

MOTIONS FOR NON-SUIT/DISMISSAL

BBID, WSID, SJTA, CDWA, SDWA

Oral Argument

March 23, 2016

Motion for Non Suit Test:

- * A motion for non-suit/judgment is used after presentation of a party's case-in-chief when the evidence is legally insufficient to meet the party's burden of proof. [CCP 631.8(a)].
- * Tribunal may weigh the evidence and make inferences and determinations of the credibility of the witnesses, including experts. (*Roth v. Parker* (1997) 57 Cal.App.4th 542, 550, citing *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245,1255 (Jordan))

Motion:

- * Motion for Judgment/Dismissal in favor of BBID in ENF01951 denying the proposed ACL because PT did not prove water was unavailable for BBID during June 2015.
- * Motion for Judgment/Dismissal in favor of WSID in ENF01949 denying the proposed CDO because PT did not prove water unavailable for WSID during May or June 2015.

Elements PT Had to Prove:

1. PT asserted enforcement actions were justified because water was unavailable for WSID starting May 1 and for BBID from June 13-25 (WR-1 Par. 24 ; WR- 4 Par. 24)
2. PT had to establish water was unavailable (Evid. Code sections 500, 550)
 - * PT chose to establish water was unavailable with global water availability analyses (WAA) from May 1, 2015 and June 12, 2015 (WR-7, Mrowka Testimony p. 3, citing to WR47, WR48)
3. PT argued in its opening statement that the enforcement actions were also justified to “protect the rule of priority.” (Tran. 34:18-20)
 - * PT chose not to present any evidence of injury to prior rights.

Burden of Proof

PT argues “**preponderance of the evidence**” standard:

- * If a trier of fact “cannot decide that something is more likely to be true than not true, [the trier of fact] must conclude that the party did not prove it.” (Cal. Civil Jury Instructions, § 200.)
- * “The sole focus . . . is on the *quality* of the evidence.” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324.)

Respondents argue “**clear and convincing evidence**” standard in cases involving important rights:

- * Proof by a “high probability”, rather than the mere probability the preponderance standard requires. (*Utility Consumers’ Action Network v. Public Util. Com. Of Calif.* (2010) 187 Cal.App.4th 688, 698)
- * Proof “so clear as to leave no substantial doubt;” “sufficiently strong to command the unhesitating assent of every reasonable mind.” *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.

Respondents contend the PT failed to meet either burden.

Overview of the Grounds for the Motion:

The evidence submitted in the PT's case-in-chief included:

1. Admissions that the WAA omitted key elements of supply
2. Admissions that the WAA included excess demand
3. Admission that PT did not analyze water availability at the WSID/BBID points of diversion.
4. Admissions that the PT did not update the WAA to include actual demands and supplies, which effected water availability and would have been “best available information”
5. No evidence of injury to prior rights

Supply Omissions in both WR47 and WR48:

- * No consideration of timing for FNF to reach the Delta (211:21-23; Coats)
- * Failure to update supply to account for DWR's reconciled monthly unimpaired flows (which was higher than all forecasts used in WR47, WR48). (Compare to WSID 181, 182; Nemeth 140-146)
- * Omitted abandoned releases of stored water. (179:6-8, Mrowka, WR-47)
- * Omitted treatment plant discharges. (179:14-17, Mrowka, WR-47)
- * Omitted Sacramento River return flows, even though included in 1977. (212:21-213:10, Coats, WR-79 pp. 76-77)
- * Did not include water present in the Delta channels (165:15 – 166:1, Mrowka)
- * Computed return flow and subbasin flows were not depicted in Daily FNF blue supply lines (197:16-25; 198:1-5, Coats)

Overstatements of demand in both WR47 and WR 48:

- * Does not include 2015 actual diversion data, which reduced demand by approximately 2,000 cfs in June. (180:21-24, Mrowka, WR-47; 196:8-24, Coats, WR-47, WR-54).
- * Included demand of North Delta Water Agency served by stored water. (182:16-21, Mrowka, WR-47, WR-48)
- * Included demands on watersheds that could not be met from supply in that watershed. (202:3-204:1, Coats, WR-52).
- * DWR randomly assigned all joint pre-1914/riparian claimants a riparian demand senior to all pre-1914 demands. (243:16-20, Mrowka).
- * Did not include corrections to the Joint Boards demand of 740 cfs. (218:20-219:22, Yeazell, Exh. 77; Exh. 53, Exh. 48)

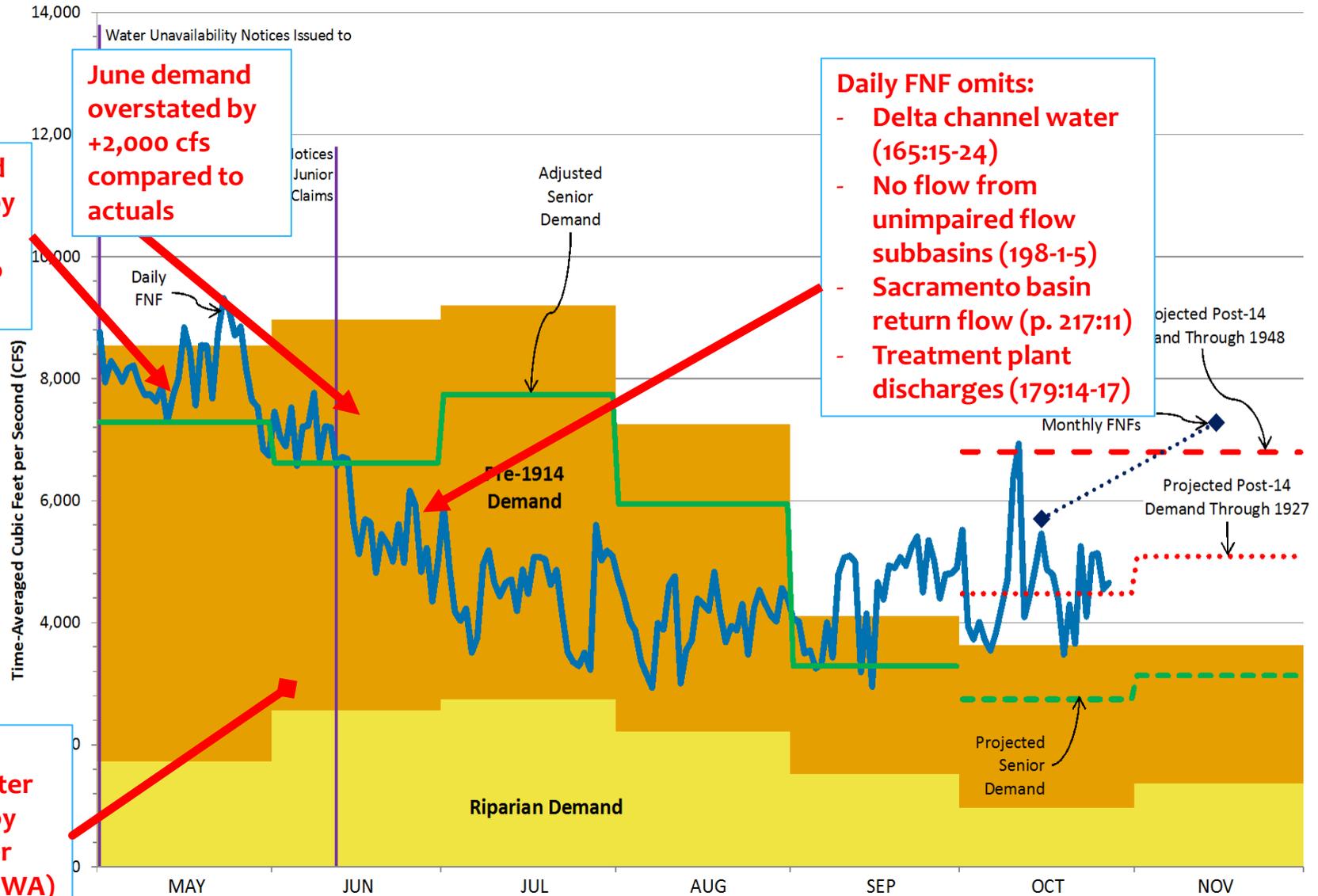
Internal Inconsistencies:

- * The May-1 WAA omits return flows that are included in the June-12 analysis. (216:5-218:4, Yeazell, Exh. 77, Exh. 53, Exh. 48)
- * The May-1 and June-12 WAA include about 740 cfs of excess demand removed a few days later. (WR 253 pp. 81-82; 218:9-219, Yeazell).
- * Supply is depicted as a daily average time step, demand depicted as a monthly time step. (all graphs)
- * FNF forecasts include 2000+ additional supplies, Daily FNF lines exclude this additional supply (all graphs)
- * Depicted demand in staff's WAA treated as hypothetical prior to May 1 (Mrowka 169:4-170:5 ["If they were diverting"]) but actual after May 1 (Mrowka Testimony, WR 7 p. 3 "best available data" on demand") for purposes of curtailment.
- * The after-the-fact graphs show actual 2015 diversions far exceed the PT's depicted supply – which is physically impossible and the PT could not explain. (183:11-186:7, WR 58; see also WR 54)

WR-58

* WR-58

2015 Sacramento River Basin Supply/Demand Analysis with Proportional Delta Demand

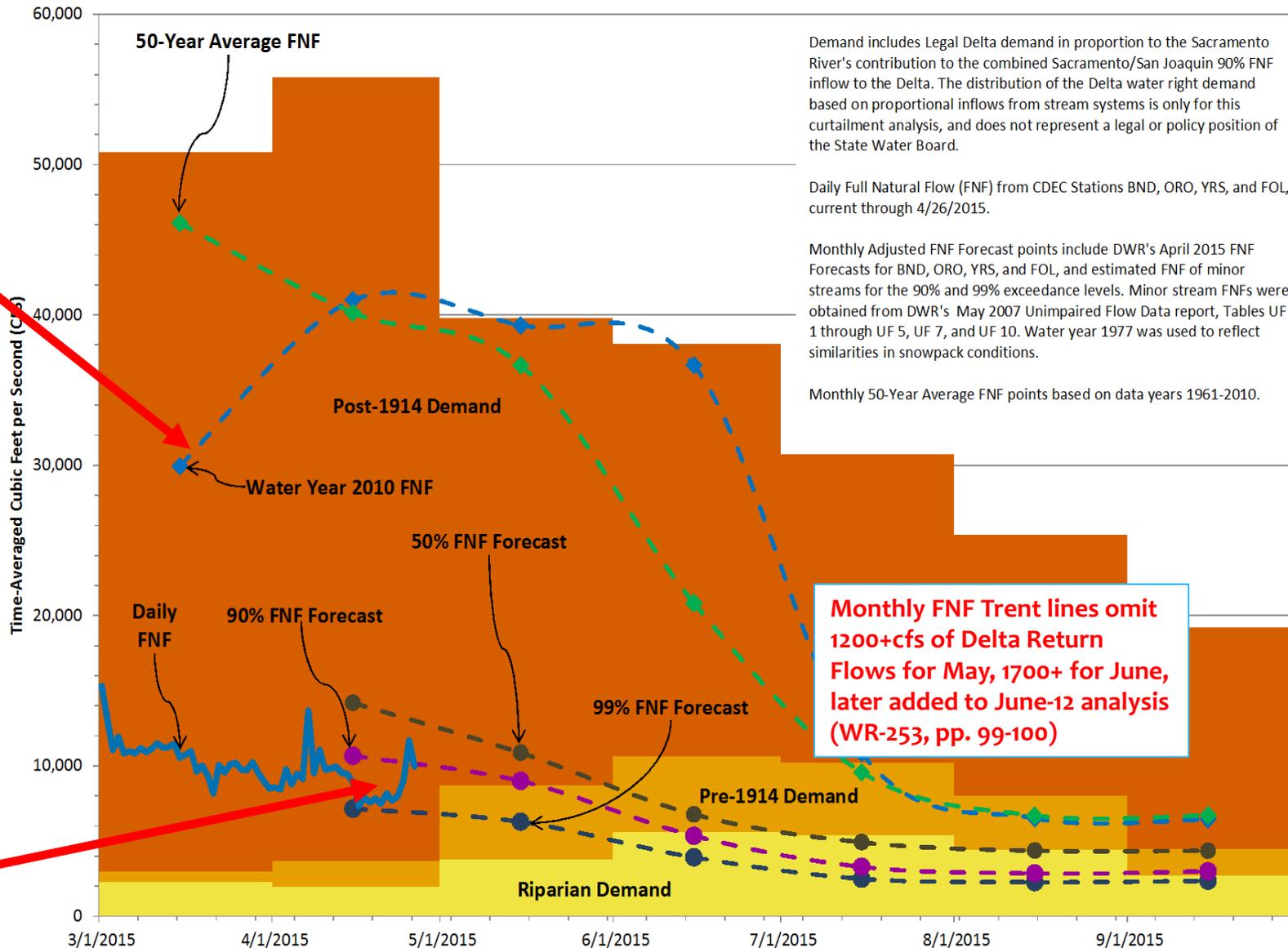


See following page for additional information.

WR-54 Confirms Water Available for WSID

- * When the PT added 2015 Actual Demands to the Chart in October 2015, it confirmed water was available for WSID – even without correcting all other errors. (WR-54)
- * May Daily FNF exceeds actual demand of riparian and pre-1914 rights by more than 1000 cfs
- * WSID has a 1916 License

2015 Sacramento River Basin Supply/Demand



Demand includes Legal Delta demand in proportion to the Sacramento River's contribution to the combined Sacramento/San Joaquin 90% FNF inflow to the Delta. The distribution of the Delta water right demand based on proportional inflows from stream systems is only for this curtailment analysis, and does not represent a legal or policy position of the State Water Board.

