.

2 HEARING OFFICER DODUC: Hold on, Mr. Tauriainen.

3 MR. TAURIAINEN: How was that with respect --

4 HEARING OFFICER DODUC: Hold on. Hold on.

5 Ms. Spaletta?

6 MS. SPALETTA: That was just a going around the
7 rule way of having Ms. Mrowka literally read a paragraph
8 from page three of Mr. Yeazell's rebuttal testimony,
9 which is Exhibit 211.

10 HEARING OFFICER DODUC: So noted, Ms. Spaletta.

11 MR. TAURIAINEN: I recall that this came out on
12 cross-examination on Monday, but I may be -- may be
13 wrong.

14 With that and with the, you know, risk of
15 inviting further objection if I continue, I'll -- I'll
16 rest on redirect.

17 HEARING OFFICER DODUC: Questions?

18 MS. KUENZI: Yes, I'm sorry. I think I just
19 heard Ms. Mrowka testify as to what Mr. Yeazell told her.
20 I was wondering if Mr. Yeazell might testify as to what
21 he said with respect to 2015 actual demand.

22 MR. YEAZELL: That -- I did take a look at it and
23 it was -- there was a reduction, but it did not seem
24 significant enough to change any -- any decisions.

25 MS. KUENZI: For purposes of the --

1 MR. YEAZELL: For --

2 MS. KUENZI: -- drought analysis?

3 MR. YEAZELL: Correct.

4 MS. KUENZI: But not for purposes -- you weren't
5 at that time looking at a specific enforcement action? I
6 mean, when you say drought analysis you're making a
7 distinction from these actions.

8 MR. YEAZELL: It would not have changed. I --
9 it -- it did not change. No, we weren't under-doing any
10 drought enforcement actions at that time, so that was
11 towards -- at the beginning of around the time when --
12 when the notices were being issued.

13 HEARING OFFICER DODUC: So clarify, when was
14 this?

15 MR. COATS: You want me to answer that? Yeah.

16 So when we received the informational orders
17 starting in March, I recall providing an update in this
18 room or one of the other rooms during one of the drought
19 updates every weeks where we had compiled the projected
20 2015 demands that they're required to submit, and we
21 compared that to the 2014 demands of those same parties.
22 At that time there was only a four percent difference to
23 their benefit as far as a reduction in demand.

24 HEARING OFFICER DODUC: And when did you compare
25 it to the actual 2015?

1 MR. COATS: Well, those actual 2015s are ongoing.
2 And that's when we actually incorporated that in the late
3 summer.

4 HEARING OFFICER DODUC: Other questions?

5 Mr. Buckman, I know you had specific questions.
6 I would prefer you to hold your questions until after the
7 recross. Okay.

8 With that, let's take a short five-minute break.
9 And then we will resume with recross by Mr. Kelly.

10 MR. KELLY: Thank you.

11 (Off the record at 2:07 p.m.)

12 (On the record at 2:15 p.m.)

13 MR. KELLY: With that, I'll turn it over to Ms.
14 Spaletta to begin the recross.

15 MS. SPALETTA: Thank you. If we could have
16 Prosecution Team's Exhibit 48 up on the screen please?
17 Okay.

18 STEVEN YEAZELL

19 RE CROSS BY MS. SPALETTA

20 FOR THE WEST SIDE IRRIGATION DISTRICT,

21 SOUTH DELTA WATER AGENCY,

22 CENTRAL DELTA WATER AGENCY

23 BY MS. SPALETTA:

24 Q. So, Mr. Yeazell, during the examination you're
25 counsel asked you to clarify what the supply was depicted

1 on this graph for June 12th, I believe, or was it June
2 7th? Do you remember which date?

3 A. (Mr. Yeazell) I believe it was June 7th.

4 Q. Okay. So let's go with June 7th. And my
5 understanding of your testimony was that when you
6 eyeballed the supply -- and by supply you were talking
7 about daily FND; correct?

8 A. Correct.

9 Q. When you eyeballed where the daily FNF was you
10 said it was around 11,000; right?

11 A. Correct.

12 Q. And then your counsel asked you to add to that
13 the 2,252 CFS representing the subbasin unimpaired flows
14 and the return flows; correct?

15 A. Yes.

16 Q. And then you said that that meant that the total
17 supply was 13,252 CFS?

18 A. I believe it was around that, yes.

19 Q. Okay. Are you looking at some notes that you
20 wrote during your --

21 A. I was looking at my numbers that I wrote down.

22 Q. Did you write those during your testimony or
23 before your testimony?

24 A. As he was -- as we were talking.

25 Q. Okay. Very good.

1 A. Just where I did the math.

2 Q. Now looking at the demand on this chart, I just
3 want to be clear that the demand represented on this
4 chart, WR-48, does not represent the actual demand in
5 2015; correct?

6 A. This is correct.

7 Q. I also want to be clear that the demand that's
8 represented is for the entire watershed; correct?

9 A. Specify which watershed.

10 Q. Well, it says at the top, "Combined Sacramento-
11 San Joaquin River Basin."

12 A. Correct.

13 Q. So we talked a little bit yesterday about the
14 fact that in this combined global watershed analysis you
15 included all of the demand from all of the watershed and
16 subwatersheds, regardless of whether or not there was
17 actually enough supply in any one of those watersheds or
18 subwatersheds to meet the demand in that particular
19 watershed or subwatershed; correct?

20 A. I would the demands in as directed by my
21 supervisors.

22 Q. Okay. So there were instances in this
23 methodology where the demand reflected could not have
24 physically been met with the supply in the wastewater;
25 correct?

1 A. I'm not the qualified person to ask that. I
2 would give that to Brian.

3 Q. Thank you.

4 Brian?

5 BRIAN COATS

6 CROSS-EXAMINATION BY MS. SPALETTA

7 FOR THE WEST SIDE IRRIGATION DISTRICT,

8 SOUTH DELTA WATER AGENCY,

9 CENTRAL DELTA WATER AGENCY

10 BY MS. SPALETTA:

11 A. (Mr. Coats) Yes, that is true.

12 Q. Mr. Coats, I should say. Sorry. Okay.

13 So do you know how much additional demand is
14 reflected that could not be met by the supply in the
15 watershed?

16 A. I don't.

17 Q. Did you undertake any analysis of that?

18 A. As we didn't separate the watershed into sub-
19 tributaries, at this time, no.

20 Q. Mr. Yeazell, did you have -- did you conduct any
21 analysis of how much excess demand you were reflecting
22 over and above available supply in each watershed or
23 subbasin?

24 A. (Mr. Yeazell) No. I was not directed to that.

1 Q. So I want to look at two other graphs that you
2 entered into evidence, the Prosecution Team entered into
3 evidence yesterday. And let's look at WR-54.

4 Graph 54 actually represents a different
5 geographic area; right? Graph 54 is just for the
6 Sacramento Basin with proportional Delta demand; is that
7 correct, Mr. Yeazell?

8 A. Correct.

9 Q. And that's actually a subset of the combined
10 data; correct?

11 A. Yes.

12 Q. And in this graph you actually did depict what
13 the 2015 actual demands were as reported under the
14 information order with the green line?

15 A. That was our rough approximation. It did not
16 take into account the priority of any pre-'14 demand that
17 was in there.

18 Q. It didn't take into account the --

19 A. The priority of the -- that was basically just
20 the reduced amount overall.

21 Q. And so that's the overall demand that was
22 reported for senior right holders?

23 A. Right. It wasn't -- it wasn't adjusted by
24 priority date.

1 Q. Okay. So it should have included everything of
2 riparians' and pre-1914?

3 A. Right.

4 Q. Okay. So then that total for the adjusted senior
5 demand in June looks to me like it's between 6,500 and
6 6,700, something like that? What is it?

7 A. I -- my -- I can't see the numbers.

8 (Mr. Coats) It looks to be about 6,800.

9 Q. Is that Mr. Coats testifying?

10 A. Yes, it is.

11 Q. And then you also put into evidence yesterday
12 another graph showing --

13 HEARING OFFICER DODUC: Mr. O'Laughlin?

14 MR. O'LAUGHLIN: Hi. Tim O'Laughlin, the San
15 Joaquin Tributaries Authority.

16 Yeah, you've guessed it, Mr. Kelly. This goes to
17 your statement that it would be nice to see and hear
18 everything. And thank you very much. Appreciate it.

19 HEARING OFFICER DODUC: You want me to see it or
20 Mr. O'Laughlin to see it?

21 Mr. O'Laughlin, you are welcome to move over
22 there.

23 MS. SPALETTA: Let me clarify for the record. We
24 are writing on a giant Post-It note, some of the
25 testimony. So we have put down supply in the combined

1 watershed of 13,252. And we have written down demand in
2 the Sacramento portion of that combined watershed of
3 6,800.

4 MR. TAURIAINEN: I have a question or an
5 objection. I'm interested to know what the relevancy of
6 this chart and this line of questioning is? Because it
7 doesn't appear to address any of the redirect, nor
8 specifically the question presented by the Hearing
9 Officers at the beginning of this afternoon's proceeding.

