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17 UNITED STATES DISTRICT COURT
18 FOR THE CENTRAL DISTRICT OF CALIFORNIA

19 WISHTOYO FOUNDATION, CENTER
20 FOR BIOLOGICAL DIVERSITY, and
21 VENTURA COASTKEEPER, a program of
22 WISHTOYO FOUNDATION

23 Plaintiffs,

24 v.

25 UNITED WATER CONSERVATION
26 DISTRICT,

27 Defendant.

Civil Case No.: 2:16-cv-03869

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

**(Endangered Species Act, 16
U.S.C. §§ 1531, et seq.)**

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1 **INTRODUCTION**

2 1. Plaintiffs Wishtoyo Foundation (“Wishtoyo”), Wishtoyo Foundation’s
3 Ventura Coastkeeper Program (“Ventura Coastkeeper”), and Center for Biological
4 Diversity (“Center”) sue the United Water Conservation District (“United”) for violations
5 of the Endangered Species Act (“ESA”). Since 1991, United has operated the Vern
6 Freeman Diversion Dam (“Dam”) on the Santa Clara River in Ventura County.

7 2. United’s operation and maintenance of the Dam, and its diversion of water
8 from the Santa Clara River at the Dam (“Diversion”), have caused, and will likely
9 continue to cause, the unauthorized “taking” of federally protected species, including
10 endangered Southern California steelhead (*Oncorhynchus mykiss*) (“Steelhead”),
11 endangered Least Bell’s vireo (“Vireo”), endangered Southwestern willow flycatcher
12 (*Empidonax traillii extimus*) (“Flycatcher”), and the threatened yellow-billed cuckoo
13 (*Coccyzus americanus*) (“Cuckoo”) (altogether “Listed Species”), in violation of ESA
14 section 9, 16 U.S.C. § 1538.

15 3. In July 2008, the National Marine Fisheries Service (“NMFS”), the federal
16 agency with jurisdiction over endangered steelhead, issued a biological opinion finding
17 that operation of the Dam and United’s Diversion jeopardizes the existence and recovery
18 of endangered Steelhead through its impairment of the Steelhead’s migration to and from
19 its historic spawning grounds above the Dam. *See* NMFS, Final Biological Opinion to
20 Reclamation re: Approve United Water Conservation District’s Proposal to Operate the
21 Vern Freeman Diversion and Fish Passage Facility at 67 (July 23, 2008) (“Final
22 Biological Opinion”). As a result of this finding of jeopardy to the species, NMFS set
23 forth a series of measures (referred to as “Reasonable and Prudent Alternatives”)
24 designed to protect Steelhead. Despite Steelhead being listed as endangered since 1997,
25 that almost 8 years have passed since the release of the Final Biological Opinion, and that
26 it has been almost 6 years since a United-convened fish panel verified that the Dam as
27 constructed, maintained, and operated precludes volitional Steelhead migration, United

1 has yet to adopt necessary measures to avoid unauthorized take of endangered Steelhead.

2 4. Well before construction of the Dam and continuing into present time,
3 United's Diversion has significantly diminished Santa Clara River flows downstream. In
4 addition, United's Diversion has, and continues to result in, significantly lowered
5 groundwater levels dependent on infiltrating surface flows underneath the River's
6 riparian zone downstream of the Dam. By lowering groundwater elevations underlying
7 the River and its floodplain beyond the reach of native riparian vegetation in a manner
8 that has substantially degraded the native riparian vegetation characteristics in the lower
9 Santa Clara River, and by depriving the River downstream of the Dam of historic
10 seasonal low flows, United's Diversion has been a primary factor in the decline of habitat
11 needed by the Vireo, Flycatcher, and Cuckoo ("Listed Bird Species"). It has also caused
12 increased mortality and other harm to these Listed Bird Species.

13 5. Through its operation of the Dam and Diversion causing various harms and
14 taking of the imperiled Steelhead, Vireo, Flycatcher, and Cuckoo, United has continued
15 to engage in the unauthorized take of listed endangered species. By this action, Plaintiffs
16 seek injunctive relief to enjoin take of endangered Steelhead, Vireo, Flycatcher, and
17 Cuckoo.

18 JURISDICTION

19 6. This Court has jurisdiction over the claims set forth in this Complaint
20 pursuant to 28 U.S.C. § 1331 (civil action arising under the laws of the United States),
21 specifically 16 U.S.C. § 1540(g)(1), which authorizes citizens to bring suit to enjoin any
22 person or government agency or instrumentality that is in violation of the ESA or any
23 regulation issued pursuant to the ESA. 16 U.S.C. § 1540(g)(1) further grants jurisdiction
24 to this Court over claims brought pursuant to the ESA's citizen suit provisions. This
25 Court further has jurisdiction pursuant to 28 U.S.C. § 2201 (declaratory relief), and 28
26 U.S.C § 2202 (injunctive relief).

1 operation of the Dam and its Diversion in Ventura County are in violation of the ESA. In
2 addition, United's offices are located in Ventura County and Plaintiffs have offices
3 located within the Central District of California.

4 **THE PARTIES**

5 12. Plaintiff Wishtoyo Foundation is a California nonprofit public interest
6 organization operating in Ventura and Los Angeles County with over 700 members
7 composed primarily of Chumash Native Americans, Ventura County residents, and Los
8 Angeles County residents. Wishtoyo's mission is to preserve, protect, and restore
9 Chumash culture, the culture of diverse communities, and the natural resources all people
10 depend upon. Wishtoyo shares traditional Chumash beliefs, cultural practices, songs,
11 dances, stories, and values with the public to instill environmental awareness and
12 responsibility for sustaining the health of our land, air, and water for the benefit of future
13 generations. The Chumash People, including ancestors of members of Wishtoyo, resided
14 in villages alongside the Santa Clara River, and buried their dead in and around the Santa
15 Clara River downstream of the Dam. The Chumash People and members of Wishtoyo
16 Foundation have an ongoing and long history of interaction with the Santa Clara River
17 that they intend to continue, that includes use of the river to sustain their life ways, food
18 sources, material culture, religious practices, cultural practices, and recreational
19 enjoyment. The Chumash continue to conduct ceremonies at sacred sites adjacent to the
20 River. Members, staff, volunteers, and constituents of Wishtoyo—including the general
21 public and the communities residing in the Santa Clara River watershed—also use the
22 Santa Clara River for recreational, navigation, wildlife viewing, aesthetic enjoyment,
23 scientific study, environmental monitoring, and educational purposes, and intend to
24 continue these uses. The Chumash People and members of Wishtoyo thus have strong
25 interests in the recovery and the protection of the Santa Clara River's cultural,
26 recreational, scientific, public benefit, and environmental resources related to the
27 Steelhead, Cuckoo, Vireo, and Flycatcher. United's operation of the Dam and Diversion,

1 and unauthorized taking of the Listed Species, harm these resources. United thereby
2 directly, adversely and irreparably affects, and continues to prejudice the general public,
3 communities residing in the Santa Clara River watershed, and Wishtoyo's members,
4 staff, volunteers, and constituents, as described herein, and will do so until and unless the
5 relief sought as set forth below is granted.

6 13. Plaintiff Ventura Coastkeeper is a program of Wishtoyo Foundation.
7 Ventura Coastkeeper's mission is to protect, preserve, and restore the ecological integrity
8 and water quality of Ventura County's inland waterbodies, coastal waters, and
9 watersheds. Ventura Coastkeeper strives to maintain clean and ecologically healthy
10 waters for all human communities and species in Ventura County through advocacy,
11 education, restoration projects, community mobilizing, and, where necessary, directly
12 initiating legal and enforcement actions on behalf of itself and its members. Members,
13 staff, volunteers, and constituents of Ventura Coastkeeper—including the general public
14 and the communities residing in the Santa Clara River watershed—use the Santa Clara for
15 recreational, navigation, wildlife viewing, aesthetic enjoyment, scientific study,
16 environmental monitoring, and educational purposes, and intend to continue this use.
17 United's operation and maintenance of the Dam and Diversion and unauthorized taking
18 of the Listed Species harm these uses and resources. United will thereby directly,
19 adversely and irreparably affect, and continue to prejudice the general public,
20 communities residing in the Santa Clara River watershed, and Ventura Coastkeeper's
21 members, staff, volunteers, and constituents, as described herein, until and unless the
22 relief sought as set forth below is granted.

23 14. Plaintiff Center for Biological Diversity is a California nonprofit
24 organization with approximately 49,000 members worldwide, including members who
25 reside in Ventura County. The Center's mission is to protect endangered species and wild
26 places through science, policy, education, and environmental law. Center members visit,
27 recreate in, study, observe, and otherwise enjoy the Santa Clara and its environs, and

1 study, observe, and otherwise enjoy the natural public trust resources at issue in this
2 Complaint. Center members reside and own property near the Santa Clara River
3 upstream and downstream of the Dam. Center members derive professional, scientific,
4 aesthetic, spiritual, recreational, economic, and educational benefits from the Santa Clara,
5 its public trust protected resources, and specifically the Steelhead, Cuckoo, Vireo, and
6 Flycatcher. The Center and its members will continue to maintain an interest in the Santa
7 Clara River, its reaches downstream of the Dam, and its resources in the future. The
8 Center and its members are directly, adversely, and irreparably affected, and will
9 continue to be prejudiced by United's operations and maintenance of the Dam and
10 Diversion and unauthorized taking of the Listed Species as described herein, until and
11 unless the relief sought as set forth below is granted.

12 15. Defendant United Water Conservation District is a ratepayer-funded public
13 agency and water conservation district created by the Water Conservation District Law of
14 1931 and organized under the laws of the State of California. (California Water Code §
15 74000, *et seq.*) United owns, operates, and maintains the Dam and the Diversion. United
16 is responsible for ensuring that the Dam is operated, and the Diversion is conducted, in
17 compliance with the ESA. United's business office is located in Santa Paula, California.

18 16. As a result of the acts and omissions of Defendant alleged herein, Plaintiffs'
19 members have suffered and will continue to suffer injuries to their aesthetic, cultural,
20 environmental, educational, spiritual, and economic interests in enjoying and using the
21 Santa Clara River and its tributaries.

22 17. Plaintiffs' and their members' direct and beneficial interest in United's
23 compliance with the ESA will be directly and adversely affected by United's continued
24 violations of the ESA and the implementing regulations, which are set forth below and
25 which would cause substantial and irreversible harm to the Listed Species. The
26 maintenance and prosecution of this action will confer a substantial benefit on the public
27 by protecting the public from the harms alleged herein.

THE ENDANGERED SPECIES ACT

1
2 18. The ESA was enacted to provide a means to conserve threatened and
3 endangered species and to conserve the ecosystems upon which those species depend. 16
4 U.S.C. § 1531(b). “Congress intended endangered species to be afforded the highest of
5 priorities,” and thus the ESA calls for federal agencies to prioritize conservation of listed
6 species above any competing statutory mandates and to use their authority to seek to
7 conserve threatened and endangered species. *Tennessee Valley Auth. v. Hill*, 437 U.S.
8 153, 174, 184-85 (1978); 16 U.S.C. § 1531(c).

9 19. The ESA prohibits “take” of endangered species listed under the act. 16
10 U.S.C. § 1538(a)(1). Specifically, under section 9 of the ESA, it is unlawful for any
11 person to engage in unauthorized take of an endangered species. 16 U.S.C. §
12 1538(a)(1)(B). Section 9’s prohibition against taking also applies to species listed as
13 threatened unless such species are specifically exempted. 50 C.F.R. § 17.31. To “take” a
14 listed species means, *inter alia*, to “harass, harm, pursue, hunt, shoot, wound, kill, trap,
15 capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). “Take”
16 includes indirect as well as direct harm and need not be purposeful. *See Sweet Home*
17 *Chapter of Communities for a Great Oregon v. Babbitt*, 515 U.S. 687, 704 (1995). An
18 actor can take a listed species within the meaning of the ESA by killing or injuring an
19 individual member of the species, or by engaging in an act that causes significant habitat
20 modification or degradation which kills or injures fish or wildlife by significantly
21 impairing essential behavioral patterns, including breeding, spawning, rearing, migrating,
22 feeding or sheltering. 50 C.F.R. § 222.102. “Harm” is defined as an act which actually
23 kills or injures fish or wildlife. Such an act may include: significant habitat modification
24 or degradation which actually kills or injures fish or wildlife by significantly impairing
25 essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or
26 sheltering. 50 C.F.R. § 222.102. Although NMFS has not defined “harass,” the U.S. Fish
27 and Wildlife Service (“USFWS”) defines “harass” as “an intentional or negligent act or

1 omission which creates the likelihood of injury to wildlife by annoying it to such an
2 extent as to significantly disrupt normal behavioral patterns which include, but are not
3 limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.

4 20. The term “person” includes “any officer, employee, agent, department, or
5 instrumentality of the Federal Government, of any State, municipality, or political
6 subdivision of a State, or . . . any State, municipality, or political subdivision of a State.”
7 § 16 U.S.C. § 1532(13). It is unlawful for any person to cause an ESA violation to be
8 committed. 16 U.S.C. § 1538(g).

9 21. A private party operating a facility pursuant to authorization from a federal
10 agency may be protected from liability under ESA section 9 if following consultation
11 with NMFS or USFWS, these agencies and the private party agree to operate the project
12 consistent with the provisions of the reasonable and prudent alternative and incidental
13 take statement set forth in a biological opinion. However, in the absence of the protection
14 offered by a biological opinion’s incidental take statement or a habitat conservation plan
15 issued under section 10 of the ESA, a private party that engages in the take of an
16 endangered species is liable under ESA section 9.

17 22. The ESA contains a broad citizen suit provision, which authorizes any
18 person to commence a civil suit “to enjoin any person....who is alleged to be in violation
19 of this chapter or regulation issued under the authority hereof....” 16 U.S.C. § 1540(g)(1).
20 A court may grant preliminary and permanent injunctive relief pursuant to this provision.
21 *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1068 (9th Cir. 1996) (granting injunction
22 based upon reasonably certain threat of imminent future harm to species).

23 **FACTUAL BACKGROUND**

24 **A. United’s Diversion and Operations at The Vern Freeman Diversion Dam**

25 23. Located on the mainstem of the Santa Clara River at approximately 10.5
26 river miles from the Pacific Ocean and Estuary, the Dam is 1,200-foot wide concrete
27 structure spanning the width of the Santa Clara, and creates roughly a 25 foot drop in

1 elevation of the River. It does not store Santa Clara River flows, but rather, working by
2 gravity, directs the Santa Clara's flows through a fish screen to help prevent Steelhead
3 entry, and then into diversion infrastructure at a fixed diversion point. Once diverted from
4 the Santa Clara River, the flows are directed to nearby percolation ponds to recharge the
5 Oxnard Plain groundwater basins ("Basins") or directly to United's water delivery
6 infrastructure to provide water for agricultural irrigation in the Oxnard Plain.

7 24. United owns and operates the diversion, storage, delivery, and groundwater
8 recharge infrastructure associated with the Dam and its Diversion, and diverts Santa
9 Clara flows at the Dam as authorized by its State of California water License and Permit.
10 Agricultural, domestic, municipal, and industrial water users in the Oxnard Plain, who
11 either receive water via direct surface/ pipeline delivery from United or indirectly from
12 extraction of Basin groundwater recharged by United, pay, on information and belief,
13 approximately 3.9 to 70 times less for Santa Clara River water diverted at the Dam than
14 other end users in the same Oxnard Plain watershed pay for water received from the State
15 Water Project, Calleguas Municipal Water District, Metropolitan Water District, or the
16 City of Oxnard's Advanced Water Purification Facility.

17 **B. United's Ownership and Control over Operations at the Vern Freeman Dam**

18 25. The U.S. Bureau of Reclamation ("Bureau") funded the construction of Vern
19 Freeman Dam pursuant to a loan contract entered into with United in 1987 under the
20 authority of the Small Reclamation Project Act of 1956. Construction of the Dam and its
21 fish ladder and fish passage infrastructure commenced in 1988 and was completed in
22 1991. The Bureau's loan contract that provided the financial assistance needed to
23 construct the Dam gave the Bureau discretion to assist United in determining the
24 adequacy of operation and maintenance, and to examine and approve substantial changes
25 in Dam's operation. In 2011, the Bureau's ongoing control and discretion over operation
26 of the Dam lapsed upon the expiration of its loan contract with United. Since repaying its
27

1 loan to the Bureau in 2011, United has exercised sole ownership, control, and operation
2 of the Dam.

3 **C. Steelhead and United's Operations at the Vern Freeman Diversion Dam**

4 **Steelhead and the Santa Clara River**

5 26. The Steelhead is an anadromous fish species native to Pacific coast streams
6 extending from the Santa Maria River, near Santa Maria, to the California-Mexico
7 border. NMFS listed Steelhead as an endangered species under the Endangered Species
8 Act ("ESA") on August 18, 1997, and reaffirmed the species' endangered status on
9 January 5, 2006. *See, e.g.*, Final Biological Opinion at 8. Genetic studies, which are
10 largely based on the collection of juvenile Steelhead from freshwater habitats in southern
11 California, including the Sespe Creek and Piru Creek tributaries to the Santa Clara River,
12 indicate that native Steelhead exist and dominate reproducing populations of Steelhead in
13 the Santa Clara River watershed. *See, e.g.*, Final Biological Opinion at 9.

14 27. Both the number of individual Steelhead and the species' total habitat within
15 its range have been dramatically reduced from historical levels. *See, e.g.*, 71 Fed. Reg.
16 834, 851 (January 5, 2006). This reduction is due in large part to dewatering of river
17 drainages and the construction and operation of dams and other watercourse
18 development, which have blocked the migration of Steelhead to its traditional spawning
19 grounds. *See, e.g.*, 62 Fed. Reg. 43937, 43949 (August 18, 1997).

20 28. Prior to 1950, the annual returning adult Steelhead run up the Santa Clara
21 River from the ocean was estimated between 7,000 - 9,000 per year. *See, e.g., id.* This
22 was one of the largest Steelhead runs in southern California. Today, very few adult
23 Steelhead are currently observed returning to the Santa Clara River and its tributaries.
24 Adult Steelhead experience harm from the extreme difficulty of reaching these tributaries
25 to spawn with each other or rainbow trout (and thus maintain their genetic diversity and
26 experience denser populations) due to the Dam, its inadequate fish passage infrastructure
27 and system, and United's Diversion. *See, e.g.*, Final Biological Opinion at 26-27, 29-30.

1 The Dam, its inadequate fish passage infrastructure and system, and United's Diversion
2 of flows and operations at the Dam, also pose substantial impacts and threats to the
3 hundreds of juvenile Southern Steelhead smolt and parr ("juvenile Steelhead") that
4 attempt to migrate annually from Sespe Creek, Santa Paula Creek, and other Santa Clara
5 River tributaries to the Santa Clara River Estuary ("Estuary") and then to the Pacific
6 Ocean. *See, e.g.*, Final Biological Opinion at 26-27, 29-30, 54-55. In addition, United's
7 operation and maintenance of the Dam and Diversion pose substantial migration threats
8 to adult Steelhead kelt ("kelt Steelhead") that after spawning in upstream tributary
9 habitat, attempt to migrate downstream past the Dam back to the ocean before one day
10 returning to spawn.

11 29. Steelhead trapping, observations, and recording devices at the Dam have
12 reported that only nine adult Steelhead were able to pass through the Dam's fish ladder
13 from 1994 to 2004. In 2012, two adult Steelhead were recorded in the fish ladder at the
14 Dam. Additional adult Steelhead have made their way from the Estuary and upstream to
15 the Dam, but have been unable to locate the entrance to the Dam's fish ladder upon
16 arrival at the Dam. *See, e.g.*, Final Biological Opinion at 26-27, 29-30. Other adult
17 Steelhead returning to the Santa Clara River never make it to the Dam, as United's
18 diversions of River flow deprive adults of a sufficiently deep and continuous freshwater
19 migration corridor needed to migrate from the ocean to the Dam. *See, e.g., id.* at 29-30,
20 63-67, 70, 80.

21 30. The Santa Clara River watershed is significant to survival and recovery of
22 the species. It is one of the last remaining watersheds that supports a Steelhead
23 population, and has been designated by NMFS as providing one of the top Steelhead
24 restoration opportunities in the species' entire range. *See* National Marine Fisheries
25 Service, Southwest Region, Protected Resources Division, Long Beach, California. 2011.
26 *Southern California Steelhead Recovery Plan. January 2012.* ("Steelhead Recovery
27 *Plan*") at 1-4, 2-14, 7-5. The Sespe Creek and Santa Paula Creek tributaries to the Santa
28

1 Clara River, both with confluences to the Santa Clara River mainstem upstream of the
2 Dam, provide unmatched high quality habitat for Steelhead spawning and rearing. Sespe
3 Creek, federally designated as a Wild and Scenic River with little to no anthropogenic
4 impacts, supports some of the best and most extensive spawning and rearing habitat for
5 Steelhead, with over 46 river miles of total Steelhead habitat, 134,004 square miles of
6 available spawning habitat, and 242,270 square miles of rearing habitat.

7 31. Protection and restoration of Steelhead populations on the Santa Clara River
8 has implications for the recovery of all the Southern California Steelhead population
9 segments because recovery of an independent Steelhead population on the Santa Clara
10 River is expected to support formation of Steelhead numbers in several adjacent
11 population units/watersheds. The Santa Clara River population unit represents a large
12 distributional component of the overall range of the Steelhead distinct population
13 segment (“DPS”), and the Santa Clara River watershed is the largest Steelhead-bearing
14 watershed in the DPS. Without the Santa Clara River population unit, the number of large
15 and inland population units would be reduced to two: the Santa Ynez River and the
16 Ventura River. The remaining units are small coastal populations, which, by themselves,
17 do not appear to favor viability and recovery of the DPS. The value of inland populations
18 such as those in the Santa Clara River watershed lies in their innate habitat characteristics
19 and conditions; inland population units extend into areas that are drier and warmer than
20 those experienced by coastal population units, and inland population units also have
21 longer migration routes. Such environmental features promote diversity (genetic,
22 phenotypic, and ecological) and specific life-history traits (*e.g.*, the ability to migrate long
23 distances, and tolerate elevated temperatures and low flows during the dry season) that
24 favor survival of the species.