Daily Full Natural Flow (FNF) from CDEC Stations BND, ORO, YRS, and FOL, current through 4/26/2015.

Monthly Adjusted FNF Forecast points include DWR's April 2015 FNF Forecasts for BND, ORO, YRS, and FOL, and estimated FNF of minor streams for the 90% and 99% exceedance levels. Minor stream FNFs were obtained from DWR's May 2007 Unimpaired Flow Data report, Tables UF 1 through UF 5, UF 7, and UF 10. Water year 1977 was used to reflect similarities in snowpack conditions.

Monthly 50-Year Average FNF points based on data years 1961-2010.

Omits actual demands (180:21-24; p. 196:2-3;

Daily FNF omits -subbasin unimpaired flows and return flows 2000 cfs+ (199:5) abandoned stored water releases (179:6-8) -treatment plants supplies (180:4)

Monthly FNF Trent lines omit 1200+cfs of Delta Return Flows for May, 1700+ for June, later added to June-12 analysis (WR-253, pp. 99-100)

PT Admitted Errors Misrepresented Water Availability for BBID

- * **After only 2 corrections to the spreadsheet for June, Yeazell acknowledged that the supply line would exceed the demand line. 219:8-22, Yeazell, WR-48).**
- * With the other identified errors, the Hearing Officers cannot conclude “it was more likely than not” that water was unavailable, let alone “that it is so clear as to leave no substantial doubt.”

Transcript Page 219:8-22

* Q: So let's go ahead and look again at the graph,
* Exhibit 48. Now we just went through an exercise where
* we established that if that blue line had been adjusted
* to reflect your return flows of 2,252 CFS that it would
* actually be hovering right there along the top of what
* you depicted as the demand in June.

