

THE SESPE WILD

The Newsletter of the Keep the Sespe Wild Committee

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COURT SLAMS UNITED WATER ON FISH PASSAGE

DECEMBER 2018

In a ruling on September 09, 2018, and a permanent injunction on October 04, 2018, a federal court in southern California left no alternative for United Water, based in Santa Paula, but to follow at long last requirements to protect the migrating southern California steelhead at its Vern Freeman Diversion Dam (VFD) on the Santa Clara River, near the town of Saticoy.

This diversion dam was built with federal funding in the early 1990's, replacing earlier earthen structures that usually washed away in winter storms, to divert river water to nearby spreading ponds, where the water drains down into several layers of aquifers. This helps replenish the water that is pumped annually for use by agricultural operations on the Oxnard Plain.

Studies have shown that as much as 50% or more of the flows diverted at the VFD originated in the Sespe watershed, which meets the Santa Clara River at Fillmore. We have written about the dysfunctional fish passage situation at the VFD many times over the past three decades.



The Vern Freeman Diversion spills 23.5 feet in high flows. The old fish ladder is immediately downstream.

There are two main problems with United Water's operation of the VFD, from the steelhead's perspective. Firstly, the fish ladder has insufficient flows to attract the upstream migrating steelhead in the early wet months of the year.

Secondly, United has for nearly three decades not been releasing enough water to maintain an adequate flow in the river corridor down to the estuary at McGrath State Beach, to allow steelhead to swim upstream towards their ancestral spawning grounds in tributaries such as Sespe, Santa Paula and Piru Creeks. No water means there's no access - it's that simple.

Steelhead, unlike salmon that die after spawning, make their way back to the ocean after spawning - and can in fact make the round trip two or three times in a lifetime.

In 1997 the National Marine Fisheries Service (NMFS) listed the southern California steelhead as an endangered species. In 2008 NMFS issued a Biological Opinion, after years of consultations with United Water, which concluded that the VFD, by impeding steelhead migration, likely jeopardizes the continued existence of the steelhead.

NMFS considers the Santa Clara River system as vital to the steelhead's recovery. Their historic range is from Santa Maria to below the Mexican border. The Biological Opinion also recommended "reasonable and prudent alternatives" to allow for improved steelhead migration. These included a better fish passage structure, and an increase in downstream flows for the river corridor during the winter and spring migration season.

United Water, the operators of the VFD, have done an impressive job of stalling for nearly 20 years these needed improvements at their dam. This led in 2016 to the filing of a lawsuit in federal court by the Wishtoyo Foundation and the

Center for Biological Diversity, alleging that United Water had not alleviated the VFD's impacts on steelhead that were identified in NMFS' 2008 Biological Opinion.

A trial was held in Los Angeles in December of 2017 and January 2018, over 15 days.

In its September 2018 ruling, the court found that without its own intervention, the harm to migrating steelhead would continue -

"the record clearly demonstrates that in the last decade or more United has proved unable and unwilling to tackle the two key problems identified as perpetuating harm to steelhead:

- (1) the inadequate fish ladder and the need for a new fish passage structure; and
- (2) the need for sufficient bypass flows to mimic the natural flow of the river and preserve the bulk of migration opportunities for steelhead downstream of VFD."



A steelhead around 17 inches long, in Sespe Creek near where it is joined by Alder Creek, in the summer of 2012. Adjacent are smaller native rainbow trout, which are the same species as the steelhead. Sespe Creek provides the best spawning and rearing habitat for steelhead in southern California.

To continue with a lengthy direct quote from the court ruling -

"With respect to fish passage, after the 2010 Fish Panel Report recommended that additional work be focused on the development of two alternatives: the hardened ramp and vertical slot, United took six years to reach a 60% design level on the hardened ramp and United never proceeded at all with the vertical slot.

Then, after NMFS reviewed the 60% hardened ramp design, NMFS wanted United to build three different model versions of the head works with two different ramp slopes, but instead United put the hardened ramp on hold, and decided to pursue a notch alternative.

Then, after United submitted a feasibility report with respect to the notch and another alternative, the infiltration gallery, NMFS concluded that those alternatives were not sufficiently developed to allow for an in-depth review, and NMFS was skeptical about whether the notch was really a viable option.

NMFS expressed that United should continue to explore the hardened ramp, infiltration gallery, and notch, and come up with a process and schedule for selecting an alternative.

Instead, United proceeded with further study of only the notch. United staff indicated that its first option at this point is the hardened ramp. United then indicated that its second option would be the vertical slot, but the Court took that off the table because United made no movement on the vertical slot since the Fish Panel's 2010 Report.

Without the vertical slot, United indicated that its second choice would be the 400-foot notch. This protracted design process, which has not resulted in a single completed design, illustrates that United has lacked the will or ability to achieve a new fish passage structure.

Next, since 2008, United has proposed various water diversion operations—the 2009 Interim Operations Plan, 2010 Smolt Bypass Plan, United's interpretation of RPA 2A, the 2016 Draft HCP, and in discussions with NMFS in 2017— each of which would create in essence the same effects (artificially truncated the Steelhead migration window), which, combined with other effects of the proposed action, led NMFS to conclude that the proposed action in the Biological Opinion was likely to cause jeopardy to the species and adversely modify or destroy designated critical habitat for the species.

