

Morat Opening Statement - BBID ACL Phase 2

I chose to participate in this hearing in order to advocate for protection of estuarine fisheries. A key need towards that end is absolute compliance with State Water Board decisions and water management.

Additional considerations that prompted me to participate in this hearing were 1) I didn't see any meaningful mention of harm to aquatic resources in the complaint, and 2) I didn't see any other party showing intent to witness to the harm to estuarine aquatic resources. The only reference to harm to public trust resources in the complaint is in paragraph 36: "Moreover, BBID's diversions likely reduced the water available for instream resources and riparian habitat within the Delta during an extreme drought emergency". It appears that this administrative civil liability complaint is all about protecting water rights and negligibly about protecting beneficial uses. The aquatic resources of this once great estuary have, through decades of increasing diversions relative to outflow, been protected far less satisfactorily than society and the Board thinks is occurring. I would prefer that a public resources agency expert on the aquatic resources be participating in my place, but where are they?

More directly I was encouraged to participate by the invitation of the August 19, 2015 Board notice seeking assistance on Key Issue 1: "Whether the State Water Board should impose administrative civil liability upon BBID for trespass and, if

so, in what amount and on what basis" and specifically to sub-issue (a): "What is the extent of harm caused by BBID's alleged unauthorized diversions?"

The source of my information about the time and amounts of diversion from BBID's intake is the Board's complaint. On the issue of water availability/curtailment for BBID's diversion during the June 13 to 25, 2015 period I have little understanding and I make no claim as to whether or not there was a trespass. The fish abundance data I present is from the California Department of Fish and Wildlife monitoring and reporting. My understanding of 2015 drought operations is largely from reading news coverage and State Water Resources Control Board public notices. I am participating in this hearing to improve the record should the Board sustain the finding that a trespass occurred and require an administrative civil liability fine. I am offering participation in the BBID ACL Phase 2 hearing only. I am the sole author of my testimony and I represent no one but myself.

The expert testimony I offer is brief and intended to enter into the hearing record just a few examples of harm to the aquatic environment from the diversion of 2,067 acre-feet over 13 days in June 2015. This to 1) demonstrate that fish were diverted and lost to the estuarine environment due to this diversion, 2) this harm occurred in the context of decades of increasing water diversions and greatly diminished fish habitat and fish populations in the estuary, and 3) this harm occurred during a time of great shared sacrifice by many water rights

beneficiaries and greatly reduced levels of environmental protection for estuarine fisheries.

1. Aquatic resources were harmed by BBID's June 13 to June 25, 2015 diversions. This is addressed in *exhibit morat 2*. The numbers are small because fish were scarce due largely to drought with concurrent excessive water diversion.

2. Harm to aquatic resources during the diversions of June 13 to June 25, 2015 took place in the context of decades of increasing percentages of diversion of inflow relative to outflow and overall greatly diminished populations of aquatic resources. The many reports on the Pelagic Organism Decline, a name given to the more recent and drastic declines of young-of-the-year striped bass, delta smelt and longfin smelt, document this disaster.

3. The diversions of BBID during the period June 13 to June 25, 2015 occurred during a time when great sacrifices for water conservation were being made by most of California's residents and industries, including agriculture, and simultaneously when environmental protections for flow and water quality for estuarine aquatic resources had been substantially weakened. The Governor's Drought Declaration and the subsequent regulatory response and the DWR/BOR Temporary Urgency Change Petition for relaxation of Water Rights Decision

1641 (approved by the Board) directed these sacrifices and greatly reduced fishery protections.

While there was no report of salvage of delta smelt at the Skinner Delta Fish Protective Facility during the June 13 to June 25, 2015 period, there has been salvage of delta smelt at this facility in earlier years during the same time frame. During the period June 13 to June 25, 1993 there were 1,162 delta smelt salvaged. Many estuarine fish were scarce or in low abundance in June 2015 due to a variety of factors, but especially water project operations adverse to their existence.

Impacts of an action are best assessed by comparing a "with-" and a "without-the-action" operations simulation documenting conditions such as flow, water project operations, water quality parameters, etc. Meeting a regulatory standard is not supportive of a finding of no environmental impact. Meeting a standard only means that you have met a standard. Sometimes meeting a standard is pure disaster for fish populations. For example, standards were met when the San Joaquin River below Friant was dried up.

The complaint states that by June 12, 2015 available supply was insufficient to meet demands of appropriative rights of some diverters. As a consequence, an unanticipated diversion after that date either caused 1) the water quality control plan standards for the protection of beneficial uses to be shorted, 2) some

upstream water project operators to release more water than should have been required of them, or 3) some combination of the first two scenarios. To the extent this action occasioned some party to have to release water from storage there are also the re-fill and water temperature impacts to downstream resources that should be considered as to harm.

The impact of this action harming aquatic resources while small in numbers cannot be considered negligible given the current state of the fisheries, the rigorous hearing process here, the amount of the proposed fine and the parties seriously engaged and invested in this hearing.

What I offer in testimony is a very weak and incomplete assessment of harm to the valley-wide aquatic resources from this action. The Board needs to consider piecemeal and cumulative impacts in addition to the direct impacts. What is lacking is a public resource agency's full analysis of the impacts of this action.

Compliance with the State Board's management decisions is essential. This hearing has been tremendously costly. It should not be repeated. Should the Board affirm a trespass, I expect the assessed fine to be levied in full as a penalty and as a deterrent to future acts of willful noncompliance.