10 HEARING OFFICER DODUC: Ms. Spaletta?

11 MS. SPALETTA: The relevance goes to your
12 examination of your witnesses regarding the best
13 available supply and demand data in 2015 to use for
14 purposes of this enforcement action.

15 HEARING OFFICER DODUC: Thank you. Please
16 proceed. And I actually appreciate this, being a visual
17 person.

18 MS. SPALETTA: I love giant Post-It notes, too.

19 BY MS. SPALETTA:

20 Q. Okay, so looking at Exhibit 54 -- or, excuse me,
21 we're going to look at the next one, Exhibit 58.

22 Mr. Yeazell, Exhibit 58 is the San Joaquin River
23 portion of the combined watershed; correct?

24 A. (Mr. Yeazell) Correct.

1 Q. Okay. So between Exhibit 54 and Exhibit 58 we
2 have the two subsets or components that make up the
3 combined watershed; correct?

4 A. Correct.

5 Q. So on Exhibit 58 you also depicted the actual
6 2015 all-senior demand with the green line; correct?

7 A. With the same caveat as before. It's not
8 prioritized.

9 Q. Okay. So it includes all of the senior demand?

10 A. Right.

11 Q. And in June, looking at this particular graph it
12 appears that that June senior demand is somewhere in the
13 neighborhood of 5,300 CFS; correct?

14 A. Yeah, it looks about that. Yes.

15 Q. Mr. Yeazell, is 6,800 plus 5,300, 12,100 CFS?

16 A. I feel like a first-grader, but, yes.

17 Q. Okay. And you didn't even need your spreadsheet,
18 so very good. Okay.

19 Now again I want to ask the same question about
20 both Exhibit 58 and 54, which is the one we looked at
21 previously. All of the demand, the actual 2015 demand
22 for all of the subbasins and subwatersheds in each of
23 these geographic areas was included on these charts, even
24 if the supply in those subbasins was too low to support
25 the demand; correct?

1 A. I put the data in as I was directed to, but, yes.

2 Q. So the answer is, yes?

3 A. As far as I know. I don't know the specifics
4 about the watersheds. I can't answer that.

5 Q. So then these charts reflect demand that could
6 not have been met by supplies depicted and would have had
7 to have been met from another source; correct?

8 A. That wasn't part of the scope of my analysis.
9 I'm going to defer that to Mr. Coats.

10 Q. Mr. Coats?

11 A (Mr. Coats) Repeat the question. I was reading
12 that legend there.

13 Q. The demand that is reflected on Exhibits 54 and
14 58 reflects all of the demands in all of the
15 subwatersheds for the geographic area depicted on each
16 exhibit --

17 A. I would have to look at the supporting
18 spreadsheet information to answer that.

19 Q. You don't know as you sit here today what demands
20 are included?

21 A. It's not referenced in the legend. I don't know
22 exactly what -- I'd have to look at the actual
23 information in the spreadsheet because we did make some
24 additional pre-'14 curtailments to select subwatersheds
25 in the summer for the San Joaquin. And so just to be

1 accurate I would want to review the spreadsheet
2 information.

3 Q. Well, I believe you testified in your deposition
4 that that was the case. Did you do research after your
5 deposition that changed your mind?

6 A. I don't recall exactly which graph I referred to.
7 It was 277 pages, but, yeah. Looking on the legend there
8 it appears, though, because it does have the full natural
9 flow stations for all of those six FNFs for the San
10 Joaquin, that it would include it.

11 Q. So it would have included all the demand?

12 A. Yes, because it does reference the FNF stations
13 there. Correct.

14 Q. So to the extent that these graphs, 54 and 59,
15 include actual 2015 demand that exceeded the flows from
16 the particular watersheds included, that demand is
17 overstated?

18 A. That's just the demand that was reported to us.
19 We can't actually report whether or not it was satisfied
20 or it wasn't.

21 Q. So it is including demand that you know could not
22 have been satisfied by what you've represented as the
23 full natural flow?

24 A. Correct.

1 Q. Ms. Mrowka, how many of the patents that were
2 submitted in response to the information request for
3 riparian rights are there?

4 KATHY MROWKA

5 CROSS-EXAMINATION BY MS. SPALETTA

6 FOR WTHE EST SIDE IRRIGATION DISTRICT,

7 SOUTH DELTA WATER AGENCY,

8 CENTRAL DELTA WATER AGENCY

9 BY MS. SPALETTA:

10 A. (Ms. Mrowka) I don't know that number.

11 Q. Is there more than 1,000?

12 A. Well, the informational order request went out to
13 slightly over 1,000 parties. It depends because some
14 parties were claiming pre-1914 rights, so they'll submit
15 different kinds of information than the parties claiming
16 riparian right. Some claim both basis and they'll have
17 to submit both types of information, so it varies a lot.

18 Q. How many of the submittals of the more than 1,000
19 have you personally reviewed?

20 A. Probably 5 to 25.

21 Q. And of those that you've reviewed do you know the
22 range of the pre-1914 priority dates that are claimed?

23 A. I was fascinated by a lot of the history and
24 documentation and the deed-type issues that I was
25 reading, so I tended to focus on that --

1 Q. Did --

2 A. -- rather than the date per se. I was curious to
3 see the Delta issues and what they were, you know,
4 submitting on their basis of right.

5 Q. So as you sit here today you actually do not have
6 an understanding of what the date range for the claimed
7 pre-1914 rights are in those submittals?

8 A. Well, that's why I had Staff assist me. I had
9 them put it all on spreadsheet for me to document for me
10 what the claims were and the types of materials that we
11 received from all parties. And I did review that
12 spreadsheet so I'd have a better understanding as to what
13 we had received and how well parties had done on their
14 submittals.

15 Q. But you expressed an expert opinion in your
16 redirect examination regarding relative priority dates.

17 But what I'm asking is as you sit here today do
18 you have an understanding of what those relative priority
19 date ranges are?

20 A. I have an understanding of the materials that I
21 received. That's over 1,000 parties. I couldn't say,
22 you know, which priority, one priority versus another
23 when you're looking at such a large volume.

24 Q. And the dates in the database that you had your
25 staff prepare, they were not actually used to sort the

1 demand that's represented on the graphs that we've been
2 looking at during this hearing, were they?

3 A. We used the materials that parties have submitted
4 to us with their statements of water diversion and use.

5 Q. You did not sort the demands that are depicted on
6 the yellow, orange and burnt orange sections of this
7 graph by priority date for the purposes of depicting the
8 demand?

9 A. Staff relied upon our eWRIMS database to sort the
10 dates and information from the database.

11 Q. Ms. Mrowka, I've now asked you, I believe seven
12 questions that were yes or no questions and you have not
13 answered any of them yes or no.

14 HEARING OFFICER DODUC: Did you want a yes or no
15 answer to that?

16 MS. SPALETTA: That would be nice.

17 HEARING OFFICER DODUC: Move on, Ms. Spaletta.

18 MS. SPALETTA: Okay.

19 BY MS. SPALETTA:

20 Q. Ms. Mrowka, do you remember in your deposition
21 when I asked you what the source of information was for
22 the 40 percent return flow for the Delta?

23 A. (Ms. Mrowka) I don't recall. Perhaps you can
24 refresh my memory.

1 Q. I asked you, and I'll go to that page of your
2 deposition, it's on page 35.

3 My question was: "Were you part of the
4 discussion regarding a decision to include the Delta
5 return flows?"

6 Answer: "I believe I was."

7 Question: "And can you tell me about that
8 discussion and how the decision was made?"

9 Answer: "Yes. We have participated in multiple
10 stakeholder outreach meetings throughout this year to
11 make sure that we had the best available information for
12 the water supply situation. And one of the comments that
13 we received was with respect to the return flow. Parties
14 felt that we should include some return flows in this
15 discussion. And we were able to identify a published
16 document, a written document from another agency that
17 informed us what would be applicable return flows."

18 Question: "Which document was that?"

19 Answer: "I don't have the specific title off the
20 tip of my tongue."

21 Question: "Do you remember the date of the
22 document?"

23 Answer: "I believe it was a Department of Water
24 Resources publication that talked to the issue."

1 Question: "Do you remember whether it was recent
2 or something that was published a long time ago?"

3 Answer: "I'm uncertain whether it was the 1977
4 Drought Report or whether it was another report. I think
5 the '77 Drought Report might have been that source, but
6 we were provided with another document at one of our
7 outreach sessions that spoke to issues such as this, and
8 I just don't recall its title offhand."

9 Question: "I found one in the Public Records Act
10 request" -- that the request that we made to the State
11 Board that they provided documents in response to --
12 "that was dated July 1956, DWR Report Number 4 entitled,
13 quote, 'Investigation of the Sacramento-San Joaquin Delta
14 Quantity and Quality of Water Supply To and Drained From
15 the Delta Lowlands,' end quote. Does that sound
16 familiar?"

17 Answer: "And it does sound familiar, and I
18 believe that document was the one that was provided at
19 outreach to us."

20 Question: "Correct. Do you know as you sit here
21 today whether the return flow information was taken from
22 the July 1956 report or from the 1977 report?"

23 Answer: "I believe the return flow information
24 is only available in one of those two documents. I
25 believe it is the document in your hand."

1 Does that refresh your recollection?

2 A. Yes, it does.

3 MS. SPALETTA: We're going to hand Ms. Mrowka
4 what has been marked as West Side Exhibit 183 which is
5 available for Mr. Buckman to put on the screen.

6 BY MS. SPALETTA:

7 Q. Ms. Mrowka, I would like you to look at Exhibit
8 183 and confirm that this was the email transmission from
9 Dante Nomellini, Jr., dated May 12th, 2015 following the
10 stakeholder meeting, and including as an attachment DWR's
11 1956 Report Number 4.

12 A. (Ms. Mrowka) It is that email.

13 Q. And this is the document that you testified in
14 your deposition was the source of information that you
15 used to compute the 40 percent Delta return flow number
16 that was then included in your analysis; correct?

17 A. I may have mentioned that but I'm not certain
18 that that's the case. I think it's the 1977 document
19 which we used.

20 Q. So at your deposition you told me it was the 1856
21 document I had in my hand. Did you change your mind?

22 A. Neither Brian Coats nor I remember exactly which
23 document, so it's one of the two.

24 MR. TAURIAINEN: Hearing Officers, Andrew
25 Tauriainen, Prosecution Team.

1 I'm going to restate --

2 HEARING OFFICER DODUC: Mr. Tauriainen?

3 MR. TAURIAINEN: I'm going to restate my
4 objection regarding relevancy. This is going pretty far
5 afield of any of the scope of redirect or the question
6 that was presented at the -- the beginning of this
7 afternoon's proceedings. And it appears to just be
8 additional cross-examination, particularly on issues that
9 are raised in their -- the other side's case in chief,
10 which hasn't been presented yet.

11 HEARING OFFICER DODUC: Ms. Spaletta?

12 MS. SPALETTA: I actually didn't think we would
13 have to deal with this issue. I didn't think it was
14 disputed. But then in Mr. Coats' redirect testimony he
15 specifically stated that the 40 percent number was
16 something they had no support for and that they included
17 it to be generous to the diverters.

18 HEARING OFFICER DODUC: You may continue, Ms.
19 Spaletta.

20 MS. SPALETTA: Thank you.

21 MR. KELLY: Good afternoon. I have a few
22 questions.

23 JEFFREY YEAZELL

24 CROSS-EXAMINATION BY MR. KELLY

25 FOR BYRON BETHANY IRRIGATION DISTRICT

1 BY MR. KELLY:

2 Q. But first, Mr. Yeazell, I want to -- I want to
3 ask you a question. Because I noted that a couple of
4 times you testified about the inclusion or exclusion of
5 data from the spreadsheets. And -- and generally your
6 response was proceeded or began with kind of a
7 qualification that you didn't decide what to include or
8 exclude into the analysis, that those decisions were made
9 by people other than you and you simply did as you were
10 directed to by supervisors or folks above you. Is that
11 an accurate statement?

12 A. (Mr. Yeazell) Correct. I compiled the data and
13 made -- and created the graphs based on the parameters
14 set by my supervisors.

15 Q. So you made no decisions with respect to what
16 would be part of the best supply dataset or what would be
17 the best demand dataset; correct?

18 A. Correct. I was told what they were and I went
19 and collected the data.

20 Q. Mr. Coats, did you make any decisions on what
21 would be included in the supply data set?

22 BRIAN COATS

23 CROSS-EXAMINATION BY MR. KELLY

24 FOR BYRON BETHANY IRRIGATION DISTRICT

25 BY MR. KELLY:

1 A. (Mr. Coats) No. That was done by my upper
2 management as a continuation from the 2014 drought.

3 Q. Mr. Coats, did you make any decisions on what
4 would be included or excluded in the demand dataset?

5 A. No.

6 KATHY MROWKA

7 CROSS-EXAMINATION BY MR. KELLY

8 FOR BYRON BETHANY IRRIGATION DISTRICT

9 BY MR. KELLY:

10 Q. Ms. Mrowka, other than the 40 percent Delta
11 return flow issue that you just spoke to Ms. Spaletta
12 about, did you make any decisions on what would be
13 included in the supply demand dataset for this -- I'm
14 sorry, in the supply dataset for this analysis?

15 A. (Ms. Mrowka) I was a participant in conversations
16 with John O'Hagan. It was a continuation of 2014 where
17 Mr. O'Hagan informed me that --

18 Q. I want to interrupt. I'm not asking about what
19 Mr. Hagan -- Mr. O'Hagan did.

20 I want to know if you made any decisions on what
21 would be included in the supply dataset for this
22 analysis? Did you make any of those decisions?

23 A. It was a continuation of the 2014, which was
24 before my time.

1 Q. Did you make any of the decisions on what would
2 be included in the supply dataset for the 2014 analysis
3 then?

4 A. That was prior to my assuming my duties.

5 Q. And so that -- is that answer no?

6 A. Correct.

7 Q. And so the same would be true for 2015, it would
8 be no?

9 A. No. In 2015 I had to look at August -- no,
10 that's demand. Never mind. Yes.

11 Q. And so for the demand side, Ms. Mrowka, did you
12 make any decisions on what would be included or excluded
13 in the demand dataset?

14 A. Absolutely.

15 Q. And what decisions did you make?

16 A. I looked at the issue as to whether we should
17 include the informational order demands in the dataset.

18 Q. And so is -- is your contribution then to the
19 demand side the utilization of information from the 2015
20 informational order which was the 2014 actual demand?

21 A. Yes.

22 Q. Other than that, did you make any decisions on
23 what to include or exclude from the demand analysis?

24 A. Absolutely.

1 Q. What else did you -- what other decisions did you
2 make?

3 A. I made a decision with respect to the month-to-
4 month incoming 2015 data and whether that would make a
5 change in our numbers and should we update every single
6 month as it goes for the 2015 incoming data.

7 Q. But are we still talking about the 2014 actual
8 demands?

9 A. 2015 incoming demand data from the informational
10 order, the month-to-month data we got in.

11 Q. Okay. So that's -- we heard a little bit of
12 testimony on recross about incorporating that data as it
13 rolled in. And so you -- it sounded -- is your testimony
14 then that another decision you made with respect to
15 demand was to include in the rolling analysis the actual
16 2015 demands that came in?

17 A. No. After I had my conversation with Mr. Yeazell
18 it didn't appear that we would need to do ongoing month-
19 to-month updates on the 2015. We did do updates. You've
20 seen those graphs today. But we -- we were looking --
21 that was my decision making as to whether we had to keep
22 rolling and changing every single month.

23 Q. And so it was your decision to not do that?

24 A. It did not affect the information on water
25 availability because the supply was so low. And so it

1 was my decision that we would go ahead and we did do the
2 recast backwards that you've seen in our exhibits today.

3 Q. Ms. Mrowka, I'm simply asking whether or not it
4 was your decision then to exclude that additional demand
5 data from the analysis.

6 A. For a brief period of time.

7 Q. Is that a yes?

8 A. Yes.

9 Q. So if I was going to ask someone, any three of
10 you, whether specific supply sources would be useful in
11 an analysis of water availability to the Byron Bethany
12 Irrigation District at its diversion facility in the
13 South Delta, who would I ask of the three of you? Do --
14 would it be Mr. Coats?

15 A. (Mr. Coats) Exactly what type of question are you
16 asking?

17 Q. Well, I'm going to -- I'm going to identify some
18 different sources of potential supply that might be
19 available to the Byron Bethany Irrigation District.

20 A. Okay.

21 Q. And I just want to know whether or not that kind
22 of information would be useful in conducting an analysis
23 of the supplies actually available to BBID.

24 A. Okay.

25 Q. So --

1 HEARING OFFICER DODUC: Instead of useful I would
2 prefer you ask the question in terms of whether it was
3 actually considered.

4 MR. KELLY: Okay. I will ask if it was actually
5 considered.

6 BY MR. KELLY:

7 Q. Mr. Coats, first of all, you did not conduct a
8 water supply availability analysis at or near Byron
9 Bethany Irrigation District's point of diversion; is that
10 correct?

11 A. (Mr. Coats) I only conducted a comparison, not a
12 full-scale full natural flow availability, correct.

13 Q. And this is the watershed-wide analysis we've
14 been looking at?

15 A. The comparison that I referred to was the area
16 downstream of Vernalis which included both PODs, along
17 with everyone else in the -- the Delta.

18 Q. And you didn't look at any other source
19 contribution, other than full natural flow; is that
20 correct?

21 A. In that particular Vernalis comparison I only
22 used -- since it wasn't a water availability
23 determination we used the actual mean daily flow at
24 Vernalis which was -- we referred to as a comparison.

1 Q. But you didn't use that for the water
2 availability analysis as part of this enforcement
3 proceeding, did you?

4 A. We actually prepared that after we had issued the
5 enforcement actions as a check.

6 Q. But it's not part of the evidence supporting the
7 action against the BBID, is it?

8 A. It's a rebuttal exhibit.

9 Q. Did you consider the contribution of any
10 wastewater treatment plants in or around the Delta as a
11 potential source of supply for BBID?

12 A. Those types of waters were brought to my -- I
13 think to John O'Hagan's attention and we discussed that.
14 And it was elected at that point he -- either he or
15 someone above him made a decision to only use full
16 natural flows, so we didn't include those.

17 Q. So do you know whether or not that information is
18 reasonably available?

19 A. As far as documented?

20 Q. Yes.

21 A. I have no knowledge of that because it's not on
22 my email.

23 Q. So one of the things that caught my eye in the
24 administrative civil liability complaint, and kind of
25 what's been talked about here, is how easy it was to find

1 out that BBID was, what you all thought, was unlawfully
2 diverting because BBID reported its -- its -- its
3 diversions and they showed upon CDEC --

4 A. Correct.

5 Q. -- is that correct?

6 A. Correct.

7 Q. And so are you aware that the Sacramento County
8 Regional Sanitation District also reports its wastewater
9 discharges in the Delta and that that information is also
10 reported on CDEC?

11 A. That's not information that I usually seek out,
12 but I -- if you say so.

13 Q. But you didn't include that in the supply?

14 A. I did not include that in the supply, no.

15 Q. And so if -- if in the month of June the supply
16 that's shown on these charts, if -- if Sac. Regional
17 discharged at a rate of -- an at average rate of 160 CFS
18 for the month of June, that supply component would not be
19 depicted on the graphs that you showed?

20 A. If it was considered full natural flow it was
21 included. But as I indicated earlier, if it's not full
22 natural flow it didn't include it.

23 Q. Can you tell me whether or not you know it's full
24 natural flow?

25 A. I can't speak to that, no.

1 Q. Do you have any idea in acre feet over a month
2 what 160 CFS is in the month of June?

3 A. 160 CFS on a daily basis is going to be about
4 double that in acre feet, so 310. So you're looking at
5 about a little under 10,000 for a month.

6 Q. And do you have -- do you recall the amount of
7 water that BBID is alleged to have unlawfully diverted in
8 the month of June?

9 A. I believe it's 1,880-something acre feet.

10 Q. So less than 20 percent of the total quantity of
11 water discharged by Sac. Regional?

12 A. Using that comparison, yes.

13 Q. And if you know, is water that would be
14 discharged from a wastewater treatment plant available to
15 riparian diverters?

16 A. That's since it's -- that's usually available for
17 appropriation.

18 Q. So it would be available to a pre-1914
19 appropriator?

20 A. (Ms. Mrowka) It would really depend on the source
21 of water and the treatment plant. I have seen treatment
22 plants with short residence times where the water
23 retained its riparian character. So it's going to depend
24 solely on source and resident times and other factors.

1 Q. But you don't know what the source of water is
2 that resulted in those discharges to the Sac. Regional,
3 do you?

4 A. We've made no evaluation of that.

5 Q. If I excluded the Central Valley Project and the
6 State Water Project, did you include the return flows
7 from releases from other storage reservoirs?

8 A. (Mr. Coats) No. The only return flows that we
9 adde4d were the percentage of the supply, along with the
10 40 percent Delta flow.

11 Q. And so was the answer to that no?

12 A. As far as I know, no.

13 Q. Are you aware of recent documentation that came
14 from the -- the Delta -- off the Delta Watermaster with
15 respect to the -- the success of the Voluntary Reduction
16 Program in the Delta in the summer of 2015?

17 MS. MCGINNIS: Objection, Hearing Officers.

18 Robin McGinnis for DWR.

19 HEARING OFFICER DODUC: Ms. McGinnis?

20 MS. MCGINNIS: I thought the scope of this
21 redirect and recross was the quality of the data the
22 Prosecution Team used, not other sources of supply they
23 should have considered in their analysis. I thought
24 those issues were part of the moving parties' cases in
25 chief.

1 HEARING OFFICER DODUC: Mr. Kelly?

2 MR. KELLY: The hearing -- Hearing Officer, my
3 understanding of what we were doing today was trying to
4 determine whether or not the evidence that the
5 Prosecution Team used is the best evidence to make that
6 determination. And I am asking about other sources of
7 supply that would have been available to BBID and West
8 Side to -- to find out whether or not those sources were
9 included. We had a supply line on the graphs. I want to
10 understand whether or not that supply line included any
11 of these other supplies.

12 HEARING OFFICER DODUC: I will grant it, but I
13 will ask you to move along. I think you're making you're
14 point.

15 MR. KELLY: I will.

16 MS. MCGINNIS: Hearing Officers, all of the --

17 HEARING OFFICER DODUC: Ms. McGinnis?

18 MS. MCGINNIS: What is included in the
19 Prosecution Team's supply and demand analysis is all --
20 it's detailed extensively in their case in chief written
21 testimony. I'm not sure we need to go over this today.

22 HEARING OFFICER DODUC: Thank you, Ms. McGinnis.
23 I'll take your objection into consideration.

24 And I will ask Mr. Kelly to move along.

25 BY MR. KELLY:

1 Q. Do you -- are you aware of the -- the reported
2 savings from that Voluntary Reduction Program?

3 A. (Ms. Mrowka) We are aware of that. And the issue
4 on that program is it compares the water savings in 2015
5 to a 2013 baseline year. And we are not looking at that.

6 HEARING OFFICER DODUC: I think the point here,
7 Mr. Kelly, that you are trying to make is that it was not
8 considered. So let's move on.

9 MR. KELLY: Okay. Thank you.

10 Could we look at WR-47? Actually, I'm sorry, 48.
11 My apologies.

12 BY MR. KELLY:

13 Q. I believe, Mr. Coats or Mr. Yeazell, which of you
14 testified with respect to adding the 2,200 CFS to the
15 supply line? I believe it was on this graph, and I don't
16 recall which one you testified to it. That was Mr.
17 Yeazell?

18 A. (Mr. Yeazell) That was me, yeah.

19 Q. Mr. Yeazell, just a quick question for you then
20 on that. The -- this graph shows the combined
21 Sacramento-San Joaquin River Basin senior supply, so the
22 entire watershed; correct.

23 A. Yes.

1 Q. And the return -- and so the demand that's
2 depicted on here is the demand in the entire watershed;
3 correct?

4 A. I believe so.

5 Q. Well, I -- and I'm looking at it.

6 A. I'm trying to --

7 Q. And I'm sorry, I didn't actually mean that to be
8 controversial. The chart -- I just assumed it because
9 the chart says "2015 Combined Sacramento-San Joaquin
10 River Basin Senior Supply Demand," that it included that
11 demand in the entire watershed.

12 A. I'm --

13 Q. And I believe that you testified yes.

14 A. I think I did, yes.

15 Q. And -- and so the return flow component that
16 we're talking about adding, what is the source of that
17 return flow component, that 2,200 CFS?

18 A. That would be the -- for June I believe it was a
19 ten percent return flow for the San Joaquin Area riparian
20 demands.

21 Q. It was -- was it -- was it solely out of the San
22 Joaquin River?

23 A. It was applied globally to the entire area.

24 Q. And that was a return flow component from the
25 prior use of water, if you know?

1 A. I don't know the source. I know it's a ten
2 percent, that it was --

3 (Mr. Coats) Yeah. It's actually referenced in
4 the legend there at the very top on the right. It's got
5 it by month. It looks to be for the month of June, ten
6 percent. And then it also references a Delta contribution
7 of 40 percent.

8 Q. Okay. So then my question is, and this is
9 similar to the question that Ms. Spaletta asked about
10 demand, unmet demand from some watersheds being carried
11 over to other watersheds. Is it -- is it true, based on
12 the work that you did, that the return flow contribution
13 to the supply couldn't be accessed physically by a lot
14 of the demand depicted in that chart?

15 A. If the -- well, yeah. If the 40 percent
16 component of that 2,250 CFS, if that's a large component
17 of it then, since that's localized to the Delta that
18 supply, that extra supply, would only be available to the
19 Delta if it was localized, correct.

20 Q. But -- but here it's shown as being charged by
21 the watershed-wide demand?

22 A. Correct.

23 Q. Okay. So as -- as engineer, and I believe all
24 three of you are engineers, do you think that -- that it
25 would be helpful in conducting an analysis of actual

1 supply and demand to try to remove the demands that
2 couldn't be accessed by the supply so you get a more
3 accurate picture of the actual supply and demand?

4 A. Of course.

5 MR. KELLY: I have no further questions.

6 HEARING OFFICER DODUC: Other members of you
7 party?

8 Ms. Zolezzi, no questions? Okay.

9 Let me ask the witness, it's been almost an hour,
10 would you like to take a break or continue? Go forward?
11 All right.

12 Let me ask the City and County of San
13 Francisco -- actually, they're not here today.

14 MR. KNAPP: Yes, they are.

15 HEARING OFFICER DODUC: Oh, they are? They came
16 in late. All right.

17 Do you have recross?

18 MR. KNAPP: Thank you. Jonathan Knapp for the
19 City and County of San Francisco.

20 We have no recross, but we would like to note
21 that we support the motion that's been made.

22 HEARING OFFICER DODUC: Thank you.

23 Mr. O'Laughlin, do you have recross?

24 MR. O'LAUGHLIN: Yes, I do.

1 MR. MONA: Ms. Doduc, one moment please. Could
2 you please ask Ms. Spaletta to take a -- put an exhibit
3 number on that big Post-It and take a picture of it and
4 send us a .pdf file of it please?