Even after receiving a June 2016 letter from NMFS Office of Law Enforcement to comply with RPA 2A (under NMFS's interpretation), United agreed to comply in 2017, but remains unwilling to stipulate to continue to do so in the future.

VFD and United's operation of VFD is causing ongoing harm to Steelhead, particularly in terms of fish passage and water diversions. There is a definite threat of future harm, but no one is in the driver's seat, no one is steering this complex issue towards a solution." [end of quoted section, pp. 129-30 of the court's ruling.]

In summary, it should be clear that the court found that United Water has delayed, obfuscated, and purposefully managed to make no permanent, constructive, major improvements at the VFD that would benefit steelhead migration.

Which brings us to the court's second ruling, in October 2018, the Permanent Injunction. This is what the court is requiring United Water to do, and at a very tight pace, far beyond that which United Water has shown itself to be capable of over the past two decades.

This will also all be taking place under the court's direct supervision, with written reports to the court from United Water on their progress every four months, and within five days of the specific deadlines mentioned.



A 28-inch upstream migrating steelhead at the Vern Freeman Diversion Dam's fish ladder in March 2009. In 20 years of monitoring at this dysfunctional fish passage structure from 1993 to 2012, United found only 11 adult steelhead to have ever entered the fish ladder. None were known to have exited safely to the Santa Clara River upstream.

Water Diversion - United Water must adhere to NMFS' Biological Opinion's recommendations that will keep enough water in the river downstream for steelhead migration.

Long Term Fish Passage Infrastructure - by a deadline of January 31, 2020, United Water must complete 100% of the design and engi-

neering work for the top two new fish passage alternatives.

United Water will then have 90 days to select their preferred alternative fish passage project.

They will then have 60 days to complete regulatory applications for the fish passage project, including Draft Environmental Impact Reports and Statements.

By no later than two years from receiving final regulatory approvals for the fish passage project, the structure must be completed and operational. A long term monitoring plan must also be in place.

Our thanks to the attorneys for Wishtoyo in Ventura County, and to those for the Center for Biological Diversity, for their thousands of hours spent on this successful lawsuit. Thanks also to NMFS for its court testimony, and for preparing the Biological Opinion on the Vern Freeman Diversion Dam.

And in particular, our thanks to United States District Judge David O. Carter for his ruling on behalf of the endangered southern California steelhead. The judge spent many hours touring the Vern Freeman Diversion Dam and its fish ladder. He also walked many miles along the river corridor towards the ocean, seeing for himself the areas of critical summer flows.

PLEASE SUPPORT US WITH A DONATION

KSWC depends on your support for all our expenses. We thank all our supporters who have donated so far this year. Donations are not tax-deductible. We wish you all a Happy 2019.

OUR THANKS TO ROBERT WASSELL AND TO FOX FINE JEWELRY, VENTURA

Local artist Robert Wassell organized an art show of his paintings of the lower Sespe Gorge, with the owners of Fox Fine Jewelry, on Main Street in downtown Ventura.

Over 20 paintings were sold over the two months of the show, of which half the proceeds were donated to KSWC. This raised us \$2,500. Our thanks go firstly to the artist, and to Debbie Fox and her staff, who also organized an opening for the show, with food, drinks and musical accompaniment, in early September.

The artist's work can be seen at -
wassellart.com

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**SESPE T-SHIRTS: \$20 incl. tax & shipping.
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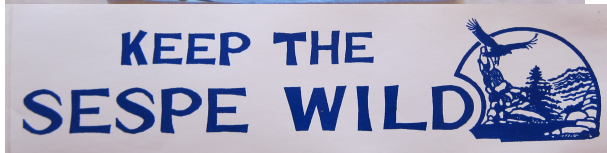
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Ojai, CA 93024.**

Allow a few weeks for delivery. Thank you.



HOMESTEADER'S GOLF

I've heard about some sort of game,
That folks all play in town-
Roamin' through somebody's pasture,
Knockin' rubber balls around;
But say - I'll tell you 'bout a game,
More brutal I confess,
I don't know what to call it -
Homesteader's golf, I guess.
It's the sport of all us Billies
Who dwell back in the hills,
Some call it "Grubbin' sage brush,"
And it's full of shocks and thrills;
But we pick a sun-baked forty
Where the lusty sage-brush thrives,

And we "Tee-off" - with a mattock,
Slicin' many fruitless drives.
And every modest lookin' shrub,
Maybe you didn't know,
Is settin' on a pesky root
That's rootin' down below;
But here you glean the culture,
As you grip your trusty club,
And play that root until he crawls
Right up beside the shrub.
And the way we score each player,
In this game I speak about -
It's the acres he uncovers
Before he passes out;

I've never really learned the game,
Perhaps I've got it wrong -
But anyone can play it,
'Though they seldom play it long.

from 'SONGS of the SESPE and
other rhymes', published in 1934
by Frank D. Felt, who lived on his
ranch where Chorro Grande sits
now. That was before Hwy. 33, and
access was on horseback through
Matilija Canyon. He acted annually
in the Ramona Pageant in Hemet.
He also wrote 'Sunset in the Sespe.'