* Q: Isn't it true that if you'd actually made adjustment of 740 CFS, that that supply line would
* have been clearly above the pre-1914 demand line?

* Yeazell: My understanding is that it was the monthly FNF forecasts that were used for the basis of
* the decisions.

* Q: Mr. Yeazell, I asked you a yes or no question. I'm asking you.

* ..

* Yeazell: I'll say yes.

2015 Combined Sacramento/San Joaquin River Basin Senior Supply/Demand

Daily Full Natural Flow (FNF) from CDEC Stations BND, ORO, YRS, FOL, TLG, MRC, GDW, MIL, MKM, and MHB, current through 6/7/2015.

Monthly Adjusted FNF Forecast points include DWR's May 2015 FNF Forecasts for BND, ORO, YRS, FOL, MIL, GDW, LGR, EXC, MHB, and PAR, and estimated FNF of minor streams for the 90% exceedance level. DWR does not provide 90% exceedance values for MHB and PAR; therefore, the available 50% exceedance values were added to the 90% exceedance forecast values. Minor stream FNFs were obtained from DWR's May 2007 Unimpaired Flow Data report, tables UF 1, UF 2, UF 3, UF 4, UF 5, UF 7, UF 10, and UF 17. Water year 1977 was used to reflect similarities in snowpack conditions.

Return flows were added to the 50% and 90% Adjusted FNF Forecast values as follows: For the San Joaquin Watershed, a percentage of the Riparian demand as used in the 1977 Drought Report (20% in April, 10% in May & June, and 0% in July, August, & September). For the Delta contribution, an assumed 40% of the prorated Riparian and Pre-14 demand was used as return flow.

Delta Riparian Demand includes Riparian-only and combination Riparian/Pre-14 demand for both statements reporting under the Informational Order and those not. Basin Riparian Demand includes Riparian-only and combination Riparian/Pre-14 demand for statements that did not report under the Order, and Riparian-only portion of the demand for statements that did report under the Order.

Delta Pre-14 Demand includes Pre-14-only demand. Basin Pre-14 Demand includes demand from Pre-14-only statements that did not report under the Informational Order, and Pre-14-only portion of the demand for statements that did report under the Order.

Overstates actual 2015 demands (218:8)