25 **Operation of the Vern Freeman Diversion Dam and its Impacts on Steelhead**

26 32. Volitional fish passage from the Pacific Ocean upstream through the Dam is
27 of vital importance to the survival and recovery of the Steelhead in the Santa Clara River

1 watershed because such passage is needed for adult Steelhead to access their intact
2 spawning and rearing habitats in the Santa Paula Creek, Sespe Creek, and other tributary
3 sub-watersheds, for juvenile Steelhead to access the Estuary and ocean, and for adult kelt
4 Steelhead to access the Estuary and ocean. The physical impediments to volitional fish
5 passage caused by the Dam and its fish ladder, and United's Diversion of River flows at
6 the Dam, are the only activities on the mainstem of the Santa Clara River that obstruct
7 adult Steelhead access to the Santa Clara River's tributaries for spawning and rearing,
8 that obstruct juvenile Steelhead access to the Estuary for rearing and acclimation, and that
9 obstruct adult kelt Steelhead to the ocean. These obstructions have led, and continue to
10 lead to the decline and mortality of Steelhead. In addition, United's year round Diversion
11 of flows at the Dam deprive the Santa Clara River Estuary ("Estuary") of needed flows of
12 sufficient water quality, thereby harming, and continuing to harm, juvenile Steelhead that
13 require suitable Estuary habitat for rearing and acclimation to survive in the ocean and to
14 return to the Santa Clara River to reproduce as adults.

15 **The NMFS Steelhead Final Biological Opinion for the Vern Freeman Dam**

16 33. To address the harms to endangered Steelhead resulting from operations at
17 the Dam during the Bureau's discretionary control, NMFS engaged United and the
18 Bureau in extensive informal and formal consultation. After United prepared and the
19 Bureau submitted a biological assessment in 2004, the Bureau and NMFS initiated formal
20 consultation in May 2005. In September 2005, NMFS issued a Draft Biological Opinion,
21 which found that the action proposed by the Bureau and United would result in jeopardy
22 to Steelhead and adverse modification to its critical habitat. The Bureau and United then
23 revised the proposed action and submitted a revised biological assessment in January
24 2007. NMFS issued a second Draft Biological Opinion in April 2008, and a Draft
25 Incidental Take Statement in June 2008, again finding that the action proposed by the
26 Bureau and United would result in jeopardy to Steelhead and adverse modification to its
27 critical habitat.

1 migration. *See, e.g.*, Final Biological Opinion at 26-27, 35-40, 47-51, 56-58. As a result,
2 Steelhead are attracted to the face of the Dam, and have a difficult time locating, or do
3 not locate, the entrance to the fish ladder at the Dam. *See, e.g., id.* In addition, the Dam
4 and its inadequate fish ladder can preclude or delay Steelhead migration by creating a fish
5 passage bottleneck, as the fish ladder is the only freshwater migration corridor through
6 the Dam. *See, e.g., id.* at 47. Furthermore, spills of water over the Dam can cause the
7 thalweg (the deepest part of the flowing river) to form on the side of the river channel
8 that is opposite the fish-ladder entrance, and the bypass channel (*i.e.*, the channel leading
9 from the river to the fish-ladder entrance) can be far removed from the thalweg,
10 occasionally slowing or precluding Steelhead from migrating upstream past the Dam.
11 *See, e.g., id.* at 57. In addition, sediment deposition immediately downstream of the Dam
12 has been observed to result in sand covering both orifices to the fish ladder and to plug
13 the fish ladder, rendering the ladder impassable. *See, e.g., id.* at 57.

14 36. While the overall performance of the fish passage system at the Dam is the
15 principal issue precluding unimpeded passage of Steelhead past the Dam in an upstream
16 direction, the fish ladder/fishway and associated or connected infrastructure at the Dam
17 itself are not adequate for Steelhead passage for the following additional reasons:

- 18
19 · The Fish ladder/fishway is not operable or accessible to Steelhead when flow is
20 turned out of or routed into the Dam's diversion canal, or when the Dam's
21 flushing gate is open and/or flushing operations are being conducted;
- 22
23 · The attraction water capacity is not adequate to attract Steelhead to the fish
24 ladder/fishway;
- 25
26 · The auxiliary water system is not screened and does not exclude Steelhead, and
27 the likelihood of injury to juvenile Steelhead passing through the fishway is

1 high;

2
3 · Turbulence in the fish ladder/fishway entrance pool and turning pools is
4 excessive;

5
6 · The fishway, though passable for some adult Steelhead in a limited fashion,
7 significantly impedes adult Steelhead migration compared to natural conditions.
8 Some Steelhead may reject it because of the shallow, turbulent flow. The
9 turbulence can be a barrier to migration for smaller Steelhead;

10
11 · Fish ladder/fishway entrance hydraulic conditions are inadequate for Steelhead
12 at high flows when water is discharged through the Dam's flushing channel,
13 and there is excessive turbulence at the two existing entrances;

14
15 · Upstream exit conditions in the fish ladder/fishway for adult Steelhead impede
16 Steelhead migration. Adult Steelhead have to exit into the Dam's diversion
17 canal perpendicular to the diversion canal flow, and then have to find an exit
18 through the diversion trashrack;

19
20 · For downstream juvenile Steelhead passage, the fish screens are deficient, pose
21 barriers to volitional juvenile Steelhead migration, and cause take to migrating
22 juvenile Steelhead;

23
24 · The fish ladder/fishway as designed, maintained, and operated is not suited for
25 the flashiness of the Santa Clara River, and the migratory requirements and
26 behavior of Steelhead, and thus at times poses a complete barrier to upstream
27 Steelhead migration.

1 *See, e.g., Vern Freeman Dam Fish Passage Conceptual Design Report*, Prepared by:
2 Vern Freeman Dam Fish Passage Panel for United Water Conservation District
3 (September 15, 2010) at xii - xiv, 5-5, 8-1 to 8-2, 9-2; *See, e.g., Final Biological Opinion*
4 at 51, 57.

5 37. Even when the Dam and its inadequate fish ladder/fishway do not prevent
6 adult Steelhead migration altogether, they delay or slow adult Steelhead migration
7 upstream. *See, e.g., Final Biological Opinion* at 57. This delay also leads to Steelhead
8 mortality and spawning failures in the watershed by effectively precluding adult
9 Steelhead from reaching tributary areas in the upper Santa Clara River watershed that
10 provide suitable, high-quality spawning habitat. *See, e.g., id.* Adult Steelhead generally
11 only locate and ascend the Dam's fish ladder after spills over the Dam's crest nearly or
12 entirely subside, when flow levels in the Santa Clara River upstream of the Dam drop.
13 *See, e.g., id.* In such lower flow conditions, flows can be of inadequate depth for
14 Steelhead migration upstream of the Dam. *See, e.g., id.* In the alternative, adult Steelhead
15 that have been delayed may not have sufficient energy once passing the Dam to survive
16 and successfully migrate to upstream tributary spawning habitat. Thus, Steelhead that
17 have successfully located and ascended the Dam's ladder are still precluded from
18 migrating to spawning habitat upstream and from spawning successfully.

19 38. Furthermore, the United's operation and maintenance of the Dam and
20 Diversion also pose substantial migration and mortality threats to adult Steelhead kelt that
21 after spawning in upstream tributary habitat, attempt to migrate downstream past the
22 Dam back to the ocean. The Dam, the Diversion infrastructure, and fish traps impede
23 volitional kelt Steelhead migration by preventing and/or obstructing access to the Estuary
24 and ocean.

25 39. As the Final Biological Opinion conclusively and accurately finds, to avoid
26 the likelihood of jeopardizing the continued existence of Steelhead or destroying or
27 adversely modifying Steelhead critical habitat, United must alleviate the obstruction the

1 Dam currently poses to volitional Steelhead migration by physically modifying the Dam
2 and its current fish passage system in a way that will provide a continuous freshwater
3 migration corridor on the Santa Clara River past the Dam. *See, e.g.*, Final Biological
4 Opinion at 50-51, 67. Concurring, the Vern Freeman Dam Fish Passage Panel convened
5 by United to evaluate the upstream passage of Steelhead at the Dam also correctly found
6 that “the existing fishway was not an adequate fish passage system” and “improvements
7 to the existing fish ladder would not improve passage sufficiently to be a viable
8 alternative compared to alternatives of a new passage.” *See, e.g., Vern Freeman Dam*
9 *Fish Passage Conceptual Design Report*, Prepared by: Vern Freeman Dam Fish Passage
10 Panel for United Water Conservation District (September 15, 2010) at xii-xiv, 5-5.

11 **Harms to Migrating Steelhead Caused by Diversion of Water From the River**

12 40. In regards to United’s impacts on the sufficiency of flows in the Santa Clara
13 River to provide for Steelhead migration from the ocean past the Dam, as the Final
14 Biological Opinion conclusively and accurately finds, United’s Diversion for off-river
15 use significantly alters the pattern and magnitude of flows in the River downstream of the
16 Dam so as to indirectly and directly adversely affect juvenile and adult Steelhead and the
17 species’ critical habitat in the River downstream. Specifically, United’s Diversion at the
18 Dam: (1) reduces the magnitude of flow in the Santa Clara River and sometimes
19 eliminates the River’s flow entirely within a year or during critical periods, (2) causes
20 fluctuating flow levels in the River in a fashion problematic for Steelhead function, (3)
21 increases the rate of River recession downstream of the Dam, (4) abbreviates flow
22 duration within individual rain-induced discharge pulses, (5) reduces migration
23 opportunity (*i.e.*, favorable conditions that allow an individual to move between or
24 among habitats) for adult and juvenile Steelhead, and (6) increases the potential for
25 stranding juvenile and adult migrating Steelhead and delaying or precluding juvenile and
26 adult Steelhead migration. *See, e.g.*, Final Biological Opinion at 30, 33, 53, 54, 59. All of
27 these alterations to the pattern and magnitude of flows in the River downstream of the

1 Dam caused by United's Diversion cause Steelhead mortality and failed spawning from
2 stranding or an inability to reach suitable spawning habitat in upstream tributaries,
3 thereby reducing numbers and production of Steelhead in the Santa Clara River
4 watershed. *See, e.g., id.* Further, these flow alterations can result in adult kelt mortality
5 and failed ability for kelt to migrate from their upstream habitat back to the Pacific
6 Ocean.

7 41. In addition, as correctly documented in the Final Biological Opinion,
8 United's Diversion of in-stream flows harms Steelhead by resulting in mortality and
9 reproduction failures because it reduces the quality and extent of Steelhead habitat in the
10 Santa Clara Estuary, the lower, tidally influenced part of the River near the River's
11 confluence with the ocean. United's Diversion decreases the duration and frequency that
12 the Estuary is open to the ocean by significantly reducing the amount of freshwater that
13 flows to the Estuary during and after storms. *See, e.g., id.* at 32, 52, 58. By reducing the
14 amount of water flowing into the Estuary, United's Diversion influences whether the
15 Estuary can breach the sandbar allowing the river to flow to the ocean, a crucial
16 migration event needed for Steelhead to survive, reproduce, and complete their lifecycle.
17 *See, e.g., id.* In addition, United's Diversion decreases the length of time the Estuary
18 sandbar remains open to the ocean for adult and juvenile Steelhead migration to and from
19 the ocean. *See, e.g., id.* The loss of water volume in the Estuary and reduced connection
20 to the ocean resulting from United's Diversion harm Steelhead because estuarine areas
21 are a primary constituent element of critical habitat for Steelhead rearing and acclimation,
22 and are essential for the conservation of the species. *See, e.g., id.* at 32, 52, 58.

23 42. United attempts to mitigate impacts of the Dam on outmigrating juvenile and
24 kelt Steelhead by trapping juvenile and kelt Steelhead and hauling them via truck to the
25 Estuary. As the Final Biological Opinion finds, this method of attempted mitigation for
26 the impacts to migrating juvenile Steelhead harms numerous Steelhead per year. *See, e.g.,*
27 *id.* at 54, 55, 56. The adverse effects of United's trap and haul program include mortality

1 to Steelhead during capture and transport; unintended fish stranding from unsuccessful
2 capture efforts; depriving Steelhead parr and smolt of biological benefits related to
3 emigrating through the remaining 10.5 miles of Santa Clara River; and relocation of parr,
4 smolt, and kelt to inappropriate habitats for given life stages so as to result in
5 reproductive failure and mortality, such as the transport of Steelhead parr or smolt to the
6 Estuary or ocean before they undergo physiological changes need for ocean survival, or
7 the transport of kelt back to tributary habitat instead of to the Estuary or to the Estuary
8 before adequate preparation. *See, e.g., id.* at 54, 55, 56. Trucking juvenile parr and smolt
9 Steelhead from the Dam to the Estuary, and trucking kelt Steelhead to the Estuary or back
10 to upstream habitat, instead of maintaining sufficient water in the River to allow juvenile
11 Steelhead and kelt Steelhead to successfully migrate downstream, harms Steelhead and is
12 not an alternative that is scientifically protective of juvenile or kelt Steelhead. *See, e.g.,*
13 *id.* at 59-60, 72.

14 **The Diversion's Harms to Juvenile Steelhead Rearing and Acclimating in the Santa**
15 **Clara River Estuary**

16 43. Juvenile Steelhead in the Santa Clara River watershed exhibit three life
17 history pathways before ocean entry. The first pathway is direct recruitment to the
18 Estuary after spending only a few months in the upper watershed. The second pathway is
19 to spend 1–2 years rearing in the upper watershed, migrate downstream to the Estuary,
20 and remain there for an additional 1–10 months before ocean entry. The third is to spend
21 one or more years rearing in the upper watershed, migrate downstream, and directly enter
22 the ocean.

23 44. Marine survival measured across the Steelhead range has been demonstrated
24 to be influenced by size at ocean entry, and generally Steelhead smaller than 150 mm are
25 unlikely to survive. It is well known that estuaries are very important rearing areas for
26 juvenile Steelhead. Diversity and richness of habitat and food sources in southern coastal
27 estuaries that form lagoons allow juvenile Steelhead to attain the necessary size for

1 marine survival, which heavily influences adult escapement from predators, increases
2 their chances for survival in the marine environment, and affects adult production from
3 the watershed.

4 45. Southern Steelhead observations in the Santa Clara River Estuary's lagoon,
5 the annual collection of juvenile Steelhead parr and smolt at the Dam's fish trap that are
6 not ready for ocean entry and/or that could benefit from additional rearing in the Estuary,
7 as well as detailed information on rearing in other similar coastal lagoons, indicates that
8 the Estuary provides "valuable" rearing habitat for juvenile Steelhead. *See, e.g.*, Final
9 Biological Opinion at 32, 54-55, 58. Not only does the Estuary provide feeding and
10 growing areas for "lagoon anadromous" type of juvenile Steelhead that choose a life
11 history strategy of rearing in the Estuary, but the Estuary provides needed areas for
12 facilitation of physiological transitions between fresh and saltwater for adult and juvenile
13 Steelhead. *See, e.g.*, Final Biological Opinion at 32, 58.

14 46. The loss of estuarine habitat within the Santa Clara River watershed is of
15 concern because estuaries are a primary constituent element of Steelhead critical habitat
16 that contain features essential to the conservation of the species. Therefore, protection of
17 the Santa Clara River Estuary is not only needed to provide for adequate acclimation and
18 holding habitat for immigrating adults moving between the marine and freshwater
19 environments, but for adequate rearing and acclimation habitat for emigrating juvenile
20 Steelhead.

21 47. Two of the most important influences on Steelhead survival and rearing in
22 the Estuary are water quality conditions and habitat availability. Juvenile Steelhead
23 generally require cool water temperatures, dissolved oxygen ("DO") concentrations near
24 saturation, and water quality that does not impart sub-lethal, acute, or chronic toxicity
25 impacts. Healthy estuarine environments with abundant food sources are also important
26 for migrating adult Steelhead because they provide a final source of abundant forage that
27 will provide the energy stores needed to make the physiological transition to fresh water,

1 migrate upstream, avoid predators, and develop to maturity upon reaching spawning
2 areas. *See, e.g.*, Final Biological Opinion at 41.

3 48. Flow from the Santa Clara River is the primary source of freshwater flowing
4 into the Estuary. The loss of natural Santa Clara River flows caused by United's
5 Diversion has a severe impact on the Estuary during the late spring and summer when the
6 Estuary transforms into a coastal lagoon after a berm forms at its mouth closing it to the
7 ocean. In the absence of natural surface flow contributions from the Santa Clara River
8 during the late spring, summer, and fall months due to United's Diversion, the Estuary
9 loses habitat area, fills less rapidly, and experiences degradation in water quality because
10 less natural flows are available to dilute agricultural, municipal waste water, and
11 industrial discharges. *See, e.g., Steelhead Recovery Plan* at 9-13-14. As NMFS has found:

12 The seasonal elimination or reduction of [Santa Clara River]
13 [E]stuary habitat is expected to harm steelhead because
14 estuarine areas provide living space to sustain over summering
15 individuals (Smith 1990, Thorpe 1994, Bond 2006) and features
16 essential to the conservation of adult and juvenile steelhead
17 (NMFS 2005). Recent findings reaffirmed that juvenile
18 steelhead over summer in the estuary of their natal creek, and
19 indicate the estuary allowed juvenile steelhead to grow fast
20 enough to migrate to the ocean their first year (Bond 2006).
21 Most individuals entered the ocean at a larger size than fish
22 rearing in the freshwater portion of the stream system. Large
23 size enhances survival in the ocean, and thus the lagoon reared
24 fish tend to be disproportionately represented in the adult
25 spawning population. These findings suggest the loss or
26 reduction in estuary habitat in the Santa Clara River watershed
27 may lead to a reduction in the number of adults returning to the

1 watershed.

2 *See, e.g.*, Final Biological Opinion at 32, 58-59.

3 49. Nutrient enrichment leading to increased algal productivity and eutrophic
4 conditions in the Estuary (with DO and pH impairments) and to periodic exceedances of
5 ammonia toxicity criteria — result from a combination of sewage effluent discharges
6 from the Ventura Waste Water Treatment Plant and lack of inflow of fresh water from
7 the Santa Clara River due to United’s Diversion. This poor water quality results in
8 mortality and other harms to Steelhead in the Estuary. Further, the changes in salinity due
9 to the combined effect of the Ventura sewage effluent discharge coupled with decreased
10 natural freshwater river flow due to United’s Diversion have also created an Estuary
11 environment hospitable to non-native aquatic species that prey on and compete with
12 juvenile Steelhead for habitat space and food.

13 50. As NMFS’s *Steelhead Recovery Plan* states: “Because estuaries are the
14 gateway used by both immigrating adults and emigrating juveniles moving between
15 marine and freshwater environments, estuarine loss affects anadromous *O. mykiss*
16 throughout the entire (Santa Clara River) watershed.” *See Steelhead Recovery Plan at 9-*
17 *13*. Accordingly, the *Steelhead Recovery Plan* calls for Recovery Action # SCR-SCS
18 12.1 - “Develop and implement an estuary restoration and management plan,” and
19 assigns this recovery action a priority rank of 1B (Priority 1 defined as “[a]ctions that
20 must be taken to prevent extinction or to prevent the species from declining irreversibly,”
21 and B defined as “action addresses one of the other four listing factors,” aside from the
22 first listing factor, leading to Federal Listing as an endangered species.) *See, e.g., id.* at 9-
23 67, 6-10. Adequate natural flows of sufficient water quality that pass by the Dam are
24 needed to replace the “substitute surface water” of inadequate water quality discharged as
25 treated sewage effluent from the Ventura Waste Water Treatment Plant that have
26 impaired Estuary Steelhead habitat since the Plant’s construction in 1958. *See, e.g.,*
27 *Steelhead Recovery Plan* at pg. 9-15, Table 9-2, 9-64-66, Table 9-7. Pursuant to a federal

1 court consent decree entered in March 2012 between Wishtoyo/Ventura Coastkeeper,
2 Heal the Bay and the City of Ventura (“Ventura Consent Decree”),¹ the City will only be
3 able to continue discharging any of its nutrient and contaminant rich effluent into the
4 Estuary after 2025 if its effluent is found not to harm Steelhead and is determined to be a
5 source of necessary “substitute surface water” to provide for Steelhead and other
6 endangered species survival. Thus, implementation of a Vern Freeman Dam Diversion
7 management plan to provide the Estuary with suitable year round flows of adequate water
8 quality from the Santa Clara River is an action that will be well integrated with other
9 remedial environmental actions mandated by law to occur in the near future.

10 **United’s Failure to Prevent Harms to Steelhead**

11 51. The Final Biological Opinion provided Reasonable and Prudent Alternatives
12 (“RPAs”) “necessary and appropriate” for the Bureau and United to implement to “avoid
13 the likelihood of jeopardizing the continued existence of the endangered Southern
14 California DPS of [S]teelhead or destroying or adversely modifying critical habitat for
15 this species.” *See, e.g.*, Final Biological Opinion at 67-71. The “economically and
16 technically feasible” RPA called for actions to “restore unobstructed southern steelhead
17 access through the lower Santa Clara River to spawning habitats in tributaries to the
18 mainstem, and re-establish those bypass flows necessary to ensure a properly functioning
19 migration corridor.” *See, e.g.*, Final Biological Opinion at 71-73, 75-78. Specifically, the
20 RPA required the Bureau and United to take a series of time-sensitive actions that would
21 result in physical modifications to the Dam and the maintenance of specific in-stream
22 flows downstream of the Dam, with the goal of restoring and maintaining “a continuous
23 unobstructed freshwater migration corridor in the Santa Clara River during winter and
24

25 ¹ On March 30, 2012, the Ventura Consent Decree was entered in the Clean Water Act suit action
26 Wishtoyo Foundation/Ventura Coastkeeper v. City of San Buenaventura, Case No. 2:10-cv-02072-
27 GHK-PJW.