5 HEARING OFFICER DODUC: Thank you, Mr. Mona. And
6 then Mr. O'Laughlin can actually see it.

7 MR. O'LAUGHLIN: I put on my glasses.

8 Can you put Exhibit 58 up again please, the San
9 Joaquin River Basin? Thank you.

10 KATHY MROWKA, BRIAN COATS AND JEFFREY YEAZELL

11 CROSS-EXAMINATION BY MR. O'LAUGHLIN

12 FOR SAN JOAQUIN TRIBUTARIES AUTHORITY

13 AND CITY AND COUNTY OF SAN FRANCISCO

14 BY MR. O'LAUGHLIN:

15 Q. My questions are directed to any of the three of
16 you who wish to respond. And I'm trying to get at what
17 is the best available factual data you could have
18 available when you were making your determinations. So I
19 want to focus on the San Joaquin River Exchange
20 Contractors. Are you familiar with the San Joaquin River
21 Exchange Contractors?

22 A. (Ms. Mrowka) Somewhat, yes.

23 Q. So if I look at this chart that's solely based on
24 the San Joaquin River Basin, is the San Joaquin River
25 Exchange Contractor demand depicted in June of 2015?

1 A. (Mr. Coats) As I explained to Mr. Kelly earlier,
2 since the legend references the full natural flow station
3 at Millerton, it would.

4 Q. So do you know as we sit here today or can you
5 access, looking at this demand chart in June, my
6 understanding would be is that there would be a number
7 associated with the demand for the San Joaquin River
8 Exchange Contractors. Could you tell us what that is?

9 A. I can't tell the exact demand, but it's in the
10 spreadsheet.

11 Q. Can you look at a spreadsheet, Mr. Yeazell, and
12 tell us what -- what the demand was for the San Joaquin
13 River Exchange Contractors would be in June of 2015?

14 A. (Mr. Yeazell) It would take a while to pull that
15 out, but it is possible.

16 MR. O'LAUGHLIN: Could we -- and I ask your
17 indulgence. I normally don't want to delay things.
18 Maybe the break that you were looking for, we could take
19 a five-minute break and Mr. Yeazell could look that up?
20 Because the number is important to understand the graph
21 and what occurred with the demand side on the San Joaquin
22 River Basin. Is that okay?

23 HEARING OFFICER DODUC: Let's go ahead and take
24 that five minutes. Thank you.

25 MR. O'LAUGHLIN: Thank you.

1 (Off the record at 2:59 p.m.)

2 (On the record at 3:10 p.m.)

3 HEARING OFFICER DODUC: Mr. O'Laughlin, please
4 resume your recross.

5 MR. O'LAUGHLIN: Thank you very much.

6 BY MR. O'LAUGHLIN:

7 Q. Did you have an opportunity to ascertain the four
8 exchange contractor member units demand on chart 58?

9 Can you put 58 back up on the screen please?

10 HEARING OFFICER DODUC: That's Mr. Buckman who
11 has to take the long way around.

12 MR. O'LAUGHLIN: Wait, there's no -- 58 please.
13 Thank you. Okay.

14 BY MR. O'LAUGHLIN:

15 Q. Do you have an answer for us?

16 A. (Mr. Yeazell) So for June the exchange
17 contractors' demands, and these are reported by -- in
18 their 2014 demands from their information order came out
19 to 92,753 acre feet.

20 Q. Equates to how much in CFS, about 1,500?

21 A. About 1,500 or so.

22 Q. Now in -- on this demand chart, then if the
23 exchange contractors' demand is depicted -- and you
24 included it all as riparian demand; is that correct?

25 A. Yes.

1 Q. Okay. And they would be taking 1,500 CFS off the
2 San Joaquin River to meet their demand in June of 2015;
3 correct, based on this chart?

4 A. Yes.

5 Q. So I'm going to try and reconcile something here.
6 I called up my friend Steve Chedester yesterday and I
7 asked him when they got their water. And he responded,
8 "The release quantities we received from Millerton
9 Lake" --

10 HEARING OFFICER DODUC: Mr. O'Laughlin, who is
11 this you're referring to, and why are you introducing his
12 testimony?

13 MR. O'LAUGHLIN: I'm not introducing it, I'm just
14 asking a question.

15 MR. TAURIAINEN: And --

16 MR. O'LAUGHLIN: You'll see. Just bear with me
17 for two seconds.

18 MR. TAURIAINEN: Hearing Officer, the --

19 HEARING OFFICER DODUC: So ask your question
20 please.

21 MR. O'LAUGHLIN: So the question includes a
22 quote, and I want to know if he agrees with this or not.
23 So this is from Steve --

24 HEARING OFFICER DODUC: Go ahead.

1 MR. TAURIAINEN: The Prosecution Team objects to
2 the hearsay that's being attempted to be introduced.

3 MR. O'LAUGHLIN: Well, yeah, but this whole
4 hearing --

5 HEARING OFFICER DODUC: All right. I'll take it
6 under advisement.

7 MR. O'LAUGHLIN: Thank you. It's a real simple
8 question. So Mr. Chedester denoted to me in an email --

9 HEARING OFFICER DODUC: Actually, you don't have
10 to go on that. Just read the statement and ask him if he
11 concurs.

12 MR. O'LAUGHLIN: Right. That's what I'm going to
13 do.

14 HEARING OFFICER DODUC: Just read it, yes.

15 MR. O'LAUGHLIN: Well, I just wanted to make
16 sure, because people didn't seem like they understood who
17 it was from.

18 BY MR. O'LAUGHLIN:

19 Q. "The release quantities we received from
20 Millerton Lake did not begin until mid-July -- mid-July."

21 So how is that this chart depicts a supply and a
22 demand to the San Joaquin River Exchange Contractors in
23 June that they never used from the San Joaquin River?

24 HEARING OFFICER DODUC: Mr. Tauriainen, were you
25 about to object? I saw you reaching for your microphone.

1 MR. TAURIAINEN: Again, that there is hearsay,
2 I'll restate that objection. It sounds like he's
3 testifying as to the contents of a document that he could
4 submit if he wants to submit his evidence, so that's the
5 secondary evidence rule. And also I think he's assuming
6 a fact that's just not in evidence that's stated in this
7 purported email. And it's irrelevant.

8 HEARING OFFICER DODUC: Well, Mr. O'Laughlin,
9 unless you can restate, I will ask you to move on.

10 MR. O'LAUGHLIN: Oh, no. I'll state it another
11 way.

12 BY MR. O'LAUGHLIN:

13 Q. Did any -- did either -- any of you call the San
14 Joaquin River Exchange Contractors in June of 2015 and
15 ascertain if, in fact, they were diverting water from the
16 San Joaquin River Basin -- the San Joaquin River in the
17 amount of 1,500 CFS?

18 A. (Ms. Mrowka) What we received from the San
19 Joaquin River Exchange Contractors was a letter telling
20 us their diversions under riparian right.

21 MR. O'LAUGHLIN: One other thing I wanted to get
22 cleared up, based on the best evidence, and we talked
23 about this a little bit and so we'll try to focus in on
24 this, on Exhibit, I think it's 47, which is the chart
25 that has all the demand in it, or is 48? I forget which

1 one it is. It might be 47. Oh, there we go. No, make
2 it the -- it's the Sacramento-San Joaquin-Bay Delta one.
3 It's the next -- oh, there we go. Thank you very much.

4 BY MR. O'LAUGHLIN:

5 Q. And anyone can answer this question.

6 So if I was looking at this chart, and I'm still
7 trying to figure it out from your testimony on Monday and
8 then your recross from today, how -- how would this chart
9 change if you had not changed the pre-'14 riparians to
10 all riparians?

11 Or let me ask it a different way.

12 Would the riparian demand that's depicted in June
13 under this chart be decreased if you had not changed all
14 pre-'14 -- people who reported pre-'14 riparian rights to
15 all riparians for June of 2015?

16 A. (Mr. Coats) Yes, it would be different?

17 Q. And would the total demand number thus come down
18 for the chart?

19 A. No. The total statement demand would be the
20 same.

21 Q. But the -- the ability for other pre-'14
22 appropriators, depending on where they are in the pecking
23 order, they may be entitled to take water; correct?

1 A. If the - if an amount was reduced under the
2 riparian block, then if the statement demand being the
3 same value, of course, the pre-'14 amount would expand.

4 Q. This will sound like a really silly question, but
5 bear with me.

6 I'm looking at these charts and graphs. And
7 we've been talking in hundreds of CFS and thousands of
8 CFS. Can you tell me, based on the thickness of these
9 lines, what the margin of error is by the line itself?

10 A. No. We don't actually have the -- I mean, the
11 reason we have the thickness of the lines drawn as is, is
12 for aesthetic purposes. Otherwise it's very hard to
13 read.

14 (Ms. Mrowka) Yes, are actual work is based on our
15 spreadsheets. It's numeric.