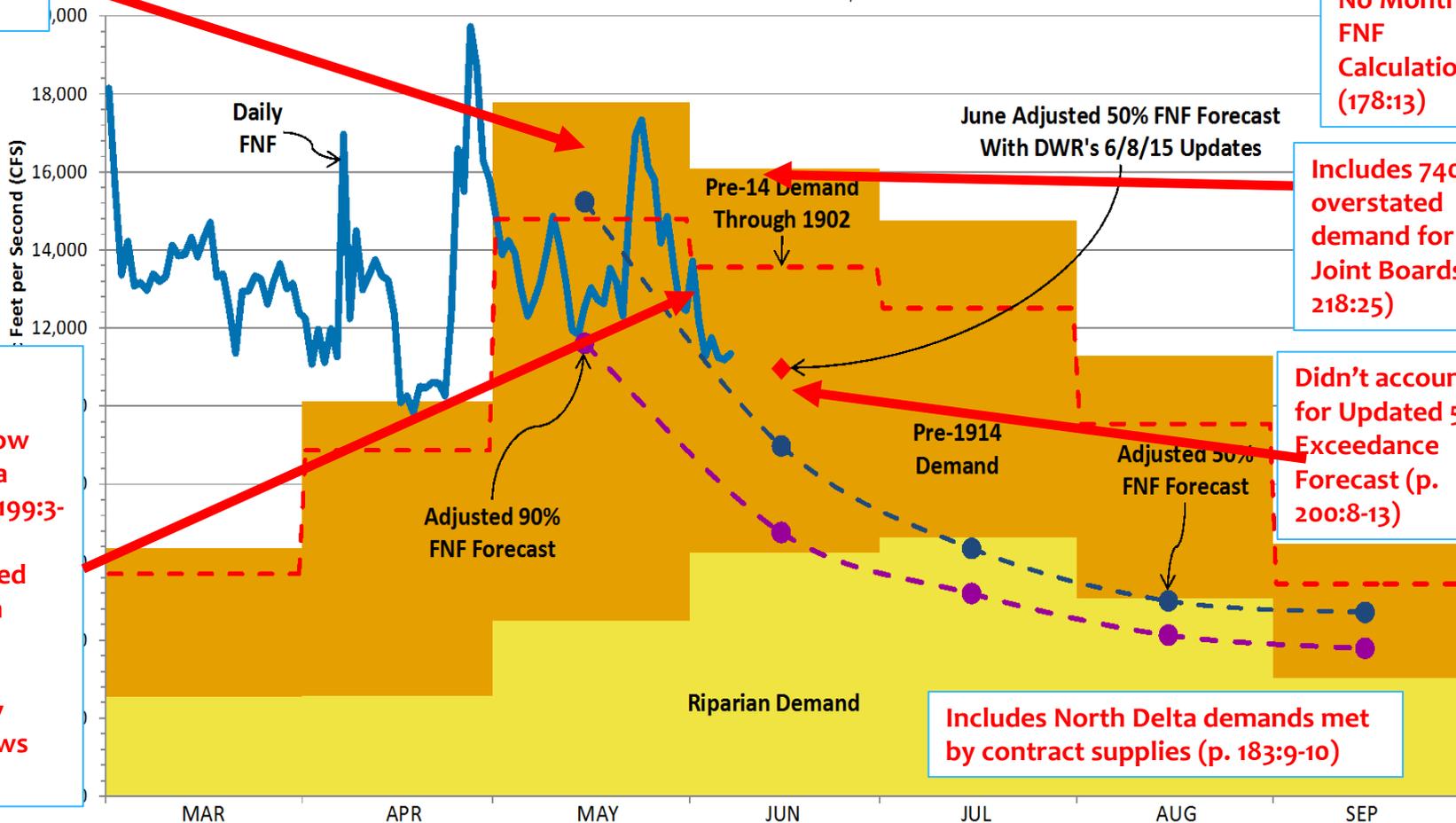
No Monthly FNF Calculations (178:13)

Includes 740 cfs overstated demand for Joint Boards (p. 218:5)

Didn't account for Updated 50% Exceedance Forecast (p. 200:8-13)

Includes North Delta demands met by contract supplies (p. 183:9-10)

Daily FNF omits:
 -Return flow from Delta (Coats, p. 199:3-5);
 -Unimpaired flow basin supply (p. 217:20)
 -Sac Valley return flows (217:11)



The PT's "Expert" Opinions Are Unsupported

- * The PT's proffered "expert" opinion that the water availability analysis was "appropriate" and used the "best available information" is not supported by the testimony. (Mrowka WR-7, p. 3)
- * The PT lead could not explain the specific supplies or demands used in each analysis. (159-160, Mrowka)
- * Mr. Yeazell's foundational spreadsheets were not reviewed or understood by his supervisors. (195:6-16, Coats; 159:17-21)
- * Evidence Code section 412 – How to view weaker evidence when it was within the power of the presenting party to put forth stronger and more satisfactory evidence.

THE PROSECUTION TEAM
PRESENTED NO EVIDENCE OF
INJURY
TO ANY PARTY FROM
BBID AND WSID DIVERSIONS

The Prosecution Team Must Prove Injury to a Senior Right Holder to Establish a Violation of §1052

- * Article X Section 2 abolished common law doctrine that entitled prior right holders to the entire natural flow of a stream.
- * *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 clearly states it is not enough to determine that water is needed for senior water rights.
- * “Whenever water in a watercourse, whether the water is foreign or part of the natural flow, is not reasonably required for beneficial use by the owners of existing rights to that water, those owners cannot prevent its beneficial use by other persons.” *Miller & Lux, Inc. v. Bank of America* (1963) 212 Cal.App.2d 719, 729.