1 spring for the purpose of providing or approximating unimpeded migration of steelhead
2 past the diversion dam over a broad range of hydrologic events.” See, e.g., Final
3 Biological Opinion at 67 (emphasis in original). The Final Biological Opinion also
4 contained an Incidental Take Statement, which authorized the Bureau and United to
5 engage in a certain level of “take” of Steelhead if the project was operated pursuant to the
6 terms of the RPAs, and proposed Reasonable and Prudent Measures (“RPMs”) and
7 Terms and Conditions (“T&Cs”) to allow for incidental take if RPMs were adhered to
8 after the RPAs were implemented. See, e.g., Final Biological Opinion at 80-84.

9 52. The Bureau’s loan contract that provided the financial assistance needed to
10 construct the Dam, gave the Bureau discretion to assist United in determining the
11 adequacy of operation and maintenance, and to examine and approve substantive changes
12 in the Dam’s operation. While the Bureau still exercised control and ownership over the
13 Dam prior to expiration of its loan contract with United in 2011, the Bureau and United
14 failed to implement the fish passage requirements of the Final Biological Opinion.
15 Neither the Bureau, nor United, adhered to or implemented RPAs 1(d) and (e), which
16 provided that long term physical modifications to the Dam enabling volitional Steelhead
17 passage be completely designed and “fully implemented and operational before the
18 Bureau’s ongoing discretion over operation of the diversion dam lapses in 2011.” See,
19 e.g., Final Biological Opinion at 70. In addition, United and the Bureau failed to adhere
20 to RPA 2, which provided the amount of flows that must be left in-stream, as opposed to
21 being diverted at the Dam, to maintain a properly functioning migration corridor for adult
22 and juvenile Steelhead in the Santa Clara River from the Dam to the Pacific Ocean. See,
23 e.g., *id.*

24 53. Since taking over sole ownership and operation of the Dam in 2011, United
25 has perpetuated the Bureau’s inaction and unlawful take of Steelhead. United has failed
26 to adopt NMFS’s required RPAs and RPMs needed to avoid take of Steelhead. Notably,
27 United has not implemented, or even fully designed, physical fish passage infrastructure

1 at the Dam to allow for volitional steelhead migration as called for by RPAs 1(d) and
2 1(e), despite NMFS concluding that the preferred alternative for volitional fish passage
3 could and should be implemented before the Bureau's discretion ceased at the end of
4 2011. *See, e.g.*, Final Biological Opinion at 75-77.

5 54. In addition, United continues to fail to release flows as provided by the Final
6 Biological Opinion, as the quantity, timing, and duration of United's flow releases from
7 the Dam are contrary to the provisions in RPA 2. *See, e.g.*, Final Biological Opinion at
8 70. First, United's flow release operations have not been modified to adhere to the
9 operational criteria specified in the Final Biological Opinion's RPA 2(a). This is
10 evidenced by NMFS' September 12, 2013 letter to United indicating that United's
11 "recent and proposed operations are not consistent with operational criteria specified in
12 reasonable and prudent alternative 2(a) of the 2008 Biological Opinion." Second, the
13 location United chooses for the "critical riffle,"² defined as the point downstream of the
14 Dam at which United is required to maintain minimum flows to provide a continuous
15 migration corridor from the Dam to the Estuary through flow releases at the Dam in lieu
16 of its Diversion, is also contrary to the provisions in RPA 2. Because United places the
17 critical riffle too far upstream, insufficient flows are released by United at the Dam to
18 maintain the in-stream flows from the Dam to the Estuary that RPA 2 requires.

19 55. When the Final Biological Opinion and its associated Incidental Take
20

21 ² United defines "critical riffle" as follows: "The critical riffle is a term we use that would describe the
22 most difficult riffle for an upstream migrant. Due to our ever changing river, the critical riffle can also
23 move. In the past it has been up towards the 118 bridge, but normally is about 1.5 to 1.9 miles upstream
24 of the 101 bridge. Normally when that stretch of the river is a losing reach the critical riffle will be
25 further downstream due to less water in the river. When it is a gaining reach, it can be closer to the 118
26 bridge. Big riffle is located at about 1.7 miles upstream of the 101 bridge. The critical riffle will have to
27 be located after every major storm. In general the channel morphology will change with peaks that
28 exceed several thousand cfs." *See* Final Biological Opinion at 70, n.25; pers. comm., M. McEachron,
hydrologist, United Water Conservation District, November 21, 2007.

1 Statement expired in 2011, United lost the incidental take protection otherwise potentially
2 afforded by compliance with the Final Biological Opinion. United has not obtained an
3 Incidental Take Permit, or any other legal permission under the ESA for take of
4 Steelhead, thus leaving United strictly liable for take of Steelhead caused by United's
5 operation and maintenance of the Dam and Diversion of flows from the River. Since the
6 Biological Opinion and the Incidental Take Statement expired, United has continued to
7 take Steelhead and has yet to adhere to the requirements of RPA 1(d)(e) or (2) in order to
8 avoid take. This is because, despite the passage of over seven years since NMFS issued
9 the Final Biological Opinion, United continues to fail to make the physical modifications
10 to the Dam and to maintain the specific in-stream flows downstream of the Dam that the
11 Biological Opinion finds are necessary to provide for volitional Steelhead passage.

12 56. A United-convened fish passage panel ("Expert Panel") released findings in
13 2010 that a hardened rock ramp going over the face of the Dam was one of the two best
14 feasible options, outside of Dam removal, to enable volitional Steelhead passage past the
15 Dam. *Vern Freeman Dam Fish Passage Conceptual Design Report*, Prepared by: Vern
16 Freeman Dam Fish Passage Panel for United Water Conservation District (September 15,
17 2010) at 9-1 to 9-2. Specifically, the Expert Panel found that Dam removal and the
18 Diversion without a Dam "should be considered as an ultimate goal to maximize fish
19 passage opportunities" and that "[c]onsidering the highly variable hydrologic
20 characteristics of the basin, edge of steelhead ecosystem, fragility of the [steelhead]
21 stock, inherent delays caused by dams, dam removal would have the greatest chance of
22 allowing and promoting restoration of Santa Clara River [steelhead] stocks." *Id.* While
23 the Expert Panel concluded that "the alternative of dam removal should be investigated as
24 a long-term goal of the interested parties," United has yet to conduct or organize such an
25 investigation. *Id.*

26 57. While, on information and belief, United currently favors ultimate selection
27 of a hardened rock ramp as its fish passage solution to avoid take of Steelhead, United's
28

1 efforts to design the ramp have been exceedingly slow and constitute unjustified delay of
2 urgently needed measures to protect and restore the Steelhead population of the Santa
3 Clara River watershed. For instance, between 2010 and late 2012, United failed to take
4 any action to design and implement the hardened rock ramp, and it was not until late
5 2012 or early 2013 that United commenced preliminary design. From that time to the
6 present, United has been working with NMFS engineers in a slow, drawn out, back and
7 forth process. The ramp component (the fishway) has yet to be designed to 30 percent
8 completion, and the upstream access way (the headworks) has yet to be designed.
9 Moreover, it has not been demonstrated that the hardened rock ramp can ultimately
10 provide adequate assurances for volitional Steelhead migration in the flashy Santa Clara
11 River, which can damage the hardened rock ramp during large storm events to the extent
12 that the hardened rock ramp does not allow for volitional Steelhead migration. Even if
13 United can make this demonstration, United has made no guarantee that the hardened
14 rock ramp or an adequate Steelhead passage solution at the Dam will be implemented at
15 all, let alone within an expeditious timeframe. Furthermore, United continues to refuse to
16 complete, and otherwise conduct, a feasibility and design study for a damless diversion
17 alternative, which may included a notched dam alternative, that could provide Steelhead
18 with the best assurance of volitional passage. While United has submitted portions of a
19 draft Habitat Conservation Plan (“HCP”) to NMFS ostensibly in pursuit of an ESA
20 section 10 incidental take permit, the draft HCP is far from complete, and United keeps
21 pushing back its date for completing the draft HCP, the HCP’s underlying studies, and
22 the design of the hardened rock ramp.

23 58. Operation of the Vern Freeman Dam as it is currently configured without an
24 adequate physical fish passage system, and with United’s flow Diversion at the Dam,
25 creates substantial barriers to volitional Steelhead migration, precluding many Steelhead
26 from reaching suitable spawning habitat and instead killing, harming, and harassing
27 Steelhead. Indeed, United’s own biologist has documented incidents in which Steelhead

1 have attempted to utilize the Dam’s fish ladder to travel upstream, have been unable to
2 pass, and therefore have built their redds (nests) below the Dam, resulting in harm to
3 Steelhead. Moreover, as NMFS’s records indicate, operations at the Dam without the
4 modifications set out in the Final Biological Opinion and other modifications, have
5 killed, and will continue to kill, Steelhead. NMFS’ records and information available to
6 the public further indicate that United’s operations at the Dam have harmed or harassed,
7 and will continue to harm and harass, adult Steelhead and juvenile Steelhead.³ In
8 addition, the timing and magnitude of United’s Diversion continues to harm adult
9 Steelhead and juvenile Steelhead by depriving Steelhead of opportunities to migrate to
10 and from the ocean, and by diminishing the ability of Steelhead to acclimate and rear in
11 the Estuary.

12 Steelhead Survival and Recovery

13 59. The Santa Clara River watershed provides one of the top Southern Steelhead
14 restoration opportunities in the species’ entire Southern California range. *See, e.g.,*
15 *Steelhead Recovery Plan* at 2-12, 2-13, 7-3 to 7-9. Unlike many of the large rivers to the
16 south, the Santa Clara River system remains in a relatively natural state and the mainstem
17 has not been dramatically altered by concrete flood control channels or large impassable
18 dams. Sespe, Piru, and Santa Paula creeks, all located in the Santa Clara River watershed
19 upstream of the Dam, provide unmatched high quality habitat for Steelhead spawning and
20

21 ³ Live and dead adult and juvenile Steelhead have been found when tending to the Dam (*e.g.*, lowering
22 flows to inspect or clean features of the diversion) or in the fish trap (Carpenter and Wise 1999, Kentosh
23 1999, United Water Conservation District 1999, United Water Conservation District 2006, email
24 correspondence S. Howard, fishery biologist, United Water Conservation District, May 8, 2007). *See,*
25 *e.g.*, Final Biological Opinion at 58. In the past, live steelhead collected at the Dam have been captured
26 (a total of ten smolts and two “resident rainbow trout” were captured in 2007, see also Table 4-2) and
27 then trucked and released in the Santa Clara River or Ventura River estuaries or upstream of the
28 diversion in the Santa Clara River or Santa Paula Creek near 12th Street. *See, e.g.*, Final Biological
Opinion at 30.

1 rearing. For example, Sespe Creek, which is relatively undisturbed, supports some of the
2 best and largest spawning habitat in Southern California. *See, e.g., Steelhead Recovery*
3 *Plan* at 9-10 to 9-14, 9-3.

4 60. The NFMS *Steelhead Recovery Plan* ranks surface water diversions as very
5 high threats to Steelhead viability and recovery in the Santa Clara River watershed.
6 Accordingly, the *Recovery Plan's* Critical Recovery Actions for Steelhead Population
7 Recovery in Santa Clara River includes implementing operating criteria to ensure the
8 pattern and magnitude of groundwater extractions and water releases, including bypass
9 flows around the Dam to “provide the essential habitat functions to support the life
10 history and habitat requirements of adult and juvenile steelhead.” *Steelhead Recovery*
11 *Plan* at 7-9, 9-17. Accordingly, the *Recovery Plan* assigns the highest prioritized Action
12 Rank for Steelhead recovery in the watershed, an Action Rank of 1A, to “Provid[ing] fish
13 passage around dams and diversions (*e.g., Vern Freeman Diversion*)” and “Develop[ing]
14 and implement[ing] water management plan for diversion operations (*e.g., Vern Freeman*
15 *Diversion*).” *Steelhead Recovery Plan* at 9-15, 9-65. Furthermore, the *Recovery Plan*
16 ranks developing and implementing an Estuary restoration and management plan to
17 protect the Estuary from upstream threats with the second highest priority, Action Rank
18 1B. *Steelhead Recovery Plan* at 9-67. For Steelhead protection and revitalization to
19 succeed in the Santa Clara River watershed, measures to secure effective Steelhead
20 migration through the Dam on the mainstem of the Santa Clara and to alter United’s
21 Diversions in a manner that will help restore an ecologically suitable Estuary for
22 steelhead rearing and acclimation must be implemented. *See, e.g., Final Biological*
23 *Opinion* at 53, 67-71. Only then can Southern Steelhead repopulate the watershed with a
24 genetically diverse population, and have assurance of survival. United’s operation of the
25 Dam and associated water Diversion is taking Steelhead in a manner precluding Santa
26 Clara River Steelhead recovery and jeopardizing Steelhead existence.

D. The Impact of United's Diversion on Native and Endangered Birds Downstream

61. United's Diversion of flows at the Dam significantly diminishes Santa Clara River flows downstream to the point that the River becomes deprived of flows it would naturally have at various times of year. United's Diversion further lowers groundwater elevations underlying the River and its floodplain downstream of the Dam beyond the reach of native riparian vegetation and trees. As a result, United's Diversion has been a primary factor in the decline of flow and high elevation groundwater dependent native riparian plant species in the Santa Clara River downstream of the Dam. This harm to native riparian vegetation in turn has harmed endangered avian life downstream of the Dam, specifically that of the Vireo, Flycatcher, and Cuckoo. Vireo, Flycatcher, and Cuckoo habitat needs to include densely foliated stands of deciduous trees and shrubs, particularly willows, with a dense understory adjacent to slow moving watercourses, backwaters, or seeps. United's Diversion has substantially degraded the presence of such riparian characteristics in the lower Santa Clara, thus causing increased mortality and other harm to these three avian species.

62. The Santa Clara River's riparian habitat serves as critical habitat for the endangered Vireo and Flycatcher, and is important habitat for the Cuckoo. These birds are especially discriminate about the vegetation types they nest in and forage from. Thus, alterations to their native riparian habitat can result in "profound effects" on their survival and populations. The replacement of the Santa Clara River's native riparian vegetation with the invasive nuisance plant giant reed (*Arundo donax*) ("*Arundo*"), with deep roots to access groundwater at lower elevations, is of "major concern", since *Arundo* provides little suitable habitat or food for these birds that require the "structural diversity" associated with native vegetation and mature riparian forests in order to breed.

63. For the reach of the Santa Clara River from the Dam to the Estuary, and for the entire interconnected Santa Clara River ecosystem to provide suitable habitat for Vireo, Flycatcher, and Cuckoo, the Santa Clara River's natural flow regime and

1 underlying groundwater depth downstream of the Dam must be sufficiently restored to
2 provide these avian species, and the native riparian plant communities they depend upon,
3 with adequate access to water during the spring, summer, winter, and fall months.

4 **Least Bell's Vireo**

5 64. A shy, secretive, and silver-tongued migratory songbird endemic to
6 California and Baja Mexico, the tenacious Vireo has been to the brink of extinction and
7 back in recent decades

8 65. The USFWS has listed the Vireo as an endangered species under the ESA
9 (the species is also listed as endangered under the California Endangered Species Act). 59
10 Fed. Reg. 16474 (May 2, 1986). The reach of the Santa Clara River from the Dam to the
11 Estuary (“Reach 1 & 2”) is listed as critical habitat for the Vireo under the ESA. 59 Fed.
12 Reg. 4845 (February 2, 1994).

13 66. Now rarely sighted in various stretches of the Santa Clara River downstream
14 of the Dam to the Estuary, the Vireo was once abundant from the Dam to the Estuary and
15 elsewhere in the Santa Clara River watershed. The species has experienced “sharp
16 declines in abundance” primarily due to habitat fragmentation and the spread of non-
17 native plant species. More than 95 percent of the Vireo’s obligate riparian habitat in its
18 historic range, including the Santa Clara River, has been destroyed by various causes.
19 United’s Dam operations have caused and/or exacerbated these adverse impacts as
20 described further herein.

21 67. Experts agree that it is accurate to describe the Santa Clara River as
22 currently the most important site and habitat type for Vireo recovery, as Vireo require the
23 structural diversity and cover provided by the Santa Clara River’s native mixed riparian
24 forest communities and riparian scrub in flatter sections of the Santa Clara River for
25 breeding, nesting, and foraging. The vegetation in Vireo home ranges is dominated in the
26 tree and shrub layers by several willow species: arroyo willow, black willow, sandbar
27 willow, yellow willow, and red willow. Important nesting and foraging shrubs for Vireo

1 include mulefat, California wild blackberry, wild rose, Mexican elderberry, and poison
2 oak. Diversity in plant species composition and structure are important components of
3 Vireo home ranges and nest sites; monotypic and, senescent willow woodland is
4 generally avoided. Vireo prefer nesting in willow thickets or mulefat that provide dense
5 vegetative cover, require a dense stratified forest canopy for foraging, and specifically
6 utilizes the native vegetation types above for foraging and nest substrate.

7 68. The dense native mixed riparian forest and riparian scrub needed by Vireo is
8 generally found on the banks of flatter mainstem and tributary channels of the Santa
9 Clara River, where there is shallow groundwater. Activity which changes the structure of
10 the riparian vegetation such as water diversions and lowered groundwater tables, leading
11 to a loss of vegetation and the replacement of native vegetation with invasive vegetation,
12 such as *Arundo*, has a profound effect on Vireo. *Arundo* provides little suitable nesting
13 habitat and little food for the species. Thus, Vireo are absent from monocultures of these
14 invasive plants.

15 69. While Vireo habitat in Reach 1 & 2 of the Santa Clara does contain patches
16 of intact habitat consisting of mulefat scrub, southern willow scrub, southern willow
17 riparian forest, and patches of sandy Santa Clara River sediment, large portions of Reach
18 1 & 2 of the Santa Clara River native Vireo riparian habitat have been degraded due to
19 the absence of native vegetation, which has been replaced by stands of *Arundo*. United's
20 Diversion of almost all of the Santa Clara River's flows during the spring, summer, fall,
21 and periods of the winter at the Dam continue to threaten, degrade, and reduce the extent
22 of native riparian forest and riparian scrub communities, compromising Vireo survival
23 and recovery in the Santa Clara River watershed and throughout their historic range.
24 These water diversions also give a competitive advantage to exotic nuisance plants such
25 as *Arundo* over the native plants necessary for Vireo habitat.

26 **Western Yellow-Billed Cuckoo (*Coccyzus americanus*)**

27 70. Secretive, except for its distinctive guttural call, the Cuckoo is an

1 increasingly rare Neotropical migratory bird dependent on large patches of native
2 streamside forest in the American West for breeding.

3 71. Effective November 3, 2014, the USFWS listed the Cuckoo as a threatened
4 species under the ESA. 79 Fed. Reg. 59992 (October 3, 2014).

5 72. In designating the Cuckoo as threatened, in its rulemaking the USFWS
6 found that the species:

7 is likely to become endangered throughout its range within the
8 foreseeable future, based on the immediacy, severity, and scope
9 of the threats to its continued existence... These include habitat
10 loss associated with manmade features that alter watercourse
11 hydrology so that the natural processes that sustained riparian
12 habitat in western North America are greatly diminished...

13 Principal causes of riparian habitat destruction, modification,
14 and degradation in the range of the western yellow-billed
15 cuckoo have occurred from alteration of hydrology due to
16 dams, water diversions, management of riverflow that differs
17 from natural hydrological patterns, channelization, and levees
18 and other forms of bank stabilization that encroach into the
19 floodplain.

20 79 Fed. Reg. 59992, 60010, 60015 (October 3, 2014).

21 73. The Cuckoo has been documented nesting in the native riparian vegetation
22 of Reach 1 & 2 of the Santa Clara River corridor during the spring to late summer
23 months. The bird has narrow habitat requirements, with field studies and habitat
24 suitability modeling concluding that vegetation type (*i.e.*, cottonwood, willow forest),
25 patch size, distance to water, and ratio of high to medium and low tree canopy height are
26 critical factors determining the suitability of habitat for yellow-billed cuckoo breeding
27 pairs. Cuckoos typically inhabit densely foliated stands of deciduous trees and shrubs,

1 particularly willows, with a dense understory, adjacent to slow moving watercourses,
2 backwaters, or seeps. In addition, the Cuckoo is discriminate about its nesting choice of
3 dense riparian woodland.

4 74. Loss of overall riparian habitat and adequate native riparian patch size are
5 the primary threats to Cuckoo populations. In regards to loss of native riparian habitat,
6 the USFWS, in its rulemaking listing the Cuckoo as threatened found:

7 The hydrologic regime (stream flow pattern) and supply of (and
8 interaction between) surface and subsurface water is a driving
9 factor in the long-term maintenance, growth, recycling, and
10 regeneration of western yellow-billed cuckoo habitat.... The
11 interconnected interaction between ground water and surface
12 water contributes to the quality of the riparian vegetation
13 community (structure and plant species) and will influence the
14 ability of vegetation to germinate, regenerate, and maintain its
15 foliage density, vigor, and species composition... Water
16 extractions, both from surface water diversions and ground
17 water pumping, can negatively affect riparian
18 vegetation... Water diversions and [groundwater] withdrawals
19 can lower ground water levels in the vicinity of riparian
20 vegetation. Because ground water and surface water are
21 generally connected in floodplains, lowering ground water
22 levels by only about 3 ft (1 m) beneath riparian areas is
23 sometimes sufficient to induce water stress in riparian trees,
24 especially in the western United States... Physiological stress in
25 native vegetation from prolonged lower flows or ground water
26 results in reduced plant growth rate, morphological change, or
27 mortality, and altered species composition dominated by more

1 drought-tolerant vegetation, and conversion to habitat
2 dominated by nonnative species... These effects reduce and
3 degrade habitat for the western yellow-billed cuckoo for
4 foraging, nesting, and cover.