16 MR. O'LAUGHLIN: Thank you. I have no further
17 questions.

18 HEARING OFFICER DODUC: Thank you, Mr.
19 O'Laughlin.

20 Department of Water Resources?

21 MS. MCGINNIS: We don't have any questions.
22 Thank you.

23 HEARING OFFICER DODUC: State Water Contractors?

24 MS. ANSLEY: We don't have anything, as well.
25 Thank you.

1 HEARING OFFICER DODUC: Westlands?

2 MR. WILLIAMS: Nothing further.

3 HEARING OFFICER DODUC: Westlands?

4 MR. WILLIAMS: Phil Williams with Westlands.

5 Nothing further. Thank you.

6 HEARING OFFICER DODUC: All right. Did you want
7 to ask your questions now or after they do their five
8 minutes?

9 MR. SATKOWSKI: I'm ready to go.

10 HEARING OFFICER DODUC: Okay. Go ahead.

11 MR. SATKOWSKI: Great. Could you put up Exhibit
12 WR-52?

13 BRIAN COATS AND JEFFREY YEAZELL

14 RECROSS EXAMINATION BY MR. SATKOWSKI

15 FOR THE STATE WATER BOARD

16 BY MR. SATKOWSKI:

17 Q. Mr. Coats, earlier today you had -- you had
18 mentioned that the -- the daily full natural flow
19 information shown on Water Right WR-52 was the best
20 supply data that you had available; is that correct?

21 A. (Mr. Coats) That's the best supply information
22 looking hindsight. But as we're in -- as we're actually
23 putting out notices, we don't have the forward-looking
24 daily FNF. We only have the monthly FNF forecast. So
25 the month -- the best information we have, as Ms. Doduc

1 indicated, as of today is the daily FNF because we know
2 that data. At the time the notices are issued we don't
3 know what the flow is going to be and we can't project
4 daily FNF. That's why we use the monthly forecasts.

5 Q. Where in your exhibits does this -- this data
6 reside for the -- and when I mean data, I mean the data
7 full natural flow?

8 A. That would be in the spreadsheets that Jeff
9 Yeazell can answer to.

10 (Mr. Yeazell) It's WR-70-something. I don't have
11 the number directly.

12 Q. So the -- the full natural flow data that's shown
13 as blue in WR-52 is located in an Exhibit 70-something?

14 A. Yeah. The master -- the master supply data is
15 in -- I compile it in one -- one -- one Excel Workbook.

16 HEARING OFFICER DODUC: If we put up the list of
17 exhibits --

18 MR. YEAZELL: Yeah. If you pull up the list I
19 can --

20 MS. KUENZI: Michael, if you try 72, let's see if
21 that's familiar.

22 MR. YEAZELL: Yeah, that's it.

23 BY MR. SATKOWSKI:

1 Q. And, Mr. Yeazell, so -- so where -- which data is
2 referred to as the daily full natural flow data, just so
3 we can be clear?

4 A. (Mr. Yeazell) Yeah. I have it split up between
5 the -- the Sacramento stations and the San Joaquin
6 stations. You can see there the two tabs on the left.
7 One -- so I have the CDEC daily FNF dash SAC, and CDEC
8 Daily FNF-SJ, so the -- the -- so we're looking at the
9 tail end of the -- the data. So the left columns, the
10 far left columns are the -- the actual data from the CDEC
11 websites.

12 Q. And so what -- what column would we use for the
13 total?

14 A. The total for which? Refresh my memory. We were
15 looking at 50 -- the graph we were looking at.

16 Q. 52, WR-52.

17 A. And the comprises which -- I don't have all this.
18 Okay. The Sacramento-San Joaquin? Okay. So we go back
19 to -- that would be the SJ six plus Sac. four column.
20 Yeah, right where your mouse is.

21 Q. Okay. Thank you.

22 A. You're welcome.

23 HEARING OFFICER DODUC: Mr. Buckman?

24 JEFFREY YEAZELL

25 RECROSS EXAMINATION BY MR. BUCKMAN

FOR THE STATE WATER BOARD

1
2 BY MR. BUCKMAN:

3 Q. Quick question for you, Mr. Yeazell. Is there
4 any reason why this data in this chart in this particular
5 cell -- column would be different from the data in a
6 previous spreadsheet, say in WR-77?

7 A. (Mr. Yeazell) It shouldn't be. Actually, that --
8 that's where -- that's where I keep the data. And
9 whenever I make a new analysis I just copy the daily FNF
10 for the appropriate watersheds over into the analysis
11 spreadsheets, so they should be the same.

12 Q. We're looking at June 7th. It looks like the
13 total would be 11,292; is that correct?

14 A. Correct.

15 Q. So looking at WR-77, on June 7th it looks like
16 the total monthly FNF you have here is 11,337 -- oh, the
17 daily, daily. It's the daily FNF is 11,337, which is
18 slightly different.

19 So could you explain what the discrepancy is?

20 A. That could be when -- you know, if there was
21 possibly -- you know, there's -- it depends on the date
22 when I pull the data. Once I create a graph it may -- I
23 may have created so -- so close to that period where the
24 numbers may have been adjusted a little bit, so --

1 Q. So the most accurate data would be where you just
2 showed us previously?

3 A. Correct, but I, you know, I tried to timestamp
4 the data we had at the time that I created that
5 particular spreadsheet, so it was current at that time.
6 As I mentioned many times that, you know, these are
7 living documents and they -- supplies and demands do
8 change slightly over -- over time.

9 Q. Can you point out the timestamp, where that's
10 located?

11 A. I wasn't being that literal, but -- so if the --
12 usually I go by the time it was saved or as far as the --
13 the file was saved or --

14 MR. TAURIAINEN: I might offer --

15 MR. YEAZELL: -- the demand is -- the demand is
16 based on whatever the date the spreadsheet is.

17 MR. TAURIAINEN: If I -- if I might offer just a
18 suggestion? The witness has --

19 HEARING OFFICER DODUC: Sure, Mr. Tauriainen.

20 MR. TAURIAINEN: Yes. Sorry. Andrew Tauriainen,
21 Office of Enforcement.

22 The witness has a copy of his case in chief Phase
23 1 testimony in front of him. And that document might
24 allow him to refresh his memory as -- as to the date
25 stamp of this particular exhibit, which is WR-77.

1 MR. YEAZELL: So WR-77 was June 10th or June --
2 yeah, June -- June 10th.

3 HEARING OFFICER DODUC: Anything else, Mr.
4 Buckman?

5 MR. BUCKMAN: One last question.

6 BY MR. BUCKMAN:

7 Q. And I'm pretty sure you went over this, and I
8 just want to be absolutely clear.

9 For the daily full natural flow calculations, did
10 you make any alterations or add any additional flows to
11 those numbers?

12 A. (Mr. Yeazell) The only alterations I did to the
13 daily full natural flow were when occasionally they were
14 reported negative in CDEC. I -- if they reported
15 negative, I converted those to zero. And that -- that
16 actual benefits the -- that increases the flow. But it's
17 kind of impossible to have a negative FNF.

18 Q. Other --

19 A. Other than that -- and that, we saw that a lot
20 during the -- during the summer months.

21 But as far as any other like other additions from
22 other sources, no, no changes.

23 MR. BUCKMAN: Thank you.

24 HEARING OFFICER DODUC: Any other questions? All
25 right.

1 Not per party, Mr. Kelly, et al, who is your
2 wrap-up speaker? Five minutes in favor of the motion.

3 CLSOINGG ARGUMENT IN FAVOR OF THE MOTION

4 BY MR. KELLY

5 FOR BYRON BETHANY IRRIGATION DISTRICT

6 MR. KELLY: Thank you, Hearing Officer Doduc and
7 Spivy-Weber, and Hearing Team.

8 I'm kind of taken back now to my -- my opening
9 statement and the frustration that I expressed in my
10 opening statement. And I, you know, I felt like we've
11 been banging on the table and banging on the door for
12 eight months now to understand and have input and be able
13 to get people to recognize the source of supply that's
14 available to some of these folks so they can divert in
15 the worst drought ever or one of the worst droughts ever
16 and the worst water supply situations ever when there was
17 what we thought was water available at our point of
18 diversion.

19 And so the folks that were here Monday and that
20 were here this morning were fighting for their lives this
21 year. And in doing that I -- and if we're going to -- if
22 we're going to look to punish them for doing that, I
23 think we better take a really hard and close look at the
24 evidence that we're using to hang them out to dry,

1 because that's what this proceeding would do, it would
2 hang them out to dry.

3 And -- and what you've heard was that -- that the
4 best evidence that the Prosecution Team relied on was
5 full natural flow. And full natural flow consists of, as
6 Mr. Nemeth explained, computed figures up in the Sierras
7 at rim stations that, you know, don't include downstream
8 contributions to the supply and there's no adjustments
9 made, and it's just this kind of theoretical number.

10 And then we have the dailies that don't include
11 return flows, that don't include discharges, that don't
12 include return flows from groundwater use. None of that
13 actual real water shows up in full natural flow numbers.
14 It's not in dispute. It's not in dispute.

15 You also heard no evidence about -- about the
16 source of supply that these folks have accessed for 100
17 years, and that's the -- the water that remained in the
18 Delta. And that was one of the things that -- that the
19 Hearing Officers said that they were kind of interested
20 in learning about in this proceeding through the case in
21 chief. And not only did you hear no evidence about what
22 quantity would be contributed by that source of supply,
23 you actually heard no evidence with respect to why it was
24 excluded. And so you should be asking yourself that.

