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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

WISHTOYO FOUNDATION ET AL.,

Plaintiffs,

vs.

**UNITED WATER CONSERVATION
DISTRICT,**

Defendant.

Case No.: CV 16-3869-DOC (PLAx)

**AMENDED JUDGMENT AND
PERMANENT INJUNCTION**

1 **ORDER ENTERING FINAL JUDGMENT AND PERMANENT INJUNCTION¹**

2 Plaintiffs Wishtoyo Foundation, Ventura Coastkeeper, and Center for Biological
3 Diversity (“Plaintiffs”) filed a complaint against Defendant United Water Conservation
4 District (“United” or “Defendant”) on June 2, 2016. The Court conducted a bench trial on
5 December 11–15, 18–20, 2017, and January 3–5, 2018. The Court filed an order on
6 September 23, 2018 (Dkt. 209), including findings of fact and conclusions of law holding
7 that Plaintiffs are entitled to declaratory and injunctive relief on their claim for take of
8 Southern California Steelhead, but not on their claim for take of Southwestern Willow
9 Flycatcher. Pursuant to that order, this is a final judgment resolving all claims pursuant to
10 Fed. R. Civ. P. 58.

11 **I.**

12 **IT IS ORDERED, ADJUDGED, AND DECREED** that:

13 Plaintiffs are entitled to a declaratory judgment that Defendant United’s operation
14 and maintenance of Vern Freeman Dam (“VFD”), including its operation and maintenance
15 of the fish ladder at the VFD, and United’s diversion of water from the VFD, constituted
16 unauthorized “take” of the Distinct Population Segment of Southern California Steelhead
17 (“Steelhead”) in violation of section 9 of the Endangered Species Act (“ESA”), 16 U.S.C.
18 § 1538.

19 **II.**

20 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that:

21 Plaintiffs are not entitled to a declaratory judgment that United’s actions constitute
22 unauthorized “take” of Southwestern Willow Flycatcher in violation of ESA section 9.
23 Accordingly and furthermore, Plaintiffs are not entitled to injunctive relief as to the
24 Southwestern Willow Flycatcher.

25 _____
26 ¹ Having considered Plaintiffs’ Proposed Judgment and Permanent Injunction (Dkt. 211-1),
27 United’s Objections (Dkt. 214), the discussions at the October 1, 2018 hearing (Dkt. 215), and the
28 Parties’ Jointly Proposed Judgment and Permanent Injunction (Dkt. 216-1), the Court enters this
order. This order supersedes and amends the September 27, 2018 Judgment and Permanent
Injunction (Dkt. 212), which is hereby VACATED.

1 **III.**

2 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that:

3 United Water Conservation District is hereby permanently enjoined to undertake the
4 following actions:

5 **1. Water Diversion**

6 Commencing on **October 22, 2018**, United shall continue to adhere to the water
7 diversion operating rules set forth in Reasonable and Prudent Alternative (“RPA”) 2 of
8 National Marine Fisheries Service (“NMFS”)’s 2008 Biological Opinion for VFD,
9 pursuant to NMFS’s interpretation of RPA 2A such that the ramping rates apply whether
10 or not United initiates diversion procedures at, above, or below 750 cubic feet per second
11 (“cfs”), until such time as United secures incidental take authorization from NMFS for the
12 maintenance and operation of VFD with respect to Steelhead, or unless the parties move
13 for relief from those operating rules and the Court approves the motion.

14 For purposes of water diversion, United may continue to use the Sespe Creek
15 Trigger. Further, for purposes of United’s compliance with RPA 2, United shall continue
16 to treat the adult Steelhead migration season as extending from January 1 to May 31 and
17 shall treat the juvenile Steelhead migration season as extending from March 1 to May 31.
18 Likewise, the Court declines to order Plaintiffs’ requested adjustment to the required
19 migration corridor width at the critical riffle (0.5 feet to 0.8 feet) and a revisiting of the
20 critical riffle measurements previously done by Thomas R. Payne & Associates in 2005. If
21 existing operational methods and metrics did not exist, the Court might be in a different
22 position. But given the availability of an existing set of operational parameters, the Court
23 declines to order and supervise the implementation of Plaintiffs’ requested revisions of
24 such parameters, which should be addressed in the permitting regulatory process.