5 79 Fed. Reg. 59992, 60018 (October 3, 2014).

6 75. In the Santa Clara River and Reach 1 & 2 of the Santa Clara River, Cuckoo
7 have been especially affected by native riparian plant habitat loss and the absence of slow
8 moving surface flows in many stretches. United's Diversion has caused loss of this
9 aquatic and native vegetation riparian habitat in Reach 1 & 2 of the Santa Clara River, as
10 United's Diversion of almost all of the River's flows during the spring, summer, and fall,
11 and periods during winters, lowers groundwater below the roots of native riparian
12 vegetation and precludes the presence of slow moving surface flows during these
13 seasons. United's flow related operations at the Dam thus have perpetuated take, and
14 continues to perpetuate take of the Cuckoo by degrading the species' habitat in a fashion
15 that causes mortality or other actual injury to the species.

16 76. The lack of flows and sufficient ground water levels in Reach 1 & 2 of the
17 Santa Clara River needed to renew and establish mixed native riparian trees and shrubs
18 suitable for Cuckoo threatens the existence and recovery of the Cuckoo in the Santa Clara
19 River and its native range. The lack of sufficient flows is compounded by the
20 replacement of this native vegetation with *Arundo* that provides little suitable nesting
21 habitat and little food. Conversion of vegetation type in the Santa Clara watershed from
22 native riparian woodlands to riparian vegetation dominated by *Arundo*, tamarisk and
23 other invasive non-native nuisance vegetation replaces vegetation that supplies the
24 Cuckoos with essential food and adequate thermal cover with vegetation that does not
25 provide these necessary components of habitat for the species. United's Diversion
26 promotes the establishment and persistence of *Arundo*, tamarisk and other non-native
27 vegetation in the Santa Clara River watershed by robbing the lower Santa Clara River of

1 almost all flows in the spring, summer, winter, and fall and lowering groundwater tables
2 downstream of the Dam.

3 Southwestern Willow Flycatcher

4 **Introduction & Decline in Historic Populations**

5 77. The Flycatcher is a small migratory song bird, whose nesting habitat is
6 restricted to relatively dense growths of trees and shrubs in riparian ecosystems in the
7 arid southwestern United States and possibly extreme northwestern Mexico.

8 78. The USFWS listed the Flycatcher as an endangered species under the ESA
9 on March 29, 1995. 60 Fed. Reg. 10694 (February 27, 1995). The USFWS also
10 designated the mainstem of the Santa Clara River in Ventura County and portions of Los
11 Angeles County as part of the species' critical habitat (including Reach 1 and 2). 78 Fed.
12 Reg. 344, 504 (January 3, 2013). In August 2002, the USFWS issued the *Flycatcher*
13 *Recovery Plan*. U.S. Fish and Wildlife Service. 2002, *Southwestern Willow Flycatcher*
14 *Recovery Plan*, Albuquerque, New Mexico, i-ix+ 210 pp., Appendices A-O ("*Flycatcher*
15 *Recovery Plan*") at 5. Reach 1 & 2 of the Santa Clara River is critical habitat for the
16 Flycatcher, and the *Flycatcher Recovery Plan* contains flow protections needed for
17 Flycatcher survival and recovery in the River downstream of the Dam. *See, e.g., id.*; 78
18 Fed. Reg. 344, 504 (January 3, 2013).

19 79. Historically, the Flycatcher was common in all lower elevation riparian areas
20 of the southern third of California, including the Santa Clara River. Today, populations
21 have been drastically reduced in its historic range, and Flycatcher sightings occur, but are
22 infrequent in Reach 1 & 2 of the Santa Clara River watershed from the Dam to the
23 Estuary.

24 80. The Flycatcher depends upon one of the most critically endangered habitats
25 in North America: southwestern riparian ecosystems associated with rivers, swamps, and
26 other wetlands. Southwestern riparian ecosystems have always comprised a very small
27 portion of the landscape in the Santa Clara River watershed, yet even in their current

1 decimated state they are disproportionately important to wildlife and plants, typically
2 supporting far greater species diversity than the surrounding upland ecosystems.

3 **Flycatcher Habitat Requirements, Threats, and Other Limiting factors**

4 81. The Flycatcher breeds and nests in diverse patchy to relatively dense riparian
5 tree and shrub communities along rivers, swamps, and other wetlands, including lakes
6 (*e.g.*, reservoirs) underlain by saturated soil during the spring to late summer months.
7 Habitat requirements for Flycatcher wintering include brushy savanna edges, second
8 growth, shrubby clearings and pastures, and woodlands near water.

9 82. In addition to dense riparian thickets, another characteristic common to most
10 occupied Flycatcher sites is that they are near lentic (quiet, slow-moving, swampy, or
11 still) water. In almost all cases, slow-moving or still surface water and/or saturated soil is
12 present at or near breeding sites during wet or non-drought years. In many cases,
13 Flycatcher nest plants are rooted in, or overhang, standing water. Typical sites occupied
14 by Flycatcher include slow-moving stream reaches and river backwater areas. Where
15 Flycatchers occur along moving streams, those streams tend to be of relatively low
16 gradient, *i.e.*, slow-moving with few (or widely spaced) riffles or other cataracts. Within
17 or adjacent to nesting habitat, surface water or saturated soil are typically, but not always,
18 present year-round or seasonally, and ground water is generally at a depth of less than 2
19 or 3 meters (6.5 to 9 ft). The Flycatcher's riparian habitats are dependent on hydrological
20 events such as scouring floods, sediment deposition, periodic inundation, and
21 groundwater recharge.

22 83. In the Santa Clara River watershed and throughout its historic range, the
23 Flycatcher has experienced extensive loss and modification of riparian breeding habitat,
24 with consequent reductions in population levels. United's Diversion has caused
25 destruction and modification of Flycatcher habitat in Santa Clara Reach 1 & 2 by
26 eliminating almost all surface flows during the summer, fall, spring and periods of the
27 winter and by decreasing groundwater levels adjoining the Santa Clara River channel,

1 altering flood regimes, causing changes in water and soil chemistry due to disruption of
2 natural hydrologic cycles, and promoting the establishment of invasive non-native plants
3 that lack habitat value for Flycatcher. By degrading Flycatcher habitat in this fashion,
4 United's Diversion has caused mortality and other harms to Flycatcher and thus
5 perpetuated unlawful take of Flycatcher.

6 **Flycatcher Recovery**

7 84. The Flycatcher is discriminate about its nesting conditions, with plant
8 structure and composition, sufficiently high groundwater levels, and the presence of slow
9 moving surface flows being amongst the most important conditions. Activity which
10 changes the structure of the riparian vegetation such as vegetation removal or
11 groundwater reduction leading to a loss of vegetation can have a profound effect on these
12 birds. Invasive vegetation such as *Arundo* is also a major concern as it provides little
13 suitable nesting habitat and little food. The spread of *Arundo* within the Santa Clara
14 riverbed represents a significant threat to Flycatcher along the river corridor given its
15 prolific spreading and ability to promote fires. In addition, once established, *Arundo*
16 tends to use more water, and out-compete native riparian species required by the
17 Flycatcher for nesting and breeding.

18 85. The USFWS Recovery Plan for the Flycatcher seeks in part to protect,
19 reestablish, mimic, and/or mitigate for the loss of the natural processes that establish,
20 maintain, and recycle riparian ecosystems relevant to the species, due in part to the high
21 potential for restoration that riparian habitats exhibit due to their dynamic nature, fair
22 level of resiliency, and ability to adapt to the dynamism of natural stream systems. If
23 United's Diversion is modified to restore natural or near-natural conditions of water flow,
24 water chemistry, and sedimentation in Reach 1 & 2 of the Santa Clara River, the River's
25 near-natural riparian ecosystem needed to support Flycatcher populations has a high
26 likelihood of re-establishment. Importantly, the restoration of unoccupied, suitable and
27 potential, native riparian habitat is vital to the recovery and long term survival of the

1 Flycatcher. Such restoration will provide suitable areas for breeding Flycatchers to: (a)
2 colonize as the population expands (numerically and geographically), and (b) move to
3 following loss or degradation of existing breeding sites.

4 86. United's Diversion of flows at the Dam impacts Flycatcher habitat in Reach
5 1 & 2 of the Santa Clara River by lowering groundwater below the roots of native
6 riparian plants and precluding the presence of slow moving surface flows in spring,
7 summer, and fall, and periods of the winter, adjacent to Flycatcher breeding and nesting
8 habitat. Loss of slow moving aquatic habitat and suitable native riparian habitat in Reach
9 1 & 2 of the Santa Clara River attributed to United's Diversion, has had, and continues to
10 have, a profound effect on the Flycatcher. The lack of flows and sufficient ground water
11 levels in Reach 1 & 2 of the River needed to renew and establish mixed native riparian
12 trees and shrubs suitable for Flycatcher, compounded with the replacement of this native
13 vegetation with *Arundo* that provides little suitable nesting habitat and little food,
14 threatens the existence and revival of the Flycatcher in the Santa Clara River and its
15 native range.

16 87. WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

17 **FIRST CLAIM FOR RELIEF**

18 **Violation of ESA Section 9 - Prohibition Against Unauthorized Take of Steelhead**
19 **16 U.S.C. § 1538; Request for Declaratory Relief and Injunction to Enjoin United**
20 **From Taking Steelhead**

21 88. Plaintiffs reassert and reallege each of the preceding paragraphs as if set
22 forth herein, and incorporate herein by reference each and every allegation set forth in
23 paragraphs 1 through 87.

24 89. United is violating ESA section 9's prohibition on the unauthorized take of
25 the Steelhead by harassing, wounding, killing, trapping, and/or capturing Steelhead,
26 and/or by causing significant habitat modification or degradation for Steelhead which
27 kills, injures, or deleteriously impacts the species by significantly impairing essential

1 behavioral patterns, including breeding, spawning, rearing, migrating, feeding or
2 sheltering. 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1532(19); 50 C.F.R. § 222.102; 50
3 C.F.R. § 17.3.

4 90. United's operation and maintenance of the Dam, and associated water
5 Diversion from the Santa Clara River at the Dam, are taking endangered Steelhead in the
6 following ways:

7 (A) The Dam hinders and at times completely blocks access to Southern
8 Steelhead's historic habitat in the tributaries to the Santa Clara River located
9 above the Dam. Eliminating and/or preventing upstream migration of adult
10 Steelhead to historical spawning habitat causes spawning failures and
11 mortality. Adult Steelhead are harassed, harmed, and killed when they are
12 unable to pass the Dam due to flaws in the fish passage design that make it
13 exceptionally difficult for adult steelhead to locate the Dam's fish ladder
14 during conditions suitable for Steelhead migration. Steelhead not able to
15 pass over the Dam, have been harassed, harmed, or killed when they return
16 to the ocean without successfully spawning, perish in the river downstream
17 without spawning, or build their redds in habitat unsuitable for successful
18 spawning below the Dam. Like migration preclusion, delayed or slowed
19 adult Steelhead migration caused by fish passage problems at the Dam
20 causes spawning failures and mortality. Adult Steelhead are only expected to
21 potentially be able to locate and ascend the ladder to pass the Dam after
22 spills over the Dam's crest nearly or entirely subside due to lower flows in
23 the River. Accordingly, if adult Steelhead pass the fish ladder, they may
24 encounter low River flows that are not of adequate depth for migration to
25 tributary spawning habitat upstream of the Dam. These taking activities
26 described in this sub-paragraph (A) are perpetual and ongoing, *i.e.*, have
27 occurred continuously with Dam operation and maintenance since Steelhead

1 have been an ESA-listed species, and will continue until effective steelhead
2 passage past the present location of Dam is achieved.

3 (B) United's Diversion of in-stream flows from the Santa Clara at the Dam
4 harasses, harms, and kills Steelhead by stranding migrating adult and
5 juvenile Steelhead, by delaying or precluding adult steelhead migrating
6 upstream, and delaying or precluding juvenile and kelt Steelhead migrating
7 downstream. Such take occurs when United's Diversion (1) reduces the
8 magnitude of flow and sometimes eliminates flow entirely within a year or
9 during critical periods, (2) causes fluctuating flow, (3) increases the flow
10 recession rate (i.e., causes low levels in the River to recede to lower levels
11 than would occur naturally), (4) abbreviates flow duration within individual
12 rain-induced discharge pulses in the River—flow alterations which reduce
13 juvenile and adult Steelhead migration opportunity (*i.e.*, by eliminating or
14 reducing the frequency of favorable River flow conditions that allow
15 individual fish to move between or among habitats). In addition, United's
16 Diversion takes steelhead because by reducing River flow as described
17 above, this Diversion reduces the quality and extent of Estuary habitat, and
18 decreases the duration and frequency that the Estuary is open to the ocean by
19 significantly reducing the amount of freshwater that flows to the Estuary
20 during and after storms. By reducing the amount of water flowing into the
21 Estuary, United's Diversion at the Dam influences whether the Estuary can
22 breach the sandbar allowing the river to flow to the ocean, a crucial event for
23 Steelhead. These taking activities described in this sub-paragraph (B) are
24 perpetual and ongoing, *i.e.*, have occurred continuously with United's
25 Diversion since Steelhead have been an ESA-listed species, and will
26 continue until United's Diversion is modified to mimic the Santa Clara
27 River's natural flow regime.

1 (C) United's Diversion harasses, harms, and kills Steelhead by failing to provide
2 needed River flows of adequate water quality to the Estuary during the
3 spring, summer, fall, and parts of the winter. Due to United's Diversion and
4 resultant diminishment of River flows into the Estuary, to date, effluent has
5 been permitted to be discharged from the Ventura Waste Water Treatment
6 Plant as a "substitute," causing oxygen starved conditions, contamination
7 from pollutants found in waste water treatment plant discharges (ie: copper,
8 nutrients, and emerging contaminants such as caffeine and antibiotics), and
9 changes in the Estuary's natural salinity. The salinity changes harm
10 Steelhead by creating an Estuary environment hospitable to non-native
11 aquatic species that prey on and compete with juvenile Steelhead for habitat
12 space and food. These taking activities described in this sub-paragraph (C)
13 are perpetual and ongoing, *i.e.*, have occurred continuously with United's
14 Diversion since Steelhead have been an ESA-listed species, and will
15 continue until United's Diversion is modified to mimic the Santa Clara
16 River's natural flow regime.

17 (D) United's trapping and hauling of emigrating juvenile and kelt Steelhead in
18 the Santa Clara River via truck to the Estuary harasses, harms, and kills
19 Steelhead. The effects of United's trap and haul program include Steelhead
20 mortality incurred during capture and transport; harm, harassment, and
21 mortality caused by unintended stranding from unsuccessful capture efforts;
22 harm and harassment caused by depriving Steelhead parr and smolt of
23 biological benefits related to emigrating through the remaining 10.5 miles of
24 Santa Clara River; and harm, harassment, and mortality to Steelhead caused
25 by relocation to inappropriate habitats for given life stages, such as the
26 transport of Steelhead parr and smolt to the ocean before they undergo
27 physiological changes needed for ocean survival. These taking activities

1 described in this sub-paragraph (D) are perpetual and ongoing, *i.e.*, have
2 occurred continuously with United's trapping and hauling of Steelhead at
3 and from the Dam since Steelhead have been an ESA-listed species, and will
4 continue until effective steelhead passage past the present location of Dam is
5 achieved and until United's Diversion is modified to mimic the Santa Clara
6 River's natural flow regime.

7 91. For United's operation and maintenance of the Vern Freeman Dam and
8 Diversion of River flows at the Dam to be legal under the ESA, United must obtain an
9 Incidental Take Permit ("ITP") for Steelhead under ESA section 10. 16 U.S.C. § 1539.
10 United has not obtained such a permit. As such, United is in violation of ESA section 9
11 for taking Steelhead via its maintenance and operation of the Dam and its Diversion of
12 Santa Clara River flows in all of the manners explained in paragraphs 1-91 above.

13 92. WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.
14

15 **SECOND CLAIM FOR RELIEF**

16 **Violation of ESA Section 9 - Prohibition Against Unauthorized Take of Vireo** 17 **16 U.S.C. § 1538; Request for Declaratory Relief and Injunction to Enjoin United** 18 **From Taking Vireo**

19 93. Plaintiffs reassert and reallege each of the preceding paragraphs as if set
20 forth herein, and incorporate herein by reference each and every allegation set forth in
21 paragraphs 1 through 92.

22 94. United is violating ESA section 9's prohibition on the unauthorized take of
23 the Vireo by harassing, wounding, killing, trapping, and/or capturing the Vireo, and/or by
24 causing significant habitat modification or degradation for the Vireo which kills, injures,
25 or deleteriously impacts the species by significantly impairing essential behavioral
26 patterns, including breeding, spawning, rearing, migrating, feeding or sheltering. 16
27 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1532(19); 50 C.F.R. § 222.102; 50 C.F.R. § 17.3.

28 95. United's operation and maintenance of the Dam and the Diversion of River

1 flows are taking endangered Vireo by causing significant modification or degradation to
2 the Vireo's habitat that significantly impairs the bird's behavioral patterns, including
3 nesting, rearing, migrating, feeding, and sheltering—and thus has caused substantial
4 decline in the Vireo's population in the Santa Clara River watershed and its range. The
5 Vireo is harmed by United's Diversion because it lowers the groundwater elevations
6 downstream of the Dam beyond the reach of the native riparian vegetation and trees that
7 the Vireo needs for breeding, nesting, rearing, and foraging. The lower groundwater
8 elevations underlying the Santa Clara River and its floodplain have resulted in
9 replacement of the structurally diverse native riparian habitat that the Vireo needs to
10 survive with invasive vegetation, including *arundo*, which provides little suitable habitat,
11 thermal cover, or food for the Vireo.

12 96. In operating and maintaining the Dam as it currently does, and diverting
13 water from the Santa Clara River as it currently does, United is perpetuating adverse
14 modification of FWS-designated critical habitat for the Vireo. For the variety of reasons
15 set out above, on a daily basis, United's Dam and Diversion, as currently operated and
16 maintained, take the endangered Vireo and renders its Santa Clara River and Estuary
17 habitat far less suitable. Take is ongoing and is reasonably likely to continue until
18 United's Diversion is modified to mimic the Santa Clara River's natural flow regime.

19 97. For United's operation and maintenance of the Vern Freeman Dam and
20 Diversion of River flows at the Dam to be legal under the ESA, United must obtain an
21 Incidental Take Permit ("ITP") for the Vireo under ESA section 10. 16 U.S.C. § 1539.
22 United has not obtained such a permit. As such, United is in violation of ESA section 9
23 for taking Vireo via its maintenance and operation of the Dam and its Diversion of Santa
24 Clara River flows in all of the manners explained in paragraphs 1-97 above.

25 98. WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

26 ///

27 ///

THIRD CLAIM FOR RELIEF

**Violation of ESA Section 9 - Prohibition Against Unauthorized Take of Cuckoo
16 U.S.C. § 1538; Request for Declaratory Relief and Injunction to Enjoin United
From Taking Cuckoo**

99. Plaintiff reasserts and realleges each of the preceding paragraphs as if set forth herein, and incorporates herein by reference each and every allegation set forth in paragraphs 1 through 98.

100. United is violating ESA section 9’s prohibition on the unauthorized take of the Cuckoo by harassing, wounding, killing, trapping, and/or capturing the Cuckoo, and/or by causing significant habitat modification or degradation for the Cuckoo which kills, injures, or deleteriously impacts the species by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering. 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1532(19); 50 C.F.R. § 222.102; 50 C.F.R. § 17.3.

101. United’s operation and maintenance of the Dam and the Diversion of River flows are taking threatened Cuckoo by causing significant modification or degradation to the Cuckoo’s habitat that significantly impairs the bird’s behavioral patterns, including nesting, rearing, migrating, feeding, and sheltering—and thus has caused substantial decline in the Cuckoo’s population in the Santa Clara River watershed and its range. The Cuckoo is harmed by United’s Diversion because it entirely dewateres sections of the Santa Clara River downstream of the Dam needed by the Cuckoo for nesting, breeding, rearing, and foraging, and lowers the groundwater elevations downstream of the Dam beyond the reach of the native riparian vegetation and trees that the Cuckoo needs for breeding, nesting, rearing, and foraging. The lower groundwater elevations underlying the Santa Clara River and its floodplain have resulted in replacement of the structurally diverse native riparian habitat that the Cuckoo needs to survive with invasive vegetation, including *arundo*, which provides little suitable habitat, thermal cover, or food for the Cuckoo.

1 C.F.R. § 17.3.

2 107. United's operation and maintenance of the Dam and the Diversion of River
3 flows are taking endangered Flycatcher by causing significant modification or
4 degradation to the Flycatcher's habitat that significantly impairs the bird's behavioral
5 patterns, including nesting, rearing, migrating, feeding, and sheltering—and thus has
6 caused substantial decline in the Flycatcher's population in the Santa Clara River
7 watershed and its range. The Flycatcher is harmed by United's Diversion because it
8 entirely dewateres sections of the Santa Clara River downstream of the Dam needed by the
9 Flycatcher for nesting, breeding, rearing, and foraging, and lowers the groundwater
10 elevations downstream of the Dam beyond the reach of the native riparian vegetation and
11 trees that the Flycatcher needs for breeding, nesting, rearing, and foraging. The lower
12 groundwater elevations underlying the Santa Clara River and its floodplain have resulted
13 in replacement of the structurally diverse native riparian habitat that the Flycatcher needs
14 to survive with invasive vegetation, including *arundo*, which provides little suitable
15 habitat, thermal cover, or food for the Flycatcher.