1 If this is really about the best evidence that
2 was presented in the case in chief to determine whether
3 there was sufficient water, sufficient real water, not
4 theoretical, not paper water, real water available for
5 the Byron Bethany Irrigation District and for West Side,
6 you have to look at all of those supplies.

7 BBID is accused of taking 1,800 CFS at a time in
8 June when the full natural flow says that water wasn't
9 available. Mr. Coats just testified that the Sac.
10 Regional Facility which discharges into the Delta
11 contributed 10,000 acre feet of water into the Delta.
12 BBID is only accused of taking 20 percent of that flow,
13 which isn't available to anybody else. It's not
14 available to riparians.

15 I'm reminded it was 1,800 acre feet that BBID is
16 accused of taking.

17 But -- but those are the sources of supply. If
18 you're going to try to punish these people and if you're
19 going to try to cut off their ag supplies for an entire
20 summer when they've got crops in the ground, when there
21 are truck crops in the ground that need one or two more
22 irrigation cycles to get them out, you better make sure
23 it's right. You owe it to them. The Division of Water
24 Rights owes it to them.

1 Now maybe the full natural flow concept is great,
2 like I said, for a planning level and you look at, you
3 know, these big watershed-wide issues. But if you're
4 going to kind of drill down and accuse people of stealing
5 water, I think that we really need to make sure that
6 we've considered the entirety of the source of supply,
7 that we have considered the appropriate demands on that
8 supply.

9 You heard Mr. Coats testify that as -- and in his
10 opinion as an engineer, he would have removed all the
11 data that couldn't be met from subwatersheds where the
12 supply was insufficient, but it wasn't done. Now I don't
13 fault Mr. Coats, Mr. Yeazell or Ms. Mrowka for that
14 because they didn't make the decisions, but somebody made
15 the decisions and it was excluded. And so supply was
16 omitted, demand was overstated, and it painted a picture
17 that you see in those graphs that wasn't real. It wasn't
18 real.

19 And we know it wasn't real because, like we
20 looked at the one chart in March and April when --
21 when -- when supply -- supplies were only ten percent of
22 the demand for post-'14 rights and everybody was
23 diverting to storage. How can that possible be? It can
24 possibly be because the data that we looked at, while it
25 might be useful for some purposes, appears to not be as

1 useful for the -- for the purpose to which it was put for
2 this proceeding. And so there's no dispute that a lot of
3 the supply was excluded, the demand was overstated. And
4 if that's the best evidence it can't be sufficient enough
5 to impose the fines and issue a cease and desist order in
6 this -- in this case.

7 Thank you.

8 HEARING OFFICER DODUC: Mr. Tauriainen, your five
9 minutes.

10 CLOSING ARGUMENT IN OPPOSITION TO THE MOTION

11 BY MR. TAURIAINEN

12 MR. TAURIAINEN: Thank you, Hearing Officers and
13 Members of the Hearing Team.

14 The issue that's before you now is this motion
15 for nonsuit. What I just heard was five minutes of
16 argument that is really their case in chief, which has
17 not yet been presented. If any of that is interesting
18 and worthy of further explanation, we should allow their
19 case in chief to proceed.

20 But I want to talk about what the motion is, the
21 nonsuit standard. There is no standard that applies in
22 this proceeding for a nonsuit. The two sides have
23 suggested that portions of the Code of Civil Procedure
24 might be informative here.

25 And where are we here in this proceeding?

1 We've had the case in chief evidence from the
2 Prosecution. We haven't had the Prosecution's full Phase
3 1 evidence yet. We haven't had the rebuttal. We haven't
4 had any of the other evidence by any of the other parties
5 submitted.

6 The -- the standard that is best applied here is
7 the 581(c) standard which is a deferential standard to
8 the plaintiff. Code of Civil Procedure 581(c), that's
9 what I -- when I said that all the indulgences need to be
10 made in favor of the Prosecution Team and all the
11 conflicting evidence should be ignored.

12 I want to also talk about the standard of the
13 evidence here, which was raised in the opening arguments
14 at the -- at the beginning of the morning. This has been
15 briefed but I just want to simply state, the standard
16 here is the preponderance of the evidence. We've talked
17 about what that was. I mentioned it in the opening, I've
18 briefed it. There is no authority that holds otherwise
19 in this type of proceeding. It does not involve
20 revocation of a vested right or anything like that. It's
21 simply an enforcement action as to whether or not a party
22 or two parties took or threatened to take water in excess
23 of their rights.

24 This -- this discussion about the best evidence
25 is -- is interesting and somewhat perplexing because it's

1 not an actual standard that applies to proceedings, to
2 these proceedings or really any other. In legal parlance
3 the best evidence is a rule regarding admissibility
4 regarding of certain types of evidence, and maybe
5 excluding certain types of evidence.

6 I think the term best evidence here has been
7 appropriated from some opinion that Ms. Mrowka gave in
8 her case-in-chief testimony where she said -- I believe
9 I'm going to kind of probably mis-paraphrase even, but
10 that the -- the supply and demand data used to support
11 the May 1st and June 12th notices was the best evidence
12 available. And that is now attempting to be imputed into
13 a standard of evidence that the Prosecution need -- Team
14 needs to meet. But the standard really is the
15 preponderance of the evidence, and that asks whether the
16 evidence submitted is more likely than not to support the
17 facts that we're asserting. The same standard applies to
18 the parties who are going to be submitting evidence in
19 their case in chief.

20 I want to talk about the cases in chief because
21 we haven't seen the other side's case in chief yet, yet
22 we spent almost all this afternoon or a significant
23 portion of this afternoon having these three witnesses
24 being cross-examined on issues raised in the other side's
25 case in chief. Those issues that are raised in the other

1 side's case in chief are addressed in the Prosecution
2 Team's rebuttal. That essentially muddies the record,
3 especially with respect to this motion that's pending
4 right now. And it's fundamentally unfair that the
5 Prosecution really couldn't present any of the rebuttal
6 testimony that really is at issue and rebuts the
7 assertions that were addressed in the cross-examination.

8 Finally, the cross-exam that the -- the Delta
9 parties did regarding their own case in chief, and the
10 rebuttal testimony, is irrelevant for the purposes of
11 this motion which really looks at the evidence that was
12 submitted by the Prosecution in its case in chief. And
13 it's certainly premature.

14 But again, if you think that any of the arguments
15 that you just heard from Mr. Kelly or any of the issues
16 that were raised in the redirect or recross examination
17 from the Delta parties is interesting and potentially
18 relevant to the issues in this proceeding, then allow
19 Phase 1 to continue. Hear their case in chief, and then
20 hear both parties' rebuttal.

21 The Prosecution Team asks you to please deny this
22 motion for a nonsuit. Thank you.

23 HEARING OFFICER DODUC: Thank you, Mr.
24 Tauriainen, now that I've actually managed to learn how
25 to say your name.

1 All right, a couple of quick questions.

2 Mr. Kelly, were you -- or Mr. Kelly and Mr.
3 Tauriainen, were you able to work out the conflict with
4 respect to -- or the Department of Water Resources, with
5 respect to Dr. Paulsen and Dr. Hutton? And before you
6 answer, I need to remind you that we did ask -- these
7 days were known in advance. We did ask for any heads-up
8 in terms of conflict. I'm told we did not receive any
9 notification of conflicts. I'm a bit perturbed that now
10 your witnesses are not available. But in any case, have
11 you been able to resolve that?

12 MR. KELLY: We have not had time to resolve that
13 and -- we have not.

14 HEARING OFFICER DODUC: Okay. All right. Let's
15 do this, let me just say again that I appreciate everyone
16 for going with the flow. I know we threw a curve today
17 and we redirected and changed what was supposed to
18 happen, but I think it was important for us. And we
19 appreciate all the efforts that everyone put into today.
20 We're going to take everything under advisement.

21 I am suspending the hearing until Monday. Unless
22 you hear otherwise in terms of an official ruling from
23 us, be prepared Monday to continue with the hearing,
24 starting with BBID's case in chief -- actually, I'm
25 sorry, BBID, West Side, et al, case in chief as you

1 outline and proposed it earlier this morning. Was it
2 only this morning? Earlier this morning.

3 MR. KELLY: I will. Dan Kelly again.

4 I will. And I've actually already conveyed to
5 both Mr. Tauriainen and Ms. Ansley, and I'll convey to
6 the others that in order to try to make this go a little
7 more orderly -- we kind of hit that stumbling block
8 yesterday morning -- I'm actually going to email them
9 with our proposal with the panels so we can let everybody
10 try to plan and schedule appropriately.

11 HEARING OFFICER DODUC: That would be great. And
12 may I also ask your indulgence for the transcript for
13 today please?

14 MR. KELLY: If -- if I may, and I apparently ran
15 afoul of -- of the prohibition on me distributing the
16 transcript like I did yesterday. And so -- so the
17 Hearing Team knows and so everybody in the room knows,
18 Kathy Davis, who has been sitting here and getting us
19 those transcripts so timely, was actually hired by my
20 firm and by the Delta parties to enable us to have daily
21 transcripts of the proceedings so we could refer to them.
22 Ms. Davis is not here on behalf of the Board or the
23 Attorney General's Office of anyone else. And so we are
24 paying for -- for Mrs. Davis's time and transcripts.