1 **2. Monitoring and Adaptive Management**

2 For purposes of monitoring compliance and effectiveness of the flow criteria used
3 in United’s operations, commencing **January 1, 2019**, United shall adhere to the directives
4 in terms and conditions 1(a) of the incidental take statement in the NMFS 2008 Biological
5 Opinion for VFD that provides: “For the purpose of ensuring that flow criteria are met,
6 United shall apply a noncontact method (e.g., continuous wave microwave radar,
7 monostatic UHF Doppler radar, pulsed Doppler microwave radar, acoustic Doppler
8 technologies, and or emerging drone based videography), or other method that is agreeable
9 to NMFS, to continuously monitor instantaneous river discharge in the Santa Clara River
10 where the Highway 118 bridge and the Highway 101 bridge cross the river.” *See*
11 Biological Opinion at 81.

12 **3. Long Term Fish Passage Infrastructure**

13 Plaintiffs’ request for injunctive relief is granted in part with respect to long term
14 fish passage infrastructure. United shall achieve 100% design, including physical
15 modeling, of the top-two long term fish passage infrastructure alternatives: (1) the
16 hardened ramp and (2) 400-foot notch, before it selects its preferred alternative. If
17 Plaintiffs and United are willing to stipulate to substitute the vertical slot in place of the
18 400-foot notch, which has only been designed to about a 10% level, the Court is willing to
19 consider such a stipulation. In developing its design plans and permit applications, United
20 shall strongly consider, and shall only reject with clearly articulable reasons, the six
21 guidelines recommended in the Declaration of NMFS biologist Anthony Spina (“Spina
22 Decl.”) (Dkt. 179-1) that accompanied the NMFS Amicus Brief (“NMFS Br.”) (Dkt. 179)
23 filed at the Court’s request.

24 By the dates provided below, United shall complete forthwith the necessary studies
25 to evaluate all reasonable alternatives to the existing fish ladder, select a preferred
26 alternative, and submit complete regulatory authorization requests to NMFS, the U.S. Fish
27 and Wildlife Service (“USFWS”), the U.S. Army Corps of Engineers, the California
28 Department of Fish and Wildlife (“CDFW”), and the California State Water Resources

1 Control Board. United shall fully complete engineering design (including necessary
2 modeling) on the: (1) hardened ramp; and (2) 400-foot notch. As part of its required
3 National Environmental Policy Act (“NEPA”)/California Environmental Quality Act
4 (“CEQA”) environmental review, United shall further analyze the other two options
5 discussed in trial testimony: the vertical slot and a damless diversion in conjunction with
6 an infiltration gallery. However, United shall not be required at this stage to do in-depth
7 modeling/engineering analysis of the vertical slot option or a damless diversion option in
8 conjunction with an infiltration gallery. Instead, United shall simply include reasonable
9 study and analysis of the vertical slot alternative and a damless diversion in conjunction
10 with an infiltration gallery alternative for purposes of NEPA/CEQA environmental review.

11 Therefore:

- 12 a. By **no later than January 31, 2020**, United shall complete evaluations and
13 100% designs of the following alternative Steelhead fish passage
14 infrastructures for VFD, including physical modeling and complete
15 engineering design, sufficient for United to choose a preferred alternative
16 and to meet NMFS’s directions for the detail required for an adequate habitat
17 conservation plan submittal: (i) the hardened ramp and (ii) the 400-foot
18 notch;
- 19 b. By **no later than January 31, 2020**, United shall complete the alternatives
20 analysis for the (i) vertical slot and a (ii) damless diversion in conjunction
21 with an infiltration gallery, sufficient for purposes of NEPA/CEQA
22 environmental review;
- 23 c. By the earlier of **April 31, 2020**, or **three months after** completion of the
24 evaluations and designs of the hardened ramp and 400-foot notch, United
25 shall select a preferred Steelhead fish passage infrastructure project. The
26 Steelhead passage alternative selected must meet the Steelhead passage
27 design criteria set forth by NMFS during NMFS’s review and approval of the
28 alternative, including in regards to attraction flow, velocities and turbulence

1 through the passage, and in regards to the flow ranges in which the passage
2 will provide for Steelhead passage (i.e., for the hardened ramp, NMFS
3 indicates that the ramp shall be designed to provide for Steelhead passage
4 between 45 to at least 6,000 cfs river flow). This alternative must include
5 design of monitoring of Steelhead migration in the reach of the Santa Clara
6 River below VFD and through VFD and its new fish passage infrastructure
7 selected;

8 d. By **no later than June 30, 2020**, United shall submit completed regulatory
9 applications for the following:

- 10 i. ESA section 10 incidental take permit and multi-species habitat
11 conservation plan (“MSHCP”) to NMFS and the USFWS for
12 operation and maintenance of VFD and United’s Diversion at the
13 VFD and/or a biological assessment in conjunction with ESA section
14 7 consultation with NMFS and the USFWS. These applications shall
15 be accompanied by a complete Draft Environmental Impact Statement
16 and Draft Environmental Impact Report so that the section 10 permit
17 is ready for the institution of environmental review under NEPA and
18 CEQA. These applications shall include proposals for a new fish
19 passage infrastructure project at VFD, bypass flows from VFD
20 sufficient to avoid jeopardizing the survival and recovery of Steelhead
21 and otherwise minimizing take of Steelhead consistent with ESA
22 directives to include reasonable and prudent measures for reducing
23 take of listed species in any authorization for species take, appropriate
24 compliance monitoring reasonably consistent with term and condition
25 4 in the incidental take statement in NMFS’s 2008 Biological Opinion
26 for VFD, and adaptive management reasonably consistent with term
27 and condition 3 in the incidental take statement in NMFS’s 2008
28 Biological Opinion for VFD;

- 1 ii. Army Corps Clean Water Act 404 permit for the New Fish Passage
- 2 Infrastructure Project;
- 3 iii. State Board Clean Water Act section 401 Water Quality Certification
- 4 for the New Fish Passage Infrastructure Project; and
- 5 iv. CDFW Lake and Streambed Alteration Agreement for the New Fish
- 6 Passage Infrastructure Project; and
- 7 e. By **no later than two years from** receiving final regulatory approvals for a
- 8 new Steelhead fish passage infrastructure project, United shall complete
- 9 construction of and commence operating such new infrastructure. This
- 10 project shall include such infrastructure as needed for implementation of a
- 11 long term monitoring and counting system for upstream migrating adult
- 12 Steelhead and downstream migrating Steelhead kelts and juveniles that do
- 13 not require Steelhead to navigate around or over an obstacle for the purposes
- 14 of being counted.

15 **4. Interim Fish Passage Infrastructure**

16 The Court grants in part Plaintiffs' request for injunctive relief with respect to
17 interim improvements to United's fish passage infrastructure. Therefore:

- 18 a. By **no later than November 1, 2018**, and as early as possible, United shall
- 19 install the existing DIDSON camera in the area between the trash rack and
- 20 Denil fish ladder upstream exit gate upstream of the diversion canal gate that
- 21 lets water into the fish screen bay to monitor adult steelhead passage from
- 22 the VFD infrastructure upstream into the Santa Clara River. United shall also
- 23 monitor downstream movement of adult, kelt, and juvenile Steelhead
- 24 entering the VFD infrastructure through this camera.
- 25 b. By **no later than January 31, 2020**, and no later than the completion of the
- 26 top-two fish passage alternative designs (the hardened ramp and the 400-foot
- 27 notch), United shall develop and submit a plan to NMFS for modifying or
- 28 replacing the VFD diversion canal fish screen in the VFD fish screen forebay

1 to comply with NMFS Anadromous Salmonid Passage Facility Design fish
2 screen criteria, to meet NMFS criteria's for approach and sweeping velocity
3 for fish screens; to eliminate velocity hot spots (i.e., localized areas where
4 velocity levels are elevated on the fish screen face that will tend to trap, suck
5 through, or injure juvenile Steelhead); to ensure reliable cleaning and
6 prevention of clogging; to contain brushes that run the entire length of the
7 screen face; and to contain appropriate screen opening sizes fry cannot pass
8 through and that meet NMFS's Anadromous Salmonid Passage Facility
9 Design fish screen criteria for Steelhead fry. United's plan shall address and
10 respond to recommendations (1) in the reports from its consultants MWH
11 Americas (the MWH Americas Report entitled 'Final Appraisal Report Fish
12 Screening Facility at the Freeman Diversion,' dated December 2006 [Trial
13 Exhibit 140]) and Northwest Hydraulic Consultants ("NHC") (the NHC
14 report entitled 'Sediment Transport and Deposition Assessment of the
15 Freeman Diversion Conveyance System, Phase 1: Existing System
16 Performance,' dated January 7, 2015 [Trial Exhibit 141] and the NHC report
17 entitled 'Sediment Transport and Deposition Assessment of Freeman
18 Diversion Conveyance System,' dated March 9, 2016 [Trial Exhibit 142])
19 and (2) the Biological Assessment, and shall either include provisions for
20 these recommendations or explanations for any recommendations that it
21 determines not to follow. United's plan shall address any design
22 considerations needed to function effectively in conjunction with the top-two
23 new fish passage alternatives (the hardened ramp and the 400-foot notch);

- 24 c. By **no later than June 30, 2020**, United shall submit a completed regulatory
25 application for NMFS approval (and the approval of the Army Corps of
26 Engineers, California State Water Resources Control Board, and the
27 California Department of Fish and Wildlife, if such approval is required).
28 Any required fish screen regulatory applications may be submitted in

1 conjunction with or separately from the long term fish passage regulatory
2 applications; and

- 3 d. By **no later than two years** (but significantly earlier, if feasible) from
4 receiving final regulatory approvals for a modified or new fish screen,
5 United shall complete construction of and commence operating such a fish
6 screen.

7 **5. Trapping**

8 United shall not resume trapping, hauling or any handling of Steelhead without
9 authorization from NMFS. Because United must request NMFS Long Beach's assistance
10 and supervision when stranded fish need to be hauled or handled, NMFS shall respond
11 promptly to a request for such assistance.

12 **6. Compensatory Measures**

13 The Court denies Plaintiffs' requests for relief that ask United to contribute up to
14 \$7,105,000 toward compensatory mitigation measures to mitigate the past and future
15 harms of VFD inflicted upon Steelhead.

16 **7. Compliance with Injunction**

17 United shall file with the Court on the docket Compliance Reports setting forth in
18 detail the manner and form in which United has complied with the Permanent Injunction.
19 United shall file such Compliance Reports: (1) every 120 calendar days from the date of
20 Judgment; and (2) within five calendar days of any deadline contained in the Permanent
21 Injunction. If during any period between Compliance Reports, United receives any written
22 comments from any of the Regulatory Agencies (NMFS, USFWS, U.S. Army Corps of
23 Engineers, CDFW, and California State Water Resources Control Board) related to
24 United's efforts to develop or achieve approval of Regulatory Authorization applications
25 pertaining Steelhead and VFD (including related to fish passage infrastructure, the fish
26 screen, water diversion operations, or adaptive management monitoring), United shall
27 attach the agencies' comments to the next Compliance Report, subject to any applicable
28 laws of privilege. If United provides the Regulatory Agencies with any written responses

1 to such comments, United shall attach its responses to the following Compliance Report,
2 subject to any applicable laws of privilege.

3 **IV.**

4 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the
5 Permanent Injunction shall remain in effect until each of the following conditions are met:
6 (1) United receives ESA incidental take authorization for VFD; and (2) United completes
7 construction and commences operations of a new fish passage structure that has been
8 approved by NMFS pursuant to ESA incidental take authorization. When such conditions
9 are met, United shall move to dissolve the Permanent Injunction.

10 **V.**

11 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Judge James
12 L. Smith (Ret.) is appointed as a Special Master to monitor compliance with the Permanent
13 Injunction and the progress of the parties.

14 **VI.**

15 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that this Court
16 shall retain jurisdiction over this matter for the purposes of enforcing or modifying the
17 terms of the Permanent Injunction. In the event that following United's submission of
18 proper permit applications for building new fish passage infrastructure at VFD, any of the
19 Regulatory Agencies (NMFS, FWS, U.S. Army Corps of Engineers, CDFW, and
20 California State Water Resources Control Board) are not completing their reviews in a
21 timely fashion, are not providing sufficient guidance to United, or it is clear that permits
22 will not be issued and compliance with the ESA will not be forthcoming, the Court will
23 entertain appropriate motions to join—or the Court will involuntarily join—any such
24 Regulatory Agency at that time, or the Court will otherwise reconsider the balance it has
25 struck.


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VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the deadline for any of the parties to move for an award of attorneys’ fees and costs pursuant to ESA section 11(g), 16 U.S.C. § 1540(g) is extended to 30 days from the entry of this Final Judgment. A party opposing such fees and costs shall have 14 days to file any objections to that motion. The parties shall promptly meet and confer in a good faith attempt to resolve the issue of attorneys’ fees and costs award without the need for motion(s) on this matter.

There being no just reason for delay, the Clerk of the Court is hereby directed, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, to enter this Final Judgment forthwith.

IT IS SO ORDERED.



DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

Dated: October 4, 2018