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Enviros Slam Calif. Water District's 'Unilateral' Fishway Focus

By **Kelly Zegers**

Law360 (April 14, 2020, 6:31 PM EDT) -- Environmental and indigenous groups have fired back at a California water district's bid to escape their accusations that it ignored deadlines to help the protected steelhead fish navigate a dam, saying that the district "pretends the facts do not exist, distorts them, or tries to change the subject."

The Wishtoyo Foundation, the Center for Biological Diversity and other groups asserted on Monday that the United Water Conservation District can't deny that it violated a Jan. 31 deadline to complete designs for fish passages on the Vern River Dam as per a 2018 court order and reiterated that United Water should be **held in contempt**.

The water district said last week it has been **doing its best to comply** with the court injunction and that the groups' motion for contempt last month didn't consider complications that arose during the design process or the fact that the country is in the midst of the COVID-19 pandemic, according to the district.

"We're certainly sympathetic to any hardships imposed on United or anyone, for that matter, by the pandemic," John Buse, a Center for Biological Diversity attorney, told Law360. "But they're not asking for short-term relief based on the pandemic, they're asking for wholesale modification of the injunction to allow them to choose what their preferred alternative is."

The 2018 injunction said the district's operation of the dam on the Santa Clara River harmed the protected species, impairing its breeding and migration because the dam's fish ladder didn't sufficiently facilitate upstream movement of the fish. As a result, the court ordered the district to design and model two types of fish passages, the "hardened ramp" and "notch" alternatives.

But the groups said United is instead "rushing ahead with unilateral pursuit" of a third, "vertical slot" option it chose to focus on.

Buse told Law360 this underplays the position of the National Marine Fisheries Service — an agency that's not a party in the dispute, but that the court goes to for expert advisory opinion — to support what the injunction says.

"United seeks to excuse its injunction noncompliance with a brazen contention that it is working hard on 'a consensus approach' and has made substantial progress toward selection of a fish passage project," the groups said. "But the real consensus United has pursued is only with itself as it continues to act as if it can unilaterally fashion the laws and court orders alike."

After a Ninth Circuit panel in February affirmed the 2018 order, United asked the lower court to change the order. United told the court that after talking with the federal government, the notch was no longer considered viable and the hardened ramp, after much study, presented substantial challenges and could cost as much as \$122 million. Only the third option, the "vertical slot," was viable, according to United's court filings.

"Whether it was a good or bad option, United was under order to complete certain milestones in evaluating other alternatives, and it failed to do so," the groups said.

The groups contend the district could only move forward with the vertical slot option if the groups also agreed with it and the court approved it.

"United could have sought a stay of the injunction, but apparently thinking it better to ask for forgiveness rather than permission, United forged ahead as if the injunction were not in place," the groups said.

A representative for the district did not immediately respond to a request for comment.

The groups are represented by Christopher Sproul, Brian Orion and Stuart Wilcox of Environmental Advocates, Jason Weiner of Wishtoyo Foundation and Wishtoyo's Ventura Coastkeeper Program, John Buse of the Center for Biological Diversity and Patricia Linn.

The United Water Conservation District is represented by Mark T. Palin, David D. Boyer, Brian M. Wheeler and Shawn M. Ogle of Atkinson Andelson Loya Ruud & Romo PLC and Paul S. Simmons and Jared S. Mueller of Somach Simmons & Dunn PC.

The case is Wishtoyo Foundation et al. v. United Water Conservation District, case number 2:16-cv-03869, in the U.S. District Court for the Central District of California.

--Additional reporting by Michael Phillis. Editing by Bruce Goldman.

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