1 And so if anybody wants transcripts, a separate
2 arrangement is going to have to be made with Ms. Davis
3 to -- to be able to get a copy of those transcripts. And
4 I'll email everybody about getting a sharing arrangement
5 for her daily fees, if people want to participate in
6 that. But I'm -- I'm happy to make that offer to split
7 costs, so long as everyone makes their own arrangements
8 to obtain copies of those dailies from -- from Kathy
9 Davis.

10 HEARING OFFICER DODUC: Thank you, Mr. Kelly.

11 Yes, Ms. Ansley?

12 MS. ANSLEY: Yes. I had maybe misunderstood Mr.
13 Kelly this morning. So you're saying this -- you're
14 suspending the hearing until this coming Monday?

15 HEARING OFFICER DODUC: Yes.

16 MS. ANSLEY: Because Mr. Hutton is in Indiana
17 taking care of some personal family matters next week.
18 So we anticipate having quite a problem with next week.
19 I know that Mr. Kelly and I had talked earlier about the
20 subsequent Monday, so I think I was maybe not listening
21 as well.

22 HEARING OFFICER DODUC: I again will ask the two
23 of you to work it out. And if -- if Dr. Hutton's
24 presence is necessary for Dr. Paulsen's testimony, is

1 there any way, Mr. Kelly, that your witnesses could be
2 taken out of order?

3 MR. KELLY: I could certainly attempt to
4 accommodate that. I don't know Dr. Hutton's
5 availability. I understand that he's not available this
6 Friday or all of next week. And I'd have to check with
7 Dr. Paulsen on her availability.

8 While I appreciate the admonition that the Chair
9 gave, I -- you know, when we are trying to -- you know,
10 these -- it's very expensive to have consultants, as you
11 all know. And we've been paying our consultants to be
12 here every day this week in anticipation of getting them
13 on. And I've not asked them to be available every day
14 for the entire two-week period because I think we all
15 expected to be through Phase 1 by the end of this week.
16 So I do apologize for the conflict that it's caused. But
17 I hope that it's at least somewhat understandable, given
18 what's happened in the proceedings.

19 I'll -- I'll work with Ms. Ansley and see if
20 there's a day in common. I'm going to have the same
21 problem. I need -- I need Dr. Paulsen here when Mr.
22 Hutton provides his rebuttal, too, and so --

23 HEARING OFFICER DODUC: I will leave the two of
24 you to work it out and submit something to us as part of
25 your proposal.

1 MR. KELLY: Thank you.

2 HEARING OFFICER DODUC: Ms. Ansley?

3 MS. ANSLEY: Thank you very much for that. And I
4 would like just to offer, as well, right now that -- that
5 we do know that Mr. Hutton is available the following
6 week, that he will be back from his --

7 HEARING OFFICER DODUC: Great.

8 MS. ANSLEY: -- Monday morning, so --

9 HEARING OFFICER DODUC: Thank you.

10 MS. ANSLEY: -- thank you.

11 HEARING OFFICER DODUC: And, Mr. Morat, I saw
12 your hand and I can anticipate now, we promised you
13 Friday, if I recall correctly.

14 MR. MORAT: Correct. I have plans to be out of
15 town next week.

16 HEARING OFFICER DODUC: Are you available the
17 week after?

18 MR. MORAT: Perhaps not until the 9th or after
19 that Friday.

20 HEARING OFFICER DODUC: All right.

21 MR. MORAT: Heard today.

22 HEARING OFFICER DODUC: Sorry.

23 MR. MORAT: My -- my written testimony, the only
24 exhibit is 815 words. I could be heard today.

25 HEARING OFFICER DODUC: Comments from parties?

1 MR. KELLY: Yeah. Dan Kelly for BBID.

2 I do appreciate the difficulty. I'm not ready to
3 cross-examine Mr. Morat today. The earliest I
4 anticipated him being to the stand was Friday. And so
5 I'm not prepared for that cross-examination.

6 HEARING OFFICER DODUC: All right. Mr. Morat, my
7 apologies to you. Because of the changes in proceedings
8 we will have to revisit with you. Just as we are
9 extending Mr. Kelly and Ms. Ansley the opportunity to try
10 to resolve scheduling conflict, we will do the same with
11 you. We will not be taking your testimony either today
12 or Friday.

13 MR. MORAT: Okay.

14 HEARING OFFICER DODUC: We'll try to find another
15 time, should this proceeding continue, the week after
16 next week where you might be available.

17 Mr. Williams?

18 MR. WILLIAMS: Thank you. Phil Williams with
19 Westlands.

20 Just in an effort to be helpful, what began a lot
21 of this was yesterday morning in an attempt to understand
22 the timing requirements that would be imposed on the
23 parties as they present their case in chief, whether it's
24 panels and how long -- how long each person gets for
25 that, also implicates the cross-examination time. And

1 I'm not really sure that that's been resolved. So I
2 don't want us to lose sight of that pending ad
3 perpetuating problem.

4 Thank you.

5 HEARING OFFICER DODUC: Hang on.

6 Mr. Tauriainen has been waiting, I believe, to
7 make a comment.

8 THE REPORTER: Your microphone sir.

9 HEARING OFFICER DODUC: Microphone.

10 MR. TAURIAINEN: Sorry about that.

11 It's really unrelated to what Mr. William's is
12 talking about. I just wanted to confirm that the start
13 time Monday would be 9:00 a.m. I didn't jot it down, if
14 that's the --

15 HEARING OFFICER DODUC: It would be 9:00 a.m. --

16 MR. TAURIAINEN: Thank you.

17 HEARING OFFICER DODUC: -- unless you hear
18 otherwise from us.

19 Mr. Kelly?

20 MR. KELLY: Yes. I'm wondering whether -- I will
21 say that our intent is as I expressed yesterday morning,
22 and that is to put as a panel of two, Dr. Paulsen and Tom
23 Burke, and as another panel of two, Greg Young and Nick
24 Bonsignore, and then as an individual, Rick Gilmore.

1 And so perhaps it would be helpful -- I know that
2 you all broke to deliberate about the time issue
3 yesterday a little bit. And so perhaps over the next
4 couple of days, if we could just get a ruling from you on
5 how much time we have for our two panels, and then Mr.
6 Gilmore in total. And then how much time that everybody
7 will have for cross-examination in total, and people can
8 just do with their time as they please. And that way it
9 just gets resolved well ahead of when we actually come to
10 provide testimony.

11 HEARING OFFICER DODUC: Thank you, Mr. Kelly.
12 That's a good suggestion.

13 All right, I think that -- oh, Ms. Spaletta?

14 MS. SPALETTA: This is housekeeping. There were
15 three exhibits that we referenced in cross-examination
16 today that we would like to move into evidence. They are
17 West Side Exhibit 183, West Side Exhibit 184 which is the
18 poster, West Side Exhibit 152-R which is the excerpts of
19 Ms. Mrowka's deposition. And then I also noticed in
20 looking at my notes that we had referenced West Side
21 Exhibit 100 on Monday, and we had failed to move that in.
22 So I'd like to move those four exhibits into evidence
23 please.

24 HEARING OFFICER DODUC: Thank you.

1 (Whereupon the above-referenced exhibits were
2 admitted into evidence by the Hearing Officer.)

3 MS. MCGINNIS: Robin McGinnis, DWR.

4 We didn't see copies of any of these exhibits
5 today. So I would like to wait until we have a chance to
6 see them, see if those --

7 HEARING OFFICER DODUC: Those are pre-submitted
8 exhibits, I believe, or are they?

9 MS. SPALETTA: That's correct. The exhibits that
10 were submitted today --

11 HEARING OFFICER DODUC: Oh.

12 MS. SPALETTA: -- Exhibit 183 was emailed to all
13 the parties on Monday evening in anticipation that it
14 might need to be used. And Exhibit 152-R is simply an
15 excerpt of the full deposition 152, which was previously
16 submitted as a placeholder to all the parties in the
17 original exhibit submissions.

18 HEARING OFFICER DODUC: Ms. McGinnis, I will just
19 note your objection.

20 MS. MCGINNIS: Could you just say what the
21 numbers are again, please, Ms. Spaletta?

22 MS. SPALETTA: Sure. The exhibits from today are
23 West Side Exhibit 183, West Side Exhibit 184, West Side
24 Exhibit 152-R, and West Side Exhibit 100.

1 MS. MCGINNIS: Okay. Thank you. I'll take a
2 look.

3 HEARING OFFICER DODUC: All right. That
4 concludes our proceedings for today. Thank you all very
5 much.

6 * * *

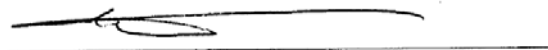
7 (Thereupon the hearing recessed at 3:43 p.m.)
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REPORTER'S CERTIFICATE

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 19th day of April, 2016.



PETER PETTY
CER**D-493
Notary Public

CERTIFICATE OF TRANSCRIBER

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 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.

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.



April 19, 2016

MARTHA L. NELSON, CERT**367