16 108. In operating and maintaining the Dam as it currently does, and diverting
17 water from the Santa Clara River as it currently does, United is perpetuating adverse
18 modification of FWS-designated critical habitat for the Flycatcher. For the variety of
19 reasons set out above, on a daily basis, United's Dam and Diversion, as currently
20 operated and maintained, take the endangered Flycatcher and renders its Santa Clara
21 River and Estuary habitat far less suitable. Take is ongoing and is reasonably likely to
22 continue until United's Diversion is modified to mimic the Santa Clara River's natural
23 flow regime.

24 109. For United's operation and maintenance of the Vern Freeman Dam and
25 Diversion of River flows at the Dam to be legal under the ESA, United must obtain an
26 Incidental Take Permit ("ITP") for the Flycatcher under ESA section 10. 16 U.S.C. §
27 1539. United has not obtained such a permit. As such, United is in violation of ESA

1 section 9 for taking Flycatcher via its maintenance and operation of the Dam and its
2 Diversion of Santa Clara River flows in all of the manners explained in paragraphs 1-109
3 above.

4 110. WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

5 **REMEDY**

6 111. Plaintiffs have no plain, speedy, and adequate remedy, in the ordinary course
7 of law, other than the relief sought in this Complaint, because there is no other
8 mechanism for compelling Defendant's compliance with the ESA as alleged herein.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiffs seek the following relief:

11 (1) A declaratory judgment that United violated ESA section 9 by taking Listed
12 Species in the Santa Clara River without authorization;

13 (2) A temporary restraining order and/or preliminary and permanent injunction
14 ordering United to implement mitigation measures necessary to cease and desist its
15 unauthorized take of endangered steelhead unless United obtains authorization as
16 required by the ESA for incidental take of the Listed Species;

17 (3) An injunction requiring United to apply for ESA incidental take
18 authorization by a date certain;

19 (4) An award of attorneys' fees and costs to Plaintiffs;

20 (5) Such other and further relief as this Court deems just and proper.

21
22 Dated: June 2, 2016

Respectfully Submitted,

23
24 */s/ Christopher Sproul*

Christopher Sproul

25 Attorney for Plaintiffs
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EXHIBIT A

PLAINTIFFS' 60 DAY NOTICE OF INTENT TO SUE UNITED WATER CONSERVATION DISTRICT UNDER THE FEDERAL ENDANGERED SPECIES ACT



February 17, 2016

United Water Conservation District
Attn: Mauricio E. Guardado, Jr.
General Manager
106 N. 8th Street
Santa Paula, CA 93060
E-mail: mauricioG@unitedwater.org

VIA ELECTRONIC MAIL AND U.S. CERTIFIED MAIL RETURN RECEIPT REQUESTED

Re: Notice of Violation and Intent to File Suit under the Endangered Species Act

Dear Mr. Guardado and United Water Conservation District:

I am writing on behalf of the Wishtoyo Foundation, its Ventura Coastkeeper Program (collectively "VCK"), and the Center for Biological Diversity (the "Noticing Parties") to give notice that the Noticing Parties intend to file a civil action against the United Water Conservation District ("United") for violations of the Endangered Species Act ("ESA"). This notice concerns violations of the ESA by United. United is unlawfully taking Southern California Steelhead as well as Least Bell's Vireo, Western Yellow-Billed Cuckoo, and Southwestern Willow Flycatcher by operating and maintaining the Vern Freeman Diversion Dam ("Vern Freeman Dam" or "Dam") and diverting water from the Santa Clara River ("Santa Clara" or "River") at the Dam. All these species are listed as protected under the ESA.

ESA section 11(g)(2)(A)(i) requires that notice of the violation be given to the Secretary and to any alleged violator of the intent to file suit sixty (60) days prior to the initiation of a civil action under 16 U.S.C. § 1540(g). This letter constitutes the required notice of the violations described below, and has been sent to United, the Secretary of the Interior of the United States Department of Interior, and the Secretary of Commerce of the United States Department of Commerce. As such, you are hereby placed on formal notice by the Noticing Parties, after the expiration of sixty (60) days from the date of this Notice of Violation and Intent To File Suit, the Noticing Parties intend to file suit in federal court under ESA section 11(g), 16 U.S.C. § 1540(g) against United for violations of the ESA.

I. IDENTITY OF PERSONS GIVING NOTICE AND THEIR COUNSEL

This letter hereby gives notice of the names, addresses, and telephone numbers of the persons giving notice of intent to file suit, which are:

A. Wishtoyo Foundation (“Wishtoyo”) and its Ventura Coastkeeper Program

Founded in 1997, Wishtoyo is a 501(c)(3) nonprofit grassroots organization with over 700 members, including Ventura County’s diverse residents and Chumash Native Americans. Wishtoyo’s mission is to preserve and protect Chumash culture, the culture of all indigenous peoples, and the environment that our current and future generations depend upon. In 2000, Wishtoyo founded its Ventura Coastkeeper Program. Ventura Coastkeeper’s mission is to protect, preserve, and restore the ecological integrity and water quality of Ventura County’s inland and coastal waterbodies for all beings in the County's diverse community through outreach and education, restoration projects, advocacy, community organizing, and when necessary, legal action.

Wishtoyo and Ventura Coastkeeper may be contacted at the following address:

Wishtoyo Foundation/Ventura Coastkeeper
Mati Waiya, Executive Director
9452 Telephone Road, #432
Ventura, CA 93004
Tel: (805) 794-1248
E-mail: matiwaiya@wishtoyo.org

B. Center for Biological Diversity

The Center for Biological Diversity is a 501(c)(3) nonprofit organization with 991,000 members and online activists, including members in Ventura County, and offices in Oakland, Los Angeles, and Joshua Tree, California; Tucson, Arizona; Pinos Altos, New Mexico; Portland, Oregon; and Washington, D.C. The Center and its members are dedicated to protecting imperiled species and their habitats through science, policy, education, and environmental law.

The Center may be contacted at the following address:

Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
Tel: 510-844-7100

All communications regarding this notice should be addressed to the following legal counsel representing the Noticing Parties in this matter:

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II. BACKGROUND

A. The Vern Freeman Diversion Dam

Located on the mainstem of the Santa Clara River at approximately 10.5 river miles from the Pacific Ocean and Estuary, the concrete Dam is 1,200 foot wide, spans the width of the Santa Clara, and creates roughly a 25 foot drop in elevation of the River. It does not store Santa Clara River flows, rather, working by gravity, it directs the Santa Clara's flows through a fish screen to help prevent steelhead entry, and then into diversion infrastructure at a fixed diversion point. Once diverted from the Santa Clara River, the flows are directed to nearby percolation ponds to recharge the over-drafted Oxnard Plain groundwater basins or directly to United's water delivery infrastructure to provide water to end users in the Oxnard Plain.



The Vern Freeman Dam and its Passage Infrastructure Extending Away from the Dam's Face

B. United's Ownership and Control over Operations at the Vern Freeman Dam

The Bureau of Reclamation ("Bureau") funded the construction of Vern Freeman Dam pursuant to a loan contract entered into with United in 1987 under the authority of the Small Reclamation Project Act of 1956. Construction of the Dam and its fish ladder and fish passage

Exhibit A

infrastructure commenced in 1988 and was completed in 1991. The Bureau's loan contract that provided the financial assistance needed to construct the Dam gave the Bureau discretion to assist United in determining the adequacy of operation and maintenance, and to examine and approve substantial changes in Dam's operation. In 2011, the Bureau's ongoing control and discretion over operation of the Dam lapsed upon the expiration of its loan contract with United. Since repaying its loan to the Bureau in 2011, United has exercised sole ownership, control, and operation of the Dam.

C. Steelhead and United's Operations at the Vern Freeman Diversion Dam

1. Steelhead and the Santa Clara River

Steelhead is an anadromous fish species native to Pacific coast streams extending from Alaska to northwestern Mexico. The Southern California distinct population segment ("DPS") of steelhead ("Southern Steelhead" or "Steelhead") extends from the Santa Maria River, near Santa Maria, to the California-Mexico border. The National Marine Fisheries Service ("NMFS") listed the Southern Steelhead as an endangered species under the Endangered Species Act ("ESA") on August 18, 1997, and their endangered status was reaffirmed on January 5, 2006. *NMFS, Final Biological Opinion to Reclamation re: Approve United Water Conservation District's Proposal to Operate the Vern Freeman Diversion and Fish Passage Facility*, July 23, 2008, Administrative Record File # 151422SWR01PR6149 ("*Final Biological Opinion*") at 8. Genetic studies, which are largely based on the collection of juvenile Steelhead from freshwater habitats in southern California, including the Sespe Creek and Piru Creek tributaries to the Santa Clara River, indicate that native Southern Steelhead exist and dominate reproducing populations of Steelhead in the Santa Clara River watershed. *Final Biological Opinion* at 9.



Endangered Steelhead Spawning

Both the number of individual Southern Steelhead and the species' total range within the Southern California DPS range are dramatically reduced from historical levels. 71 Fed. Reg. 834, 851 (2006). This reduction is due in large part to dewatering of river drainages and the construction and operation of dams and other watercourse development, which have blocked the migration of Southern Steelhead to its traditional spawning grounds. 62 Fed. Reg. 43937, 43949 (1997). Because the existence of Southern Steelhead is endangered, it has been federally protected under the ESA since 1997. 62 Fed. Reg. 43937-39 (1997).

Prior to 1950, the annual returning adult Southern Steelhead run up the Santa Clara River from the ocean was estimated to be over 8,000 per year. This was one of the largest Southern

Steelhead runs in southern California. Moore, Mark R., July 1980, *An Assessment of the Impacts of the Proposed Improvements to the Vern Freeman Diversion on Anadromous Fishes of the Santa Clara River System*, Ventura County, CA, Prepared for Ventura County Environmental Resources Agency Under Contract Number 670. Today, very few adult Southern Steelhead are currently observed returning to the Santa Clara River and its tributaries. Adult Southern Steelhead experience extreme difficulty reaching these tributaries to spawn with each other or rainbow trout (and thus maintain their genetic diversity and experience denser populations) due to the Dam, its inadequate fish passage infrastructure and system, and United's diversion of flows at the Dam ("Diversion"). Kelley, E. 2004. *Information synthesis and priorities regarding steelhead trout (Oncorhynchus mykiss) on the Santa Clara River*, prepared for the Nature Conservancy ("Kelly 2004") at 7-8, 31; *Final Biological Opinion* at 26-27, 29-30. The Dam, its inadequate fish passage infrastructure and system, and United's Diversion of flows and operations at the Dam, also pose substantial impacts and threats to the hundreds of juvenile Southern Steelhead smolt and parr ("juvenile Steelhead") that attempt to migrate annually from Sespe Creek, Santa Paula Creek, and other Santa Clara River tributaries to the Santa Clara River Estuary ("SCRE or Estuary") and then to the Pacific Ocean. *Final Biological Opinion* at 26-27, 29-30, 54-55; Kelley, E. 2008, *Steelhead Smolt Survival in the Santa Clara and Santa Ynez River Estuaries*. Prepared for The California Department of Fish and Game. University of California, Santa Barbara ("Kelley 2008") at 9; Anderson, S.S. and Ambrose, R.F., *Independent Evaluation of the: Estuary Subwatershed Study Assessment of the Physical and Biological Condition of the Santa Clara River Estuary, Ventura County, California Final Synthesis Report 1 and the Environmental Effects of the City of Ventura Wastewater Reclamation Facility Discharge to the Santa Clara River Estuary*, June 14, 2011 ("Anderson and Ambrose Estuary Evaluation") at 4-6.

Steelhead trapping, observations, and recording devices at the Vern Freeman Dam have reported that only nine adult Southern Steelhead were able to pass through the Dam's fish ladder from 1994 to 2004. NMFS, *Final Biological Opinion to U. S. Federal Energy Regulatory Commission, re: Issue New License to United Water Conservation District for Operation of the Santa Felicia Hydroelectric Project (P-2153-012)*, May 5, 2008, Tracking # SWR/2002/02704: APS ("Santa Felicia Final Biological Opinion") at 36; Stoecker and Kelley 2005. *Santa Clara River Steelhead Trout: Assessment and Recovery Opportunities*, Prepared for The Nature Conservancy and The Santa Clara River Trustee Council ("Stoecker and Kelley 2005") at 8; Comstock, Richard. July 1992. *Santa Clara River Steelhead Restoration Assessment*. U.S. Fish and Wildlife Service ("Comstock") at 3. In 2012, two adult Steelhead were recorded in the fish ladder at the Vern Freeman Dam. Additional adult Southern Steelhead may make their way from the Estuary and upstream to the Dam, but are either uncounted or unable to locate the entrance to the Dam's fish ladder upon arrival at the Dam. *Final Biological Opinion* at 26-27, 29-30. Other adult Steelhead returning to the Santa Clara River never make it to the Dam, as United's diversions of River flow deprive adults of a sufficiently deep and continuous freshwater migration corridor needed to migrate from the ocean to the Dam. *Id.*

The Santa Clara River watershed is significant to survival and recovery of the species. It is one of the last remaining watersheds that supports populations of the Southern California distinct population segment of Steelhead, and has been designated by NMFS as providing one of the top Southern Steelhead restoration opportunities in the entire Southern California Evolutionarily Significant Unit (ESU). National Marine Fisheries Service, Southwest Region, Protected Resources Division, Long Beach, California. 2011. *Southern California Steelhead Recovery Plan. January 2012*. ("Steelhead Recovery Plan") at 1-4, 2-14, 7-5. The Sespe Creek and Santa Paula Creek tributaries to the Santa Clara River, both with confluences to the Santa Clara River mainstem

upstream of the Dam, provide unmatched high quality habitat for Steelhead spawning and rearing. Steelhead Recovery Plan at 4-2 to 4-3, 9-4, 9-10 to 9-11, 9-14. Sespe Creek, federally designated as a Wild and Scenic River with little to no anthropogenic impacts, supports some of the best and most extensive spawning and rearing habitat for Southern Steelhead, with over 46 river miles of total Steelhead habitat, 134,004 square miles of available spawning habitat, and 242,270 square miles of rearing habitat. *Id.*; *Kelley 2004* at 33-35.

Protection and restoration of Southern Steelhead populations on the Santa Clara River has implications for the recovery of all the Southern California Steelhead population segments because recovery of an independent Southern Steelhead population on the Santa Clara River is expected to support formation of Southern Steelhead numbers in several adjacent population units/watersheds. *Final Biological Opinion* at 21. The Santa Clara River population unit represents a large distributional component of the overall range of the DPS, and the Santa Clara River watershed is the largest Southern Steelhead-bearing watershed in the DPS. *Id.* Without the Santa Clara River population unit, the number of large and inland population units would be reduced to two: the Santa Ynez River and the Ventura River. *Id.* The remaining units are small coastal populations, which, by themselves, do not appear to favor viability and recovery of the DPS. *Id.* The value of inland populations such as those in the Santa Clara River watershed lies in their innate habitat characteristics and conditions; inland population units extend into areas that are drier and warmer than those experienced by coastal population units, and inland population units also have longer migration routes. *Id.* Such environmental features promote diversity (genetic, phenotypic, and ecological) and specific life-history traits (*e.g.*, the ability to migrate long distances, and tolerate elevated temperatures and low flows during the dry season) that favor survival of the species. *Id.*

2. Operation of the Vern Freeman Diversion Dam and its Impacts on Steelhead

Volitional fish passage from the Pacific Ocean upstream through the Vern Freeman Dam is of vital importance to the survival and recovery of the Southern Steelhead in the Santa Clara River watershed because such passage is needed for adult Steelhead to access their intact spawning and rearing habitats in the Santa Paula Creek, Sespe Creek, and other tributary sub-watersheds, and for juvenile Steelhead to access the Estuary and ocean. The physical impediments to volitional fish passage caused by the Dam and its fish ladder, and United's Diversion of River flows at the Dam, are the only activities on the mainstem of the Santa Clara River that obstruct adult Steelhead access to the Santa Clara River's tributaries for spawning and rearing, and that obstruct juvenile Steelhead access to the Estuary for rearing and acclimation. In addition, United's year round Diversion of flows at the Dam deprive the Santa Clara River Estuary of needed flows of sufficient water quality, thereby adversely impacting juvenile Steelhead that require suitable Estuary habitat for rearing and acclimation to survive in the ocean and to return to the Santa Clara to reproduce as adults.

3. The NMFS Steelhead Final Biological Opinion for the Vern Freeman Dam

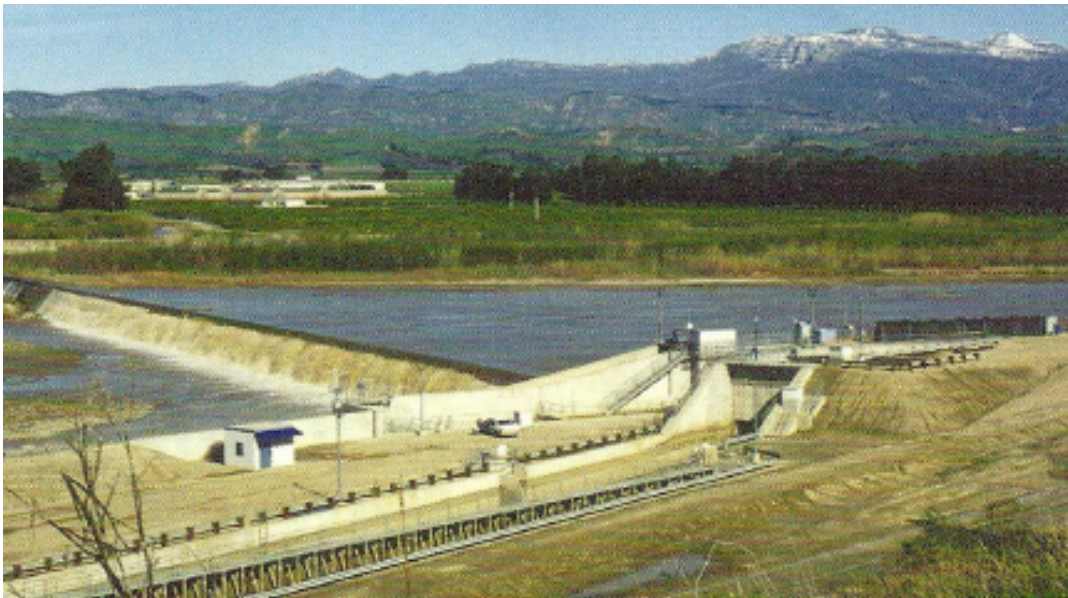
To address the harms to endangered Steelhead resulting from operations at the Vern Freeman Dam during the Bureau's discretionary control, NMFS, the Federal agency charged with administering the ESA for anadromous fish species, engaged United and the Bureau in extensive informal and formal consultation. After United prepared and the Bureau submitted a biological assessment in 2004, the Bureau and NMFS initiated formal consultation in May 2005. In September 2005, NMFS issued a Draft Biological Opinion, which found that the action proposed by the Bureau and United would result in jeopardy to Southern Steelhead and adverse modification to its critical habitat. The Bureau and United then revised the proposed action and submitted a revised biological

assessment in January 2007. NMFS issued a second Draft Biological Opinion in April 2008, and a Draft Incidental Take Statement in June 2008, again finding that the action proposed by the Bureau and United would result in jeopardy to Southern Steelhead and adverse modification to its critical habitat.

NMFS issued the Final Biological Opinion to the Bureau for the Dam on July 23, 2008. *Id.* at 1. The Final Biological Opinion found United's operation of the Dam is likely to jeopardize the continued existence of Southern Steelhead, and is likely to destroy or adversely modify critical habitat for this species. *Id.* at 66. The Final Biological Opinion found United's operation of the Dam increases the extinction risk to endangered Southern Steelhead by reducing and at times eliminating migration opportunities and success, and by precluding migration of the species to its historical spawning and rearing habitat, all of which lead to mortality, spawning failures, and rearing failures. *Id.* at 64. Specifically, the Final Biological Opinion found that the Dam, with its inadequate fish passage solution, creates a physical barrier that impedes adult Steelhead from migrating in an upstream direction and impedes juvenile Steelhead from migrating in a downstream direction, and that United's diversion of flows at the Dam deprives adult Steelhead and juvenile Steelhead of the flows needed for migration and survival downstream of the Dam all the way to the Estuary and Pacific Ocean. *Id.* at 66; 26-27, 35-40, 47-51, 56-58; 30, 33, 53, 54.

4. Harms to Steelhead Caused By the Vern Freeman Dam and its Inadequate Fish Passage Infrastructure and System

The preclusion or delay of upstream adult Southern Steelhead migration caused by the Dam results in adult Southern Steelhead returning to the ocean without reaching high-quality spawning habitat upstream of the Dam, or perishing somewhere in the River downstream or upstream of the Dam without reaching high-quality spawning habitat. This delaying or preclusion of migration occurs when high flows in the River, sufficient for steelhead migration, spill over the Dam's crest, creating turbulence and elevated water velocities at the base of the Dam. The turbulence, high flows, and high water velocity attract Steelhead to the Dam's base, instead of to the fish-ladder entrance at the extreme southern bank of the River 100 feet downstream, because high flows and water velocities guide upstream Steelhead migration. *See* Final Biological Opinion at 26-27, 35-40, 47-51, 56-58. As a result, Steelhead are attracted to the face of the Dam, and have a difficult time locating, or do not locate, the entrance to the fish ladder. *Id.* In addition, the Dam and its inadequate fish ladder can preclude or delay Steelhead migration by creating a fish passage bottleneck, as the fish ladder is the only freshwater migration corridor through the Dam. *Id.* at 47. Furthermore, spills of water over the Dam can cause the thalweg (the deepest part of the flowing river) to form on the side of the river channel that is opposite the fish-ladder entrance, and the bypass channel (i.e., the channel leading from the river to the fish-ladder entrance) can be far removed from the thalweg, occasionally slowing or precluding Steelhead from migrating upstream past the Dam. *Id.* at 57. In addition, sediment deposition immediately downstream of the Dam has been observed to result in sand covering both orifices to the fish ladder and to plug the fish ladder, rendering the ladder impassable. *Id.* at 57.



