

CALIFORNIA TROUT



KEEPER OF THE STREAMS

December 18, 1998

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Hon. Bruce Babbitt, Secretary
U.S. Department of the Interior
1849 C Street, N.W., No. 6143
Washington, D.C. 20240

Hon. William M. Daley, Secretary
U.S. Department of Commerce
15th St. and Constitution Ave., N.W.
Washington, D.C. 20230

Roger Patterson, Regional Director
Mid Pacific Region, Bureau of Reclamation
Federal Office Building
2800 Cottage Way
Sacramento, CA 95825-1898

John J. Johnson, General Manager
Casitas Municipal Water District
1055 Ventura Avenue
P.O. Box 17
Ojai, CA 93022

Rolland Schmitt, Director
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dr. William T. Hogarth, Director
National Marine Fisheries Service
Southwest Region
501 W. Ocean Blvd., No. 4200
Long Beach, CA 90802

Re: Sixty Day Notice of Intent to Sue for Violation of the Endangered Species Act (ESA), 16 U.S.C. §1540(g).

Dear Sirs:

Section 11 of the ESA, 16 USC §1540(g), requires that, 60 days prior to the filing of a citizen suit in federal district court under the ESA, notice be given of any such action to the Secretary of Commerce with respect to any endangered anadromous fish species, and to the alleged violators of the ESA.

Accordingly, California Trout, Inc., (CalTrout), on behalf of itself and its 5,100 members, hereby provides notice that, after 60 days from the date of this letter, it will commence a civil action in the United States District Court for the Central District of California, against the Casitas Municipal Water District (CMWD) and the U.S. Bureau of Reclamation (BOR) to enjoin them from unlawfully taking, jeopardizing, and failing to conserve, endangered southern California steelhead trout (*Oncorhynchus mykiss*), through the operation of the Robles Diversion on the



Ventura River in Ventura County, California. The CMWD, through a contract with BOR, operates the Robles Diversion Dam and its associated diversion canal and reservoir, Casitas Lake, while the BOR is the owner with title of these facilities.

Specifically, CalTrout will demonstrate that CMWD and BOR's operations of the Robles Diversion and its related diversion and storage facilities has caused the take of endangered southern California steelhead, as eggs, fry, smolts, and adults, in violation of §9 of the ESA, 16 U.S.C. §1538(a)(1)(B), by:

1. Operating the Robles Diversion without a fish ladder or other adequate means of fