

THE SESPE WILD

The Newsletter of the Keep the Sespe Wild Committee

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UNITED WATER KILLS STEELHEAD at FREEMAN DIVERSION MARCH 2024

The United Water Conservation District (United Water) owns and operates the Vern Freeman Diversion facility on the Santa Clara River near Saticoy, between Santa Paula and the estuary in Oxnard. It was built with federal funding in the early 1990's.

This diversion facility takes river water, chiefly in the wet season, and allows it to soak down into the soil to replenish groundwater aquifers that have been depleted after unsustainable pumping by agricultural and municipal users.

The Freeman Diversion consists of a broad, low concrete dam across the Santa Clara River, 1,200 feet in width and 25 feet in height.

This dam has since its construction in the mid-1990's formed a barrier that prevents the native steelhead trout population from accessing their ancestral spawning and rearing grounds in the Santa Clara River's tributaries - chiefly Santa Paula, Sespe and Piru Creeks.

The original fishladder on the southern side of the Freeman Diversion facility was poorly designed, and has only ever allowed a handful of steelhead to pass upstream in the winter/spring migration season. (There are cameras in place that photograph any steelhead making it into the fishladder.)

The Southern Steelhead was listed as an endangered species in 1997, under the federal Endangered Species Act (ESA).

United Water has since even before 1997 failed to take serious steps to improve fish passage for the southern steelhead at the Freeman Diversion facility.

The National Marine Fisheries Service (NMFS) is the federal agency charged with managing the recovery of those species, like the southern steelhead, that spend part of their life-cycle in the ocean. NMFS was responsible for producing

the 2012 Recovery Plan for the southern steelhead, as required by the ESA.

NMFS also issued a Biological Opinion in 2008, finding that the Freeman Diversion facility is likely to jeopardize the continued existence of the southern steelhead.

DEFINITION OF THE "TAKE" OF ENDANGERED STEELHEAD TROUT

Section 9(a)(1)(B) of the Endangered Species Act makes it unlawful for any person to "take" any threatened or endangered species. The term "take" is defined in the ESA to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

NMFS has defined "harm" to mean an act which actually kills or injures fish. Such an act may include significant habitat modification or degradation which actually kills or injures fish by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering (50 CFR 222.102).

NMFS specifically identified the following as habitat-modifying activities that may cause death or injury to the southern steelhead; only one of these activities need be occurring to cause death or injury:

"maintaining barriers that eliminate or impede a listed species' access to habitat or ability to migrate"

"removing water or otherwise altering stream-flow when it significantly impairs spawning, migration, feeding or other essential behavioral patterns"; **or**



A stranded upstream-migrating adult steelhead taken from the Freeman Diversion in April 2012

"operating dams or water diversions with inadequate fish screens or fish passage facilities in listed species' habitat".

On multiple occasions United Water has contacted NMFS' Long Beach office when a young or adult migrating steelhead has been located in their diversion's fishladder, or in the Santa Clara River nearby.

While NMFS' Law Enforcement Division's investigations of these numerous steelhead take occurrences were underway, no information was publicly available as to the details and consequences of the ongoing investigations.

In 2022, NMFS declared that these investigations were all closed. In mid-2023, Keep Sespe Wild sent a Freedom of Information Act (FOIA) request to NMFS' Law Enforcement Division, seeking to make public their information on the unauthorized steelhead deaths at or near the Freeman Diversion facility.

Foremost amongst the FOIA documents that KSWC recently received from NMFS' Law Enforcement Division is a memorandum prepared by NMFS' Fisheries Biologist Darren Brumback (now retired), dated November 2015.

This 18-page memorandum has been made public for the first time through the FOIA process, and it details for five years, from October 2010 to October 2015, the "Alleged take of endangered southern California steelhead by United Water Conservation District resulting from operation of the Vern Freeman Diversion in the Santa Clara River, Ventura County, California."

Here are some highlights from the memorandum:

(1) United Water acknowledges that unauthorized take of endangered steelhead is resulting

from the presence and operation of the Vern Freeman Diversion. In consideration of knowingly taking steelhead, United Water has undertaken development of a habitat conservation plan in support of applying for an incidental take permit for this species under Section 10(a)(1)(B) of the ESA.

Development of the habitat conservation plan appears to have been initiated in 2007; however, United Water has not completed a draft habitat conservation plan and application for an incidental take permit, as evidenced by NMFS not receiving a complete draft plan or application.

Therefore, United Water does not possess authorization for any take of this species that has occurred as a result of the ongoing presence and operation of the Vern Freeman Diversion.

(2) With regard to upstream migration, although the diversion is equipped with a fish ladder, very few adult steelhead have been observed to actually pass through the ladder.

This is not surprising because an impartial panel of fish-passage experts concluded the Vern Freeman Diversion fish ladder is not an adequate fish passage system (Vern Freeman Dam Fish Passage Panel 2010).

Reasons for this conclusion included inadequate attraction flow to the fishladder entrance, excessive turbulence at the entrance and within the fish ladder, poor fish-ladder exit conditions, and operational constraints causing the fish-ladder to be shut off when steelhead are migrating.

(3) Take by trap and capture - In the following, take due to trap and capture includes -

- (a) the unintentional consequences of operating the Vern Freeman Diversion that results in trapping or capturing steelhead by stranding them in isolated areas, and
- (b) the intentional act of trapping and capturing steelhead by operating a fish trap at the Vern Freeman Diversion.

(4) Neither the stranding of steelhead that resulted from operation of the diversion nor the subsequent rescue of stranded steelhead was authorized under the ESA, and constitutes take due to trap and capture under the ESA.

(5) Conclusion

Based on the above information, it is my professional opinion that unlawful take of endangered steelhead occurred between October 2010 and October 2015 as a result of the presence and operation of the Vern Freeman Diversion.

United Water's operation of a fish trap (i.e., attempt to engage in any such conduct - trap and capture) for a cumulative 497 days constitutes take under the ESA.

The unlawful take of endangered steelhead will likely continue to occur unless United Water develops a conservation plan that ensures take resulting from the Vern Freeman Diversion is minimized and mitigated to the maximum extent practicable and will not reduce the likelihood of survival and recovery of this species in the wild, and an incidental take permit is issued by NMFS. *(End of memorandum highlights.)*

No such conservation plan has been submitted to NMFS since this memorandum was written in 2015, meaning that United Water's inaction on this habitat conservation plan has continued now for 17 years, since 2007.

Neither has there been any legal action taken in response to this evidence of United Water's ongoing take of endangered steelhead at or adjacent to their Freeman Diversion facility.



The Freeman Diversion dam in winter flows. The diversion structures and fishladder are behind the photographer.

THANKS FOR YOUR DONATIONS TO KSWC!

Your donations maintain KSWC's ongoing work to protect the watershed of Sespe Creek, and its native species. Thanks again to those who donated in December/January both to our regular expenses, and towards the cost of the appeal lawsuit filed by Santa Barbara's Environmental Defense Center to protect the conifer forests atop Pine Mountain from the U.S. Forest Service's ill-advised logging proposal.

We raised our \$9,000 goal towards the appeal costs, with your generous assistance.

NEW HOURS AT OJAI RANGER STATION

The Ojai District Ranger Station at 1190, East Ojai Avenue is now open to the public Thursdays, Fridays and Saturdays from 9:00 a.m. till 2:00 p.m. (805) 646-4348.

The front desk is open for general information, permits, local maps, literature about the Ojai Ranger District, as well as trail guides and plant and wildlife identification guidebooks.

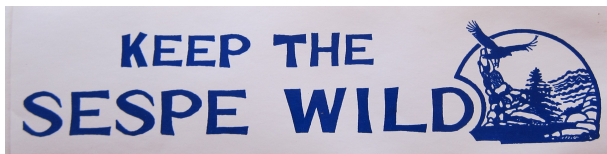


The non-functional fishladder at the Freeman Diversion

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Allow a few weeks for delivery.

SANTA CLARA RIVER PRESERVE OPENS

The major tributaries to the Santa Clara River - such as Sespe Creek - are accessible to the public because they lie within Los Padres Forest. Until recently, there has been little public access to the many miles of the mainstem of the Santa Clara River. The Nature Conservancy has just opened 1,000 acres of restored river-bank habitat along two miles of the river. Enter at 1368, Mission Rock Road, Santa Paula; open from dawn to dusk every day (but closed after heavy rains). Check the Nature Conservancy's Santa Clara River Preserve website. No dogs.