Turbulence From River Flows Over the Dam's Crest Attracts Migrating Adult Steelhead to the Base of the Vern Freeman Dam Instead of to its Fish Ladder

While the overall performance of the fish passage system at the Dam is the principal issue precluding unimpeded passage of Steelhead past the Dam in an upstream direction, the fish ladder/fishway and associated or connected infrastructure at the Dam itself are not adequate for Steelhead passage for the following additional reasons:

- The Fish ladder/fishway is not operable or accessible to Steelhead when flow is turned out of or routed into the Dam's diversion canal, or when the Dam's flushing gate is open and or flushing operations are being conducted;
- The attraction water capacity is not adequate to attract Steelhead to the fish ladder/fishway;
- The auxiliary water system is not screened and does not exclude Steelhead, and the likelihood of injury to juvenile Steelhead passing through the fishway is high;
- Turbulence in the fish ladder/fishway entrance pool and turning pools is excessive;
- The fishway, though passable for some adult Steelhead in a limited fashion, significantly impedes adult Steelhead migration compared to natural conditions. Some Steelhead may reject it because of the shallow, turbulent flow. The turbulence can be a barrier to migration for smaller Steelhead;
- Fish ladder/fishway entrance hydraulic conditions are inadequate for Steelhead at high flows when water is discharged through the Dam's flushing channel, and there is excessive turbulence at the two existing entrances;
- Upstream exit conditions in the fish ladder/fishway for adult Steelhead impede Steelhead migration. Adult Steelhead have to exit into the Dam's diversion canal perpendicular to the diversion canal flow, and then have to find an exit through the

diversion trashrack;

- For downstream juvenile Steelhead passage, the fish screens are deficient, pose barriers to volitional juvenile Steelhead migration, and pose take threats to migrating juvenile Steelhead;
- The fish ladder/fishway as designed, maintained, and operated is not suited for the flashiness of the Santa Clara River, and the migratory requirements and behavior of Steelhead, and thus at times poses a complete barrier to upstream Steelhead migration.

Vern Freeman Dam Fish Passage Conceptual Design Report, Prepared by: Vern Freeman Dam Fish Passage Panel for United Water Conservation District (September 15, 2010) at xii - xiv, 5-5, 8-1 to 8-2, 9-2; *Final Biological Opinion* at 51, 57.

Even when the Dam and its inadequate fish ladder/fishway do not prevent adult Steelhead migration altogether, they delay or slow adult Steelhead migration upstream. *Id.* at 57. This delay also leads to Steelhead mortality and spawning failures in the watershed by effectively precluding adult Steelhead from reaching tributary areas in the upper Santa Clara River watershed that provide suitable, high-quality spawning habitat. *Id.* Adult Steelhead generally only locate and ascend the Dam's fish ladder after spills over the Dam's crest nearly or entirely subside, when flow levels in the Santa Clara River upstream of the Dam drop. *Id.* In such lower flow conditions, flows can be of inadequate depth for Steelhead migration upstream of the Dam. *Id.* In the alternative, adult Steelhead that have been delayed may not have sufficient energy once passing the Dam to survive and successfully migrate to upstream tributary spawning habitat. Thus, Steelhead that have successfully located and ascended the Dam's ladder, are still precluded from migrating to spawning habitat upstream and from spawning successfully.



Flows over the Dam's Face Attract Steelhead to its Base Instead of to the Fish Ladder 100 Feet Downstream

The Final Biological Opinion conclusively finds that to avoid take of Steelhead, United must alleviate the obstruction the Dam currently poses to volitional Steelhead migration by physically modifying the Dam and its current fish passage system in a way that will provide a continuous freshwater migration corridor on the Santa Clara River past the Dam. *Final Biological Opinion* at

50-51. Concurring, the Vern Freeman Dam Fish Passage Panel convened by United to evaluate the upstream passage of Steelhead at the Dam found that “the existing fishway was not an adequate fish passage system” and “improvements to the existing fish ladder would not improve passage sufficiently to be a viable alternative compared to alternatives of a new passage.” *Vern Freeman Dam Fish Passage Conceptual Design Report*, Prepared by: Vern Freeman Dam Fish Passage Panel for United Water Conservation District (September 15, 2010) at xii-xiv, 5-5.

5. Harms to Migrating Steelhead Caused by Diversion of Water From the River

In regards to United’s impacts on the sufficiency of flows in the Santa Clara River to provide for Steelhead migration from the ocean past the Dam, the Final Biological Opinion conclusively finds that United’s diversion of water at the Dam for off-river use (“United’s Diversion” or “the Diversion”) significantly alters the pattern and magnitude of flows in the River downstream of the Dam so as to indirectly and directly adversely affect juvenile and adult Steelhead and the species’ critical habitat in the River downstream. Specifically, United’s Diversion at the Dam: (1) reduces the magnitude of flow in the Santa Clara River and sometimes eliminates the River’s flow entirely within a year or during critical periods, (2) causes fluctuating flow levels in the River in a fashion problematic for Steelhead function, (3) increases the rate of River recession downstream of the diversion dam, (4) abbreviates flow duration within individual rain-induced discharge pulses, (5) reduces migration opportunity (*i.e.*, favorable conditions that allow an individual to move between or among habitats) for adult and juvenile Steelhead, and (6) increases the potential for stranding juvenile and adult migrating Steelhead and delaying or precluding juvenile and adult Steelhead migration. *Final Biological Opinion* at 30, 33, 53, 54, 59. All of these alterations to the pattern and magnitude of flows in the River downstream of the Dam caused by United’s Diversion can lead to mortality and failed spawning from stranding or an inability to reach suitable spawning habitat in upstream tributaries, thereby reducing numbers and production of Steelhead in the Santa Clara River watershed. *Id.*

In addition, the Final Biological Opinion documents that United’s Diversion of in-stream flows takes Steelhead because it reduces the quality and extent of Steelhead habitat in the Santa Clara Estuary, the lower, tidally influenced part of the River near the River’s confluence with the ocean. United’s Diversion decreases the duration and frequency that the Estuary is open to the ocean by significantly reducing the amount of freshwater that flows to the Estuary during and after storms. *Id.* at 32, 52, 58; *City of Ventura Special Studies, Estuary Subwatershed Study Assessment of the Physical and Biological Condition of the Santa Clara River Estuary, Ventura County, California, Amended Final Report*, Stillwater Sciences, September 2011 (“*Stillwater Estuary Study*”) at 43. By reducing the amount of water flowing into the Estuary, United’s Diversion influences whether the Estuary can breach the sandbar allowing the river to flow to the ocean, a crucial event for Southern Steelhead. *Id.* In addition, United’s Diversion decreases the length of time the Estuary sandbar remains open to the ocean for adult and juvenile Southern Steelhead migration to and from the ocean. *Id.* The loss of water volume in the Estuary and reduced connection to the ocean resulting from United’s Diversion are adverse effects to Steelhead because estuarine areas are a primary constituent element of critical habitat for Steelhead and are essential for the conservation of the species. *Final Biological Opinion* at 32, 52, 58.

United attempts to mitigate impacts of the Dam on outmigrating juvenile Steelhead by trapping juvenile Steelhead and hauling them via truck to the Estuary. The Final Biological Opinion finds that this method of attempted mitigation for the impacts to migrating juvenile Steelhead constitutes take which could adversely impact 900 Southern Steelhead per year. *Id.* at 54, 55, 56.

The adverse effects of United’s trap and haul program include mortality to Steelhead during capture and transport; unintended fish stranding from unsuccessful capture efforts; depriving Steelhead parr and smolt of biological benefits related to emigrating through the remaining 10.5 miles of Santa Clara River; and relocation to inappropriate habitats for given life stages, such as the transport of Steelhead parr to the ocean before they undergo physiological changes need for ocean survival. *Id.* at 54, 55, 56. Trucking juvenile Southern Steelhead from the Dam to the Estuary, instead of maintaining sufficient water in the River to allow juvenile Steelhead to successfully migrate downstream, is not an alternative that is scientifically protective of juvenile Steelhead. *Id.* at 72.

6. The Diversion’s Harms to Juvenile Steelhead Rearing and Acclimating in the Santa Clara River Estuary

Juvenile Steelhead in the Santa Clara River watershed exhibit three life history pathways before ocean entry. *Steelhead Growth in a Small Central California Watershed: Upstream and Estuarine Rearing Patterns*, Sean A. Hayes, et. al, NOAA, National Marine Fisheries Service (2008) (“*Hayes 2008*”) at 122-126; *Anderson and Ambrose Estuary Evaluation* at 4-6; *Kelley 2008* at 8-9; *Final Biological Opinion* at 26-27, 29-30, 54-55. The first pathway is direct recruitment to the Estuary after spending only a few months in the upper watershed. *Id.* The second pathway is to spend 1–2 years rearing in the upper watershed, migrate downstream to the Estuary, and remain there for an additional 1–10 months before ocean entry. *Id.* The third is to spend one or more years rearing in the upper watershed, migrate downstream, and directly enter the ocean. *Id.*

Marine survival measured across the Steelhead range has been demonstrated to be influenced by size at ocean entry, and generally Steelhead smaller than 150 mm are unlikely to survive. Bond, M. H. 2006. *Importance of estuarine rearing to central California steelhead (Oncorhynchus mykiss) growth and marine survival*. Master Thesis, University of California, Santa Cruz (“*Bond 2006*”) at 1-4, 29-33, 37-38; *Hayes 2008* at 122-126. It is well known that estuaries are very important rearing areas for juvenile Steelhead. *Id.*; *The Effects of Sandbar Formation and Inflows on Aquatic Habitat and Fish Utilization in Pescadero, San Gregorio, Waddell and Pornponio Creek Estuary/Lagoon Systems, 1985-1989*, Jerry J. Smith, December 12, 1990 (“*Smith 1990*”) at 28-32; *Final Biological Opinion* at 32, 52, 58. Diversity and richness of habitat and food sources in southern coastal estuaries that form lagoons allow juvenile Steelhead to attain the necessary size for marine survival, which heavily influences adult escapement from predators, increases their chances for survival in the marine environment, and possibly defines adult production from the watershed. *Hayes 2008* at 122-126; *Steelhead Restoration and Management Plan for California*, Department of Fish and Game, 1996 at 77; Stillwater Sciences. 2008. *Santa Clara River Parkway Floodplain Restoration Feasibility Study*. Prepared for the California State Coastal Conservancy, Oakland, California. July 2008. (“*Floodplain Restoration Study*”) at 2-38.

Southern Steelhead observations in the Santa Clara River Estuary’s lagoon, the annual collection of juvenile Steelhead parr and smolt at the Dam’s fish trap that are not ready for ocean entry and or that could benefit from additional rearing in the Estuary, as well as detailed information on rearing in other similar coastal lagoons, suggests that the Estuary provides “valuable” rearing habitat for juvenile Steelhead. *Final Biological Opinion* at 32, 54-55, 58; *Stillwater Estuary Study* at 137, 132, 14 - 1.4.1; *Anderson and Ambrose Estuary Evaluation* at 4-6; *Kelley 2008* at 8-9; *Final Biological Opinion* at 26-27, 29-30, 32, 54-55, 58. Not only does the Estuary provide feeding and growing areas for “lagoon anadromous” type of juvenile Steelhead that choose a life history strategy of rearing in the Estuary, but the Estuary provides needed areas for facilitation of physiological transitions between fresh and saltwater for adult and juvenile Steelhead. *Id.*; *Hayes*

2008 at 122-126; *Smith* at 28-32; *Bond 2006* at 1-4, 29-33, 37-38; *Final Biological Opinion* at 32, 58.

The loss of estuarine habitat within the Santa Clara River watershed is of concern because estuaries are a primary constituent element of Southern Steelhead critical habitat that contain features essential to the conservation of the species. Therefore, protection of the Santa Clara River Estuary is not only needed to provide for adequate acclimation and holding habitat for immigrating adults moving between the marine and freshwater environments, but for adequate rearing and acclimation habitat for emigrating juvenile Steelhead.

Two of the most important influences on Steelhead survival and rearing in the Estuary include water quality conditions and habitat availability. *Stillwater Estuary Study* at 132. Juvenile Steelhead generally require cool water temperatures, dissolved oxygen (“DO”) concentrations near saturation, and water quality that does not impart sub-lethal, acute, or chronic toxicity impacts. *Stillwater Estuary Study* at 132; Hecht, et. al., *An overview of sensory effects on juvenile salmonids exposed to dissolved copper: Applying a benchmark concentration approach to evaluate sublethal neurobehavioral toxicity*, U.S. Dept. Commerce, NOAA Technical Memo. NMFS-NWFSC-83, October 2007 at 1-2, 15, 17-18. Healthy estuarine environments with abundant food sources are also important for migrating adult Steelhead because they provide a final source of abundant forage that will provide the energy stores needed to make the physiological transition to fresh water, migrate upstream, avoid predators, and develop to maturity upon reaching spawning areas. *Final Biological Opinion* at 41.

Inflow from the Santa Clara River is the primary source of freshwater flowing into the Estuary. *Stillwater Estuary Study* at 40. The loss of natural Santa Clara River flows caused by United’s Diversion has a severe impact on the Estuary during the late spring and summer when the Estuary transforms into a coastal lagoon after a berm forms at its mouth closing it to the ocean. In the absence of natural surface flow contributions from the Santa Clara River during the late spring, summer, and fall months due to United’s Diversion, the Estuary loses habitat area, fills less rapidly, and experiences degradation in water quality because less natural flows are available to dilute agricultural, municipal waste water, and industrial discharges. *Steelhead Recovery Plan* at 9-13-14. NMFS has found that:

The seasonal elimination or reduction of [Santa Clara River] [E]stuary habitat is expected to harm steelhead because estuarine areas provide living space to sustain over summering individuals (Smith 1990, Thorpe 1994, Bond 2006) and features essential to the conservation of adult and juvenile steelhead (NMFS 2005). Recent findings reaffirmed that juvenile steelhead over summer in the estuary of their natal creek, and indicate the estuary allowed juvenile steelhead to grow fast enough to migrate to the ocean their first year (Bond 2006). Most individuals entered the ocean at a larger size than fish rearing in the freshwater portion of the stream system. Large size enhances survival in the ocean, and thus the lagoon reared fish tend to be disproportionately represented in the adult spawning population. These findings suggest the loss or reduction in estuary habitat in the Santa Clara River watershed may lead to a reduction in the number of adults returning to the watershed. *Final Biological Opinion* at 32, 58-59.

The City of Ventura’s discharge of millions of gallons per day of tertiary treated nutrient rich sewage effluent into the Estuary, used as a “substitute” for flows that historically flowed un-

diverted by United at the Vern Freeman Dam to the Estuary (“substitute surface water”), causes eutrophic conditions (oxygen depletion) in the Estuary, changes in the Estuary’s natural salinity, and acute, chronic, and sub-lethal toxicity threats to the Estuary’s steelhead and their food sources. *Final Biological Opinion* at 321; *Kelly 2004* at 8; *Stillwater Estuary Study* at 110-111, 118, 166-67; *Anderson and Ambrose Estuary Evaluation* at 7-8, 10-19.

Nutrient enrichment leading to increased algal productivity and eutrophic conditions in the Estuary (with DO and pH impairments) and to periodic exceedances of ammonia toxicity criteria — result from a combination of sewage effluent discharges from the Ventura Waste Water Treatment Plant (“VRFW”) and lack of inflow of fresh water from the Santa Clara River due to United’s Diversion. *Stillwater Estuary Study* at 2, 81. Further, the changes in salinity due to the combined effect of the Ventura sewage effluent discharge coupled with decreased natural freshwater river flow due to United’s Diversion have also created an Estuary environment hospitable to non-native aquatic species that prey on and compete with juvenile Steelhead for habitat space and food. *Stoecker and Kelley 2005* at 4; *Steelhead Recovery Plan* at 9-13.



Oxygen Starved Conditions for Juvenile Steelhead in the Santa Clara River Estuary Caused by Algal Blooms from Nutrient Rich “Substitute” River Flows from a Wastewater Treatment Plant

NMFS’s *Steelhead Recovery Plan* states that: “Because estuaries are the gateway used by both immigrating adults and emigrating juveniles moving between marine and freshwater environments, estuarine loss affects anadromous *O. mykiss* throughout the entire (Santa Clara River) watershed.” *Steelhead Recovery Plan* at 9-13. Accordingly, the *Steelhead Recovery Plan* calls for Recovery Action # SCR-SCS 12.1 - “Develop and implement an estuary restoration and management plan”, and assigns this recovery action an action rank of 1B. *Id.* at 9-67. Adequate natural flows of sufficient water quality that pass by the Dam are needed to replace the “substitute surface water” of inadequate water quality discharged as treated sewage effluent from the Ventura Waste Water Treatment Plant that have impaired Estuary Steelhead habitat since the Plant’s construction in 1958. *Steelhead Recovery Plan* at pg. 9-15, Table 9-2, 9-64-66, Table 9-7. Pursuant to a federal court consent decree entered in March 2012 between Wishtoyo/Ventura Coastkeeper,

Heal the Bay and the City of Ventura (“Ventura Consent Decree”),¹ the City will only be able to continue discharging any of its nutrient and contaminant rich effluent into the Estuary after 2025 if its effluent is found not to harm Steelhead and is determined to be a source of necessary “substitute surface water” to provide for Steelhead and other endangered species survival. Thus, implementation of a Vern Freeman Dam Diversion management plan to provide the Estuary with suitable year round flows of adequate water quality from the Santa Clara River is an action that will be well integrated with other remedial environmental actions mandated by law to occur in the near future.

7. United’s Failure to Prevent Harms to Steelhead

The Final Biological Opinion provided Reasonable and Prudent Alternatives (“RPAs”) “necessary and appropriate” for the Bureau and United to implement to “avoid the likelihood of jeopardizing the continued existence of the endangered Southern California DPS of steelhead or destroying or adversely modifying critical habitat for this species.” *Final Biological Opinion* at 67-71. The “economically and technically feasible” RPA called for actions to “restore unobstructed southern steelhead access through the lower Santa Clara River to spawning habitats in tributaries to the mainstem, and re-establish those bypass flows necessary to ensure a properly functioning migration corridor.” *Final Biological Opinion* at 71-73, 75-78. Specifically, the RPA required the Bureau and United to take a series of time-sensitive actions that would result in physical modifications to the Dam and the maintenance of specific in-stream flows downstream of the Dam, with the goal of restoring and maintaining “a continuous unobstructed freshwater migration corridor in the Santa Clara River during winter and spring *for the purpose of providing or approximating unimpeded migration of steelhead past the diversion dam over a broad range of hydrologic events.*” *Final Biological Opinion* at 67 (emphasis in original). The Final Biological Opinion also contained an Incidental Take Statement, which authorized the Bureau and United to engage in a certain level of “take” of Southern Steelhead if the project was operated pursuant to the terms of the RPAs, and proposed Reasonable and Prudent Measures (“RPMs”) and Terms and Conditions (“T&Cs”) to allow for incidental take if RPMs were adhered to after the RPAs were implemented. *Final Biological Opinion* at 80-84.

The Bureau’s loan contract that provided the financial assistance needed to construct the Dam, gave the Bureau discretion to assist United in determining the adequacy of operation and maintenance, and to examine and approve substantive changes in Dam’s operation. While the Bureau still exercised control and ownership over the Dam prior to expiration of its loan contract with United in 2011, the Bureau and United failed to implement the fish passage requirements of the Final Biological Opinion. Neither the Bureau, nor United, adhered to or implemented RPAs 1(d) and (e), which provided that long term physical modifications to the Dam enabling volitional Southern Steelhead passage be completely designed and “fully implemented and operational before the Bureau’s ongoing discretion over operation of the diversion dam lapses in 2011.” In addition, the Bureau failed to adhere to RPA 2, which provided the amount of flows that must be left in-stream, as opposed to being diverted at the Dam, to maintain a properly functioning migration corridor for adult and juvenile Steelhead in the Santa Clara River from the Dam to the Pacific Ocean.

¹ On March 30, 2012, the Ventura Consent Decree was entered in the Clean Water Act suit action Wishtoyo Foundation/Ventura Coastkeeper v. City of San Buenaventura, Case No. 2:10-cv-02072-GHK-PJW.

Since taking over sole ownership and operation of the Dam in 2011, United has perpetuated the Bureau's inaction and unlawful take of Southern Steelhead. While making simple modifications to its operations and fish ladder, United has failed to adopt NMFS's required RPAs and RPMs needed to avoid take of Steelhead. Notably, United has not implemented, or even fully designed, physical fish passage infrastructure at the Dam to allow for volitional steelhead migration as called for by RPAs 1(d) and 1(e), despite NMFS concluding that the preferred alternative for volitional fish passage could and should be implemented before the Bureau's discretion ceased at the end of 2011. *Final Biological Opinion* at 75-77.

In addition, United continues to fail to release flows as mandated by the Final Biological Opinion, as the quantity, timing, and duration of United's flow releases from the Dam are contrary to the provisions in RPA 2. First, United's flow release operations have not been modified to adhere to the operational criteria specified in the Final Biological Opinion's RPA 2(a). This is evidenced by NMFS's September 12, 2013 letter to United indicating that United's "recent and proposed operations are not consistent with operational criteria specified in reasonable and prudent alternative 2(a) of the 2008 Biological Opinion." Second, the location United chooses for the "critical riffle"², defined as the point downstream of the Dam at which United is required to maintain minimum flows to provide a continuous migration corridor from the Dam to the Estuary through flow releases at the Dam in lieu of its Diversion, is also contrary to the provisions in RPA 2. Because United places the critical riffle too far upstream, insufficient flows are released by United at the Dam to maintain the in-stream flows from the Dam to the Estuary that RPA 2 requires.

When the Final Biological Opinion and its associated incidental take statement ("ITS") expired in 2011, United lost the incidental take protection otherwise potentially afforded by compliance with the Final Biological Opinion. United has not obtained an incidental take permit, or any other legal permission under the ESA for take of Southern Steelhead, thus leaving United strictly liable for take of Steelhead caused by United's operation and maintenance of the Dam and Diversion of flows from the River. Since the Biological Opinion and the ITS expired, United has continued to take Southern Steelhead and has yet to adhere to the requirements of RPA 1(d)(e) or (2) in order to avoid take. This is because, despite the passage of over seven years since NMFS issued the Final Biological Opinion, United continues to fail to make the physical modifications to the Dam and to maintain the specific in-stream flows downstream of the Dam that the Biological Opinion finds are necessary to provide for volitional Southern Steelhead passage.

A United-convened fish passage panel ("Expert Panel") released findings in 2010 that a hardened rock ramp going over the face of the Dam was one of the two best feasible options,

² United defines "critical riffle" as follows: "The critical riffle is a term we use that would describe the most difficult riffle for an upstream migrant. Due to our ever changing river, the critical riffle can also move. In the past it has been up towards the 118 bridge, but normally is about 1.5 to 1.9 miles upstream of the 101 bridge. Normally when that stretch of the river is a losing reach the critical riffle will be further downstream due to less water in the river. When it is a gaining reach, it can be closer to the 118 bridge. Big riffle is located at about 1.7 miles upstream of the 101 bridge. The critical riffle will have to be located after every major storm. In general the channel morphology will change with peaks that exceed several thousand cfs." *Final Biological Opinion* at 70, n.25; pers. comm., M. McEachron, hydrologist, United Water Conservation District, November 21, 2007.

outside of Dam removal, to enable volitional Steelhead passage past the Dam. *Vern Freeman Dam Fish Passage Conceptual Design Report*, Prepared by: Vern Freeman Dam Fish Passage Panel for United Water Conservation District (September 15, 2010) at 9-1 to 9-2. Specifically, the Expert Panel found that Dam removal and the Diversion without a Dam “should be considered as an ultimate goal to maximize fish passage opportunities” and that “[c]onsidering the highly variable hydrologic characteristics of the basin, edge of steelhead ecosystem, fragility of the [steelhead] stock, inherent delays caused by dams, dam removal would have the greatest chance of allowing and promoting restoration of Santa Clara River [steelhead] stocks.” *Id.* While the Expert Panel concluded that “the alternative of dam removal should be investigated as a long-term goal of the interested parties,” United has yet to conduct or organize such an investigation. *Id.*

While United did decide to select a hardened rock ramp as its fish passage solution to avoid take of Steelhead, United’s efforts to design the ramp have been exceedingly slow and constitute unjustified delay of urgently needed measures to protect and restore the Steelhead population of the Santa Clara River watershed. For instance, between 2010 and late 2012, United failed to take any action to design and implement the hardened rock ramp, and it was not until late 2012 – early 2013 that United commenced preliminary design. From late 2012 – early 2013 to the present, United has been working with NMFS engineers in a slow drawn out, back and forth process. The ramp component (the fishway) has yet to be designed to 30% completion, and the upstream access way (the headworks) has yet to be designed. Moreover, United has made no guarantee that the hardened rock ramp or an adequate Steelhead passage solution at the Dam will be implemented at all, let alone within an expeditious timeframe. Furthermore, United continues to refuse to complete, and otherwise conduct, a feasibility and design study for a damless diversion alternative that could provide Steelhead with the best assurance of volitional passage. While United has submitted portions of a draft Habitat Conservation Plan (“HCP”) ostensibly in pursuit of an ESA section 10 incidental take permit, the draft HCP is far from complete, and United keeps pushing back its date for completing the draft HCP, the HCP’s underlying studies, and the design of the hardened rock ramp.

Operation of the Vern Freeman Dam as it is currently configured without an adequate physical fish passage system, and United’s improper Diversion of flow at the Dam, creates substantial barriers to volitional Southern Steelhead migration, precluding many Southern Steelhead from reaching suitable spawning habitat and harassing, killing, and harming Southern Steelhead. Indeed, United’s own biologist has documented incidents in which Southern Steelhead have attempted to utilize the Dam’s fish ladder to travel upstream, have been unable to pass, and therefore have built their redds (nests) below the Dam, resulting in harm to Southern Steelhead. Moreover, NMFS’ records indicate that operations at the Dam without the modifications set out in the Final Biological Opinion have killed, and will continue to kill, Southern Steelhead. NMFS’ records further indicate that United’s operations at the Dam have harmed or harassed, and will continue to harm and harass, adult Steelhead and juvenile Steelhead.³ In addition, the timing and

³ Live and dead adult and juvenile Steelhead have been found when tending to the Dam (*e.g.*, lowering flows to inspect or clean features of the diversion) or in the fish trap (Carpenter and Wise 1999, Kentosh 1999, United Water Conservation District 1999, United Water Conservation District 2006, email correspondence S. Howard, fishery biologist, United Water Conservation District, May 8, 2007). *Final Biological Opinion* at 58. In the past, live steelhead collected at the Dam have been captured (a total of ten smolts and two “resident rainbow trout” were captured in 2007, see also Table 4-2) and then trucked and released in the Santa Clara River or Ventura River estuaries or upstream of the diversion in the Santa Clara River or Santa Paula Creek near 12th Street. *Final*

magnitude of United's Diversion continues to harm adult Steelhead and juvenile Steelhead by depriving Steelhead of opportunities to migrate to and from the ocean, and by diminishing the ability of Steelhead to acclimate and rear in the Estuary.

8. Steelhead Survival and Recovery

The Santa Clara River watershed provides one of the top Southern Steelhead restoration opportunities in the species' entire Southern California range. *Stoecker and Kelley 2005* at 8; *Steelhead Recovery Plan* at 2-12, 2-13, 7-3 to 7-9. Unlike many of the large rivers to the south, the Santa Clara River system remains in a relatively natural state and the mainstem has not been dramatically altered by concrete flood control channels or large impassable dams. *Stoecker and Kelley 2005* at 8. Sespe, Piru, and Santa Paula creeks, all located in the Santa Clara River watershed upstream of the Dam, provide unmatched high quality habitat for Steelhead spawning and rearing. For example, Sespe Creek, which is relatively undisturbed, supports some of the best and largest spawning habitat in Southern California. *Id.*; *Steelhead Recovery Plan* at 9-10 to 9-14, 9-3.

The NFMS Steelhead Recovery Plan ranks surface water diversions as very high threats to Steelhead viability and recovery in the Santa Clara River watershed. Accordingly, the Recovery Plan's Critical Recovery Actions for Steelhead Population Recovery in Santa Clara River includes implementing operating criteria to ensure the pattern and magnitude of groundwater extractions and water releases, including bypass flows around the Vern Freeman Dam to "provide the essential habitat functions to support the life history and habitat requirements of adult and juvenile steelhead." *Steelhead Recovery Plan* at 7-9, 9-17. Accordingly, the Recovery Plan assigns the highest prioritized Action Rank for Steelhead recovery in the watershed, an Action Rank of 1A, to "Provid[ing] fish passage around dams and diversions (e.g., Vern Freeman Diversion)" and "Develop[ing] and implement[ing] water management plan for diversion operations (e.g., Vern Freeman Diversion)." *Steelhead Recovery Plan* at 9-15, 9-65. Furthermore, the Recovery Plan ranks developing and implementing an Estuary restoration and management plan to protect the Estuary from upstream threats with the second highest priority, Action Rank 1B. *Steelhead Recovery Plan* at 9-67. For Southern Steelhead revitalization to succeed in the Santa Clara River watershed, measures to secure effective Steelhead migration through the Vern Freeman Dam on the mainstem of the Santa Clara and to alter United's Diversions in a manner that will help restore an ecologically suitable Estuary for steelhead rearing and acclimation must be implemented. *See Final Biological Opinion* at 53, 67-71. Only then can Southern Steelhead repopulate the watershed with a genetically diverse population. United's operation of the Vern Freeman Dam and associated water Diversion is taking Steelhead in a manner precluding Santa Clara River Southern Steelhead recovery and jeopardizing Southern Steelhead existence.

D. The Impact of United's Diversion on Native and Endangered Birds Downstream

United's diversion of flows at the Vern Freeman Dam significantly diminish Santa Clara River flows downstream to the point that the River becomes deprived of flows it would naturally have at various times of year. United's Diversion further lowers groundwater elevations underlying the River and its floodplain downstream of the Dam beyond the reach of native riparian vegetation and trees. As a result, United's Diversion has been a primary factor in the decline of flow and high elevation groundwater dependent native riparian plant species in the Santa Clara River downstream

Biological Opinion at 30.

of the Dam. This harm to native riparian vegetation in turn has harmed endangered avian life downstream of the Dam, specifically the Least Bell's Vireo ("Vireo"), Southwestern Willow Flycatcher ("Flycatcher"), and Western Yellow Billed Cuckoo ("Cuckoo") (collectively "the Listed Bird Species"). Vireo, Flycatcher, and Cuckoo habitat needs to include densely foliated stands of deciduous trees and shrubs, particularly willows, with a dense understory adjacent to slow moving watercourses, backwaters, or seeps. United's Diversion has substantially degraded the presence of such riparian vegetation characteristics in the lower Santa Clara, this causing increased mortality and other harm to these three avian species.

The Santa Clara River's riparian habitat serves as critical habitat for the endangered Vireo and Flycatcher, and is important habitat for the Cuckoo. *Re-imagining Access ARCS of Experience for the Santa Clara River*, California State Polytechnic Univ. 2009 ("ARCS of Experience for the Santa Clara River") at 224. These birds are especially discriminate about the vegetation types they nest in and forage from. Thus, alterations to their native riparian habitat can result in "profound effects" on their survival and populations. *Id.* The replacement of the Santa Clara River's native riparian vegetation with the invasive nuisance plant giant reed (*arundo donax*) ("*arundo*"), with deep roots to access groundwater at lower elevations, is of "major concern", since *arundo* provides little suitable habitat or food for these birds that require the "structural diversity" associated with native vegetation and mature riparian forests in order to breed. *Id.*; *Environmental Factors Correlated with Changes in Riparian Plant Composition along the Santa Clara River Floodplain, California, Holly 2011* ("*Riparian Plant Composition*") at 6. For the reach of the Santa Clara River from the Dam to the Estuary, and for the entire interconnected Santa Clara River ecosystem to provide suitable habitat for Vireo, Flycatcher, and Cuckoo, the Santa Clara River's natural flow regime and underlying groundwater depth must be sufficiently restored to provide these avian species, and the native riparian plant communities they depend upon, with adequate access to water during the spring, summer, winter, and fall months.

1. Least Bell's Vireo

The Least Bell's Vireo, a migratory songbird endemic to California and Baja California, Mexico, is listed as an endangered species under the ESA, and is also listed as endangered under the California Endangered Species Act. 59 Fed. Reg. 16474 (1986). The reach of the Santa Clara River from the Vern Freeman Diversion Dam to the Estuary ("Reach 1 & 2") is listed as critical habitat for the Vireo under the Endangered Species Act. 59 Fed. Reg. 4845 (1994).



An Endangered Least Bell's Vireo and its Hatchlings

Now rarely sighted in various stretches of the Santa Clara River downstream of the Dam to the Estuary⁴, the Vireo was once abundant from the Dam to the Estuary and elsewhere in the Santa Clara River watershed. *Floodplain Restoration Study* at 2-47, 2-48; *The Status of the Least Bell's Vireo on Properties owned by the Nature Conservancy at the Santa Clara River*, Griffith Wildlife Biology (2010) ("*Least Bell's Vireo on the Santa Clara River*") at 1-2, 6. The species experienced "sharp declines in abundance" during the first half of the twentieth century primarily due to habitat fragmentation and the spread of non-native plant species. *Floodplain Restoration Study* at 2-47, 2-48; *Least Bell's Vireo on the Santa Clara River* at 1-2, 6. More than 95% of the Vireo's obligate riparian habitat in its historic range, including the Santa Clara River, has been destroyed by agriculture, urban development, flood control, water project, mining activities, grazing, and exotic plants. *Id.*

Experts agree that it is accurate to describe the Santa Clara River as currently the most important site and habitat type for Vireo recovery, as Vireo require the structural diversity and cover provided by the Santa Clara River's native mixed riparian forest communities and riparian scrub in flatter sections of the Santa Clara River for breeding, nesting, and foraging. *Least Bell's Vireo on the Santa Clara River* at 2-3; *Riparian Plant Composition* at 6; *Floodplain Restoration Study* at 2-33; U.S. Fish and Wildlife Service, September 2, 2009, *Re-initiation of the River Street Townhomes Biological Opinion*, City of Fillmore, Ventura County, California (8-8-09-F-40R) at 1-

⁴ Studies documenting the recent presence of Least Bell's Vireo and other native and endangered birds in Reach 1 & 2 of the Santa Clara include: PBS&J, September 2008, *The Results of Least Bell's Vireo Surveys Santa Clara River Weir Field Downstream of Highway 101*, Ventura County Watershed Protection District April - July 2008; PBS&J, March 3, 2009, *Santa Clara River Weir Field Downstream of Highway 101, Biological Resources Technical Report*; Ventura County Watershed Protection District, December 2008, *Draft Mitigation Plan for the Santa Clara River Weir Field Downstream of Highway 101*; National Park Service, Sooge, Mark, et. al, *A Southwestern Willow Flycatcher Natural History Summary and Survey Protocol Technical Report* NPS/NAUCPRS/NRTR-97/12, May 1977.

2. The vegetation in Vireo home ranges is dominated in the tree and shrub layers by several willow species: arroyo willow, black willow, sandbar willow, yellow willow, and red willow.⁵ *Least Bell's Vireo on the Santa Clara River* at 2-3. Important nesting and foraging shrubs for Vireo include mulefat, California wild blackberry, wild rose, Mexican elderberry, and poison oak.⁶ *Id.* Diversity in plant species composition and structure are important components of vireo home ranges and nest sites; monotypic and, senescent willow woodland is generally avoided. *Id.* Vireo prefer nesting in willow thickets or mulefat that provide dense vegetative cover, require a dense stratified forest canopy for foraging, and specifically utilizes the native vegetation types above for foraging and nest substrate.⁷ *Least Bell's Vireo on the Santa Clara River* at 2-3; *Floodplain Restoration Study* at 2-47.

The dense native mixed riparian forest and riparian scrub needed by Vireo is generally found on the banks of flatter mainstem and tributary channels of the Santa Clara River, where there is shallow groundwater. *Floodplain Restoration Study* at 2-33 (see Figure 2-17).⁸ Activity which changes the structure of the riparian vegetation such as water diversions and lowered groundwater tables, leading to a loss of vegetation and the replacement of native vegetation with invasive vegetation, such as *arundo*, has a profound effect on Vireo. *ARCS of Experience for the Santa Clara River* at 224; *Santa Clara River Parkway Strategic Plan for Arundo Treatment and Post-treatment Revegetation*, Stillwater Sciences, 2011 (“*Santa Clara River Arundo Treatment*”) at 4; *Least Bell's Vireo on the Santa Clara River* at 2-3; U.S. Fish and Wildlife Service, July 6, 2010, *Biological Opinion for the Landfill Drain Outlet Maintenance Along the Santa Clara River, Ventura County, California (File Number SPL-2009-00498-CLH) (8-8-10-F-7)* (“*Landfill Drain Final Biological Opinion*”) at 5. *Arundo* provides little suitable nesting habitat and little food for the species. *Id.*; *Least Bell's Vireo on the Santa Clara River* at 2-3. Thus, Vireo are absent from monocultures of these invasive plants. *Id.* at 2-3.

While Vireo habitat in Reach 1 & 2 of the Santa Clara does contain patches of intact habitat consisting of mulefat scrub, southern willow scrub, southern willow riparian forest, and patches of sandy Santa Clara River sediment, large portions of Reach 1 & 2 of the Santa Clara River native Vireo riparian habitat have been degraded due to the absence of native vegetation, which has been replaced by stands of *arundo*. *Landfill Drain Final Biological Opinion* at 6; *Santa Clara River Arundo Treatment* at 1-4. United's Diversion of almost all of the Santa Clara River's flows during the spring, summer, winter, and fall at the Dam continue to threaten, degrade, and reduce the extent of native riparian forest and riparian scrub communities, compromising Vireo survival and recovery in the Santa Clara River watershed and throughout their historic range. These water diversions give a competitive advantage to exotic nuisance plants such as *arundo* over the native plants necessary for Vireo habitat.

⁵ Other trees include Fremont cottonwood, white alder, California sycamore, and coast live oak.

⁶ In addition, common herbaceous species found in Least Bells Vireo habitat include western ragweed, mugwort, and stinging nettle.

⁷ Vireos require diversity in vegetative species and structure. They require large canopy trees (willow, cottonwood, alder, elderberry) for foraging, shelter, refuge, and song perches; shrubs (mulefat, willow, blackberry, rose) for foraging and nesting; and understory/herbs (blackberry, mugwort) for foraging. *Least Bell's Vireo on the Santa Clara River* at 11.

⁸ In these areas, the community is characterized by an open to dense tree canopy and variable shrub and understory layers. *Floodplain Restoration Study* at 2-33 (see Figure 2-17). In more geomorphically dynamic areas of the floodway, where mature forests cannot typically establish and earlier successional stages of vegetation generally dominate, mixed riparian forest transitions to mixed riparian scrub. *Id.*

2. Western Yellow-Billed Cuckoo (*Coccyzus americanus*)

Effective November 3, 2014, the U.S. Fish and Wildlife Service (“USFWS”) listed the western distinct population segment (“DPS”) of the yellow-billed cuckoo (*Coccyzus americanus*) (“Western Yellow-Billed Cuckoo” or “Cuckoo”) as a threatened species under the ESA. 79 Fed. Reg. 59992 (2014).



The Threatened Western Yellow-Billed Cuckoo

In designating the Cuckoo as threatened, the USFWS rulemaking found that the species:

is likely to become endangered throughout its range within the foreseeable future, based on the immediacy, severity, and scope of the threats to its continued existence... These include habitat loss associated with manmade features that alter watercourse hydrology so that the natural processes that sustained riparian habitat in western North America are greatly diminished... Principal causes of riparian habitat destruction, modification, and degradation in the range of the western yellow-billed cuckoo have occurred from alteration of hydrology due to dams, water diversions, management of riverflow that differs from natural hydrological patterns, channelization, and levees and other forms of bank stabilization that encroach into the floodplain. 79 Fed. Reg. 59992, 60010, 60015 (2014).

The Cuckoo, has been documented nesting in the native riparian vegetation of Reach 1 & 2 of the Santa Clara River corridor during the spring to late summer months. *Floodplain Restoration Study* at 2-47; *ARCS of Experience for the Santa Clara River* at 224. The bird has narrow habitat requirements, with field studies and habitat suitability modeling concluding that vegetation type (*i.e.*, cottonwood, willow forest), patch size, distance to water, and ratio of high to medium and low tree canopy height are critical factors determining the suitability of habitat for yellow-billed cuckoo breeding pairs. *Floodplain Restoration Study* at 2-47. Cuckoos typically inhabit densely foliated stands of deciduous trees and shrubs, particularly willows, with a dense understory, adjacent to slow moving watercourses, backwaters, or seeps. *Floodplain Restoration Study* at 2-47. In addition, the Cuckoo is discriminate about its nesting choice of dense riparian woodland. *Floodplain Restoration Study* at 2-33; *ARCS of Experience for the Santa Clara River* at 224.

Loss of overall riparian habitat and adequate native riparian patch size are the primary threats to Cuckoo populations. *Floodplain Restoration Study* at 2-47. In regards to loss of native riparian habitat, the USFWS, in its rulemaking listing the Cuckoo as threatened found:

The hydrologic regime (stream flow pattern) and supply of (and interaction between) surface and subsurface water is a driving factor in the long-term maintenance, growth, recycling, and regeneration of western yellow-billed cuckoo habitat... The interconnected interaction between ground water and surface water contributes to the quality of the riparian vegetation community (structure and plant species) and will influence the ability of vegetation to germinate, regenerate, and maintain its foliage density, vigor, and species composition... Water extractions, both from surface water diversions and ground water pumping, can negatively affect riparian vegetation... Water diversions and [groundwater] withdrawals can lower ground water levels in the vicinity of riparian vegetation. Because ground water and surface water are generally connected in floodplains, lowering ground water levels by only about 3 ft (1 m) beneath riparian areas is sometimes sufficient to induce water stress in riparian trees, especially in the western United States... Physiological stress in native vegetation from prolonged lower flows or ground water results in reduced plant growth rate, morphological change, or mortality, and altered species composition dominated by more drought-tolerant vegetation, and conversion to habitat dominated by nonnative species... These effects reduce and degrade habitat for the western yellow-billed cuckoo for foraging, nesting, and cover. 79 Fed. Reg. 59992, 60018 (2014).

In the Santa Clara River and Reach 1 & 2 of the Santa Clara River, Cuckoo have been especially affected by native riparian plant habitat loss and the absence of slow moving surface flows in many stretches. *Floodplain Restoration Study* at 2-47. United's Diversion has caused loss of this aquatic and native vegetation riparian habitat in Reach 1 & 2 of the Santa Clara River, as United's Diversion of almost all of the Santa Clara River's flows during the spring, summer, and fall, and periods during winters, lowers groundwater below the roots of native riparian vegetation and precludes the presence of slow moving surface flows during these seasons. *Id.* United's flow related operations at the Dam thus has perpetuated take, and continues to perpetuate take of the Cuckoo by degrading the species' habitat in a fashion that causes mortality or other actual injury to the species. *Floodplain Restoration Study* at 2-47.

The lack of flows and sufficient ground water levels in Reach 1 & 2 of the Santa Clara River needed to renew and establish mixed native riparian trees and shrubs suitable for Cuckoo threatens the existence and recovery of the Cuckoo in the Santa Clara River and its native range. The lack of sufficient flows is compounded by the replacement of this native vegetation with *arundo* that provides little suitable nesting habitat and little food. *ARCS of Experience for the Santa Clara River* at 224; *Floodplain Restoration Study* at 2-47; 79 Fed. Reg. 59992, 60021 (2014). Conversion of vegetation type in the Santa Clara watershed from native riparian woodlands to riparian vegetation dominated by *arundo*, tamarisk and other invasive non-native nuisance vegetation replaces vegetation that supplies the Cuckoos with essential food and adequate thermal cover with vegetation that does not provide these necessary components of habitat for the species. *Id.* United's Diversion promotes the establishment and persistence of *arundo*, tamarisk and other non-native vegetation in the Santa Clara River watershed by robbing the lower Santa Clara River of almost all flows in the spring, summer, winter, and fall and lowering groundwater tables downstream of the Dam. *Id.*

3. Southwestern Willow Flycatcher

a. Introduction & Decline in Historic Populations

The USFWS listed the Southwestern Willow Flycatcher (*Empidonax traillii extimus*) as an endangered species under the ESA on March 29, 1995. 60 Fed. Reg. 10694 (1995). The USFWS also designated the mainstem of the Santa Clara River in Ventura County and portions of Los Angeles County as part of the species' critical habitat (including Reach 1 and 2). 78 Fed. Reg. 344, 504 (2013). In August 2002, the USFWS issued the *Flycatcher Recovery Plan*. U.S. Fish and Wildlife Service. 2002, *Southwestern Willow Flycatcher Recovery Plan*, Albuquerque, New Mexico, i-ix+ 210 pp., Appendices A-O ("*Flycatcher Recovery Plan*") at 5. Reach 1 & 2 of the Santa Clara River is critical habitat for the Flycatcher, and the *Flycatcher Recovery Plan* contains flow protections needed for Flycatcher survival and recovery in the River downstream of the Dam. *Id.*; 78 Fed. Reg. 344, 504 (2013).

The Flycatcher is a small migratory song bird, whose nesting habitat is restricted to relatively dense growths of trees and shrubs in riparian ecosystems in the arid southwestern United States and possibly extreme northwestern Mexico. *Flycatcher Recovery Plan* at 4; U.S. Fish and Wildlife Service, May 3, 2001, *Final Biological Opinion for the Replacement of the Highway 101 Bridge over the Santa Clara River, Ventura County, California* (HDA-CA, File #:07-VEN-101-22.0/24.0, Document #.33561) (1-8-01-F-4) ("*Highway 101 Bridge Biological Opinion*") at 5-6.



The Endangered Southwestern Willow Flycatcher

Historically, the Flycatcher was common in all lower elevation riparian areas of the southern third of California, including the Santa Clara River. *Flycatcher Recovery Plan* at 8; 78 Fed. Reg. 344, 350-363 (2013). Today, populations have been drastically reduced in its historic range, and Flycatcher sightings occur, but are infrequent in Reach 1 & 2 of the Santa Clara River watershed from the Dam to the Estuary. *Id.*; *Floodplain Restoration Study* at 2-47 to 2-48; *Flycatcher Recovery Plan* at 77- 80, 86; *Highway 101 Bridge Biological Opinion* at 5-11.

The Flycatcher depends upon one of the most critically endangered habitats in North America: southwestern riparian ecosystems associated with rivers, swamps, and other wetlands. *Flycatcher Recovery Plan* at 2, 4; 78 Fed. Reg. 344, 350-363 (2013). Southwestern riparian ecosystems have always comprised a very small portion of the landscape in the Santa Clara River watershed, yet even in their current decimated state they are disproportionately important to wildlife and plants, typically supporting far greater species diversity than the surrounding upland ecosystems. *Flycatcher Recovery Plan* at 2.

b. Habitat Requirements, Threats, and Other Limiting factors

The Flycatcher breeds and nests in diverse patchy to relatively dense riparian tree and shrub communities⁹ along rivers, swamps, and other wetlands, including lakes (*e.g.*, reservoirs) underlain by saturated soil during the spring to late summer months. *Flycatcher Recovery Plan* at 4, 11-12, iv; *Floodplain Restoration Study at 2-47*; *ARCS of Experience for the Santa Clara River* at 224; *Least Bell's Vireo on the Santa Clara River* at 11; 78 Fed. Reg. 344, 350-363 (2013). Most of these habitats are classified as forested wetlands or scrub-shrub wetlands, and common tree and shrub species comprising nesting habitat include willows, seep willow (aka mulefat), boxelder, stinging nettle, blackberry, cottonwood, arrow weed, tamarisk (aka saltcedar), and Russian olive. *Flycatcher Recovery Plan* at 4, 11-12, iv; 78 Fed. Reg. 344, 350-363 (2013). Habitat requirements for Flycatcher wintering include brushy savanna edges, second growth, shrubby clearings and pastures, and woodlands near water. *Flycatcher Recovery Plan* at iv.

In addition to dense riparian thickets, another characteristic common to most occupied Flycatcher sites is that they are near lentic (quiet, slow-moving, swampy, or still) water. *Flycatcher Recovery Plan* at 18; 78 Fed. Reg. 344, 350-363 (2013). In many cases, Flycatcher nest plants are rooted in, or overhang, standing water. *Id.* Typical sites occupied by Flycatcher include slow-moving stream reaches and river backwater areas. *Id.* Where Flycatchers occur along moving streams, those streams tend to be of relatively low gradient, *i.e.*, slow-moving with few (or widely spaced) riffles or other cataracts. *Id.* Within or adjacent to nesting habitat, surface water or saturated soil are typically, but not always, present year-round or seasonally, and ground water is generally at a depth of less than 2 or 3 meters (6.5 to 9 ft). *Flycatcher Recovery Plan* at 4; 78 Fed. Reg. 344, 350-363 (2013). The Flycatcher's riparian habitats are dependent on hydrological events such as scouring floods, sediment deposition, periodic inundation, and groundwater recharge. *Flycatcher Recovery Plan* at 18; 78 Fed. Reg. 344, 350-363 (2013).

In the Santa Clara River watershed and throughout its historic range, the Flycatcher has experienced extensive loss and modification of riparian breeding habitat, with consequent reductions in population levels. *Flycatcher Recovery Plan* at iv; 78 Fed. Reg. 344, 350-363 (2013). United's Diversion has caused destruction and modification of Flycatcher habitat in Santa Clara Reach 1 & 2 by eliminating surface flows and decreasing groundwater levels adjoining the Santa

⁹ Occupied nesting sites usually consist of dense vegetation in the patch interior, or an aggregate of dense patches interspersed with openings. In most cases this dense vegetation occurs within the first 3 - 4 m (10-13 ft) above ground. These dense patches are often interspersed with small openings, open water, or shorter/sparser vegetation, creating a mosaic that is not uniformly dense. In almost all cases, slow-moving or still surface water and/or saturated soil is present at or near breeding sites during wet or non-drought years. *Flycatcher Recovery Plan* at 11-12.

Clara River channel, altering flood regimes, causing changes in water and soil chemistry due to disruption of natural hydrologic cycles, and promoting the establishment of invasive non-native plants that lack habitat value for Flycatcher. *Flycatcher Recovery Plan* at iv.,34; 78 Fed. Reg. 344, 350-363 (2013). By degrading Flycatcher habitat in this fashion, United's Diversion has caused mortality and other harms to Flycatcher and thus perpetuated unlawful take of Flycatcher.

c. Recovery

The Flycatcher is discriminate about its nesting conditions, with plant structure and composition, sufficiently high groundwater levels, and the presence of slow moving surface flows being amongst the most important conditions. *ARCS of Experience for the Santa Clara River* at 224; 78 Fed. Reg. 344, 350-363 (2013). Activity which changes the structure of the riparian vegetation such as vegetation removal or groundwater reduction leading to a loss of vegetation can have a profound effect on these birds. *Id.* Invasive vegetation such as *arundo* is also a major concern as it provides little suitable nesting habitat and little food.¹⁰ *Id.* The spread of *arundo* within the Santa Clara riverbed represents a significant threat to Flycatcher along the river corridor given its prolific spreading and ability to promote fires. *Id.* In addition, once established, *arundo* tends to use more water, and out-compete native riparian species required by the Flycatcher for nesting and breeding. *Riparian Plant Composition* at 3.

The USFWS Recovery Plan for the Flycatcher seeks in part to protect, reestablish, mimic, and/or mitigate for the loss of the natural processes that establish, maintain, and recycle riparian ecosystems relevant to the species, due in part to the high potential for restoration that riparian habitats exhibit due to their dynamic nature, fair level of resiliency, and ability to adapt to the dynamism of natural stream systems. *Flycatcher Recovery Plan* at 2, 3. If United's Diversion is modified to restore natural or near-natural conditions of water flow, water chemistry, and sedimentation in Reach 1 & 2 of the Santa Clara River, the River's near-natural riparian ecosystem needed to support Flycatcher populations has a high likelihood of re-establishment. *Flycatcher Recovery Plan* at 3; 78 Fed. Reg. 344, 350-363 (2013). Importantly, the restoration of unoccupied, suitable and potential, native riparian habitat is vital to the recovery and long term survival of the Flycatcher. Such restoration will provide suitable areas for breeding Flycatchers to: (a) colonize as the population expands (numerically and geographically), and (b) move to following loss or degradation of existing breeding sites. *Flycatcher Recovery Plan* at 17.

United's Diversion of flows at the Vern Freeman Dam impacts Flycatcher habitat in Reach 1 & 2 of the Santa Clara River by lowering groundwater below the roots of native riparian plants and precluding the presence of slow moving surface flows in spring, summer, and fall, and periods of the winter, adjacent to Flycatcher breeding and nesting habitat. Loss of slow moving aquatic habitat and suitable native riparian habitat in Reach 1 & 2 of the Santa Clara River attributed to United's Diversion, has had, and continues to have, a profound effect on the Flycatcher. The lack of flows and sufficient ground water levels in Reach 1 & 2 of the River needed to renew and establish mixed native riparian trees and shrubs suitable for Flycatcher, compounded with the replacement of this

¹⁰ The Southwestern Willow Flycatcher catches insects while flying, hovers to glean them from foliage, and occasionally captures insects on the ground. Flycatchers forage within and above the canopy, along the patch edge, in openings within the territory, above water, and glean from tall trees as well as herbaceous ground cover. *Flycatcher Recovery Plan* at 25.

native vegetation with *arundo* that provides little suitable nesting habitat and little food, threatens the existence and revival of the Flycatcher in the Santa Clara River and its native range. *ARCS of Experience for the Santa Clara River* at 224; *Floodplain Restoration Study* at 2-47; 78 Fed. Reg. 344, 350-363 (2013).

III. VIOLATIONS OF THE FEDERAL ENDANGERED SPECIES ACT

This letter provides notice to United of the Noticing Parties' intent to sue United for the ESA violations identified below.

United is taking species listed under the ESA in the Santa Clara River watershed in violation of ESA section 9 and 50 C.F.R. § 224.102, 50 C.F.R. § 17.21, and 50 C.F.R. § 17.31. United's operation and maintenance of the Vern Freeman Dam, and its Diversion of water from the Santa Clara River, are causing the various harms to, and taking of, endangered Southern Steelhead discussed below. Further, United's operation and maintenance of the Dam, and its Diversion of water from the Santa Clara River, are causing the various harms to, and taking of, endangered Least Bell's Vireo, threatened Western Yellow-Billed Cuckoo, and endangered Southwestern Willow Flycatcher discussed below. These harms constitute taking of ESA-listed endangered and threatened species in violation of ESA section 9 and 50 C.F.R. § 224.102, 50 C.F.R. § 17.21 and 50 C.F.R. § 17.31.

Take of a listed species means, *inter alia*, to harass, harm, kill, trap or capture the species. 16 U.S.C. § 1532(19). An actor can take a listed species within the meaning of the ESA by killing or injuring an individual member of the species, or by engaging in an act that causes significant habitat modification or degradation which kills, injures, or deleteriously impacts the species by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering. 50 C.F.R. § 222.102; 50 C.F.R. § 17.3. As described above in this notice letter, United's operation and maintenance of the Dam, and its water Diversion at the Dam are harassing, wounding, killing, trapping, capturing, and most certainly harming Southern Steelhead both by killing and/or injuring individuals of this species and by causing significant habitat modification or degradation to its habitat that significantly impairs the fish's behavioral patterns, including spawning, rearing, migrating, feeding, and sheltering—and thus has caused substantial decline in the Southern Steelhead population in the Santa Clara River and its Estuary. United is further harming and taking Least Bell's Vireo, Western Yellow-Billed Cuckoo, and Southwestern Willow Flycatcher as described below.

First, United's operation and maintenance of the Dam, and associated water Diversion from the Santa Clara River at the Dam, are taking endangered Southern Steelhead in the following ways:

- (A) The Dam hinders and at times completely blocks access to Southern Steelhead's historic habitat in the tributaries to the Santa Clara River located above the Dam. Eliminating and or preventing upstream migration of adult Southern Steelhead to historical spawning habitat causes spawning failures and mortality. Adult Southern Steelhead are harassed, harmed, and killed when they are unable to pass the Dam due to flaws in the fish passage design that make it exceptionally difficult for adult steelhead to locate the Dam's fish ladder during conditions suitable for steelhead migration. Southern steelhead not able to pass over the Dam, have been harassed, harmed, or killed when they return to the ocean without successfully spawning, perish in the river downstream without spawning, or build their redds in habitat

unsuitable for successful spawning below the Dam. Like migration preclusion, delayed or slowed adult Southern Steelhead migration caused by fish passage problems at the Dam causes spawning failures and mortality. Adult Southern Steelhead are only expected to potentially be able to locate and ascend the ladder to pass the Dam after spills over the Dam's crest nearly or entirely subside due to lower flows in the River. Accordingly, if adult Steelhead pass the fish ladder, they may encounter low River flows that are not of adequate depth for migration to tributary spawning habitat upstream of the Dam. This taking activity is perpetual and ongoing, *i.e.*, has happened on every day that Southern Steelhead have been an ESA-listed species (The Dam has been operated and maintained every day during this time period) and will continue every day in the future until effective steelhead passage past the present location of Dam is achieved.

- (B) United's Diversion of in-stream flows from the Santa Clara at the Dam harasses, harms, and kills Southern Steelhead by stranding migrating adult and juvenile Steelhead, by delaying or precluding adult steelhead migrating upstream, and delaying or precluding juvenile Steelhead migrating downstream. Such take occurs when United's Diversion (1) reduces the magnitude of flow and sometimes eliminates flow entirely within a year or during critical periods, (2) causes fluctuating flow, (3) increases the flow recession rate (*i.e.*, causes low levels in the River to recede to lower levels than would occur naturally), (4) abbreviates flow duration within individual rain-induced discharge pulses in the River-- flow alterations which reduce juvenile and adult Steelhead migration opportunity (*i.e.*, by eliminating or reducing the frequency of favorable River flow conditions that allow individual fish to move between or among habitats). In addition, United's Diversion takes steelhead because by reducing River Flow as described above, this Diversion reduces the quality and extent of Estuary habitat, and decreases the duration and frequency that the Estuary is open to the ocean by significantly reducing the amount of freshwater that flows to the Estuary during and after storms. By reducing the amount of water flowing into the Estuary, United's Diversion at the Dam influences whether the Estuary can breach the sandbar allowing the river to flow to the ocean, a crucial event for Southern Steelhead. This taking activity is perpetual and ongoing, *i.e.*, has happened on every day that Southern Steelhead have been an ESA-listed species and United has diverted the Santa Clara River's natural flows at the Dam.
- (C) United's Diversion harasses, harms, and kills Southern Steelhead by failing to provide needed River flows of adequate water quality to the Estuary during the spring, summer, fall, and parts of the winter. Due to United's Diversion and resultant diminishment of River flows into the Estuary, to date, effluent has been permitted to be discharged from the Ventura Waste Water Treatment Plant as a "substitute", causing oxygen starved conditions, contamination from pollutants found in waste water treatment plant discharges (*ie*: copper, nutrients, and emerging contaminants such as caffeine and antibiotics), and changes in the Estuary's natural salinity. The salinity changes harm Southern Steelhead by creating an Estuary environment hospitable to non-native aquatic species that prey on and compete with juvenile Steelhead for habitat space and food.
- (D) United's trapping and hauling of emigrating juvenile Southern Steelhead in the Santa Clara River via truck to the Estuary harasses, harms, and kills Southern Steelhead.

The effects of United's trap and haul program include Steelhead mortality incurred during capture and transport; harm, harassment, and mortality caused by unintended stranding from unsuccessful capture efforts; harm and harassment caused by depriving Steelhead parr and smolt of biological benefits related to emigrating through the remaining 10.5 miles of Santa Clara River; and harm, harassment, and mortality to Steelhead caused by relocation to inappropriate habitats for given life stages, such as the transport of Steelhead parr and smolt to the ocean before they undergo physiological changes needed for ocean survival.

Second, United's operation and maintenance of the Dam and the Diversion of River flows are taking endangered Least Bell's Vireo, endangered Southwestern Willow Flycatcher, and threatened Western Yellow-Billed Cuckoo by causing significant modification or degradation to the Listed Bird Species' habitat that significantly impairs the birds' behavioral patterns, including, nesting, rearing, migrating, feeding, and sheltering—and thus has caused substantial decline in the Listed Bird Species population in the Santa Clara River watershed and through their ranges. The Listed Bird species are harmed by United's Diversion because it entirely dewateres sections of the Santa Clara River downstream of the Dam needed by the Listed Bird Species for nesting, breeding, rearing, and foraging, and lowers the groundwater elevations downstream of the Dam beyond the reach of the native riparian vegetation and trees that the Listed Bird Species need for breeding, nesting, rearing, and foraging. The lower groundwater elevations underlying the Santa Clara River and its floodplain have resulted in replacement of the structurally diverse native riparian habitat that the Listed Bird Species need to survive with invasive vegetation, including *arundo*, which provides little suitable habitat, thermal cover, or food for the Listed Bird Species.

In operating and maintaining the Dam as it currently does, and diverting water from the Santa Clara River as it currently does, United is perpetuating adverse modification of NMFS-designated critical habitat for Southern Steelhead, FWS-designated critical habitat for Vireo and Flycatcher, and important habitat for Cuckoo. For the variety of reasons set out above, on a daily basis, United's Dam and Diversion, as currently operated and maintained, take these threatened and endangered species and render their Santa Clara River and Estuary habitat far less suitable.

For United's operation and maintenance of the Vern Freeman Dam and Diversion of River flows at the Dam to be legal under the ESA, United must obtain an Incidental Take Permit ("ITP") under ESA section 10. 16 U.S.C. § 1539. United has not obtained such a permit. As such, United is in violation of ESA section 9 for taking ESA-listed species via its maintenance and operation of the Dam and its Diversion of Santa Clara River flows in all of the manners explained above. The Noticing Parties therefore put United on notice of their intent to sue sixty days after the mailing of this letter.

IV. NOTICE OF INTENT TO SUE UNITED FOR VIOLATIONS OF THE ENDANGERED SPECIES ACT

The Noticing Parties contend that United has failed in the respects set forth above to comply with the requirements imposed by the ESA. ESA section 11(g), 16 U.S.C. § 1540(g), requires that sixty (60) days prior to the initiation of a civil action under ESA section 11(g), a citizen must give notice of intent to sue.

By this letter, pursuant to ESA section 11(g), 16 U.S.C. § 1540(g), the Noticing Parties hereby put you on notice that after the expiration of sixty (60) days from the date of this Notice of

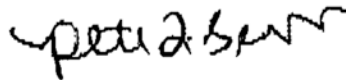
Intent To File Suit, they intend to file an enforcement action in federal court against United for violations of the ESA.

The Noticing Parties intend to seek injunctive relief preventing further ESA violations pursuant to ESA sections 11(g)(1), 16 U.S.C. § 1540(g)(1), and such other relief as is permitted by law. In addition to the violations set forth above, this notice covers all ongoing violations of the ESA and violations evidenced by information that becomes available to the Noticing Parties after the date of this Notice of Intent to File Suit.

The Noticing Parties are interested in discussing effective remedies for the violations noted in this letter. If you wish to pursue such discussions in the absence of further litigation, it is suggested that you initiate those discussions within the next twenty (20) days so that they may be completed before the end of the 60-day notice period. Although the Noticing Parties are always interested in avoiding unnecessary litigation, they do not intend to delay the filing of a complaint in federal court if discussions are continuing when the notice period ends.



Mati Waiya
Executive Director
Wishtoyo Foundation & Ventura Coastkeeper



Peter Galvin
Director of Programs
Center for Biological Diversity

Service List

VIA ELECTRONIC MAIL AND U.S. CERTIFIED MAIL RETURN RECEIPT REQUESTED

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