The Prosecution Team Must Prove Injury to a Senior Right Holder to Establish a Violation of §1052

- * Theoretical or technical infringement of riparian rights is not an actionable injury. (*Peabody v. Vallejo* 2 Cal.2d 351, 374-375.) Instead – injury to riparian rights can only result from *material* damage to the right. (Ibid.)
- * A senior user is not entitled to prevent a junior from diverting absent proof of injury. *Tulare Irr. Dist. V. Lindsay Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, CCP Sections 530, 532, 534.
- * The right of a junior appropriator is entitled to protection to its full extent, just as the right of a prior appropriator”. Hutchins, *The California Law of Water Rights* at p. 264, citing *Smith V. O’Hara* (1875) 43 Cal. 371, 375.

There is no testimony regarding injury to prior rights:

- BBID and WSID are only accused of taking water that was needed for appropriators senior to them. Whether or not they took project water was not considered, and not part of what they evaluated. Page 156 lines 21-24, Page 157, Page 240 Lines 5-11.
- The Prosecution Team did not analyze the availability of water at BBID or WSID's point of diversion. Page 160
- The Prosecution Team did not evaluate water availability at the Delta levels at the points of diversion of the two districts, rather, they did a “comparison, which is different” and “not a water availability determination.” Page 210 line 24, 25, Page 211 lines 1-4.

The testimony established:

- The water availability analysis and curtailment were based solely on the water supply analysis that staff conducted on a watershed wide basis. Page 161 lines 5-14.
- The Prosecution Team did not investigate “which parties would have been impacted specifically.” Page 238 lines 24-25, Page 239 Line 1.
- The Prosecution Team did not investigate any individuals for injury. Page 240 lines 3-5.
- Ms. Mrowka admitted that they have no evidence that the failure of WSID or BBID to stop diverting actually harmed another more senior water diverters, they only made the “presumption.” Page 187 lines 5-10, 19-20.

THE WATER AVAILABILITY
ANALYSIS VIOLATES THE RULE OF
PRIORITY

Staff Violated Priority System by assuming seniority of all riparian claimants

- * Upon passing to private ownership, lands contiguous to streams are vested with riparian rights in the streams, subject to . . . appropriative rights already vested. (Hutchins, *The California Law of Water Rights*, 1956, p.180; see also *Wutchumna Water Co. v. Pogue* (1907) 151 Cal. 105, 111.)
- * Thus, riparian rights are subject to whatever appropriative water rights were already vested when title passed to private ownership.
- * The PT's demand analysis inappropriately assumes all riparian water rights are senior to all appropriative water rights.
- * The PT's demand analysis also inappropriately assumed the validity of all claimed riparian and pre-1914 rights for purposes of curtailment and enforcement.

Staff Violated the Priority System

- * Staff testified it allowed junior diverters to continue to divert after curtailments:
 - * SMUD power example: 172:16-176:8, Mrowka, BBID 404
- * Staff testified that under the PT's WAA, any junior rights diverting in March and April 2015 were unlawfully diverting, but staff did not provide curtailment notices during this time, or pursue enforcement. (166:16-171:19, Mrowka; BBID 403)

CONCLUSION

The Prosecution Team's case in chief established that when it issued the May 1 and June 12, 2015 curtailment notices the Division Staff:

- * Had not considered all sources of supply,
- * Had not considered basic delta hydrology,
- * Included excess estimates of demand,
- * Did not consider water availability specific to WSID or BBID, and
- * Did not consider if the WSID or BBID diversions injured any water user.

Instead, the Prosecution Team simply **assumed** that demand outstripped supply, and **presumed**, without evidence, that any diversions would injure more senior water right holders.

The PT failed to present evidence sufficient to support a finding that it was “more likely than not” that water was unavailable for WSID and BBID, let alone that it was a “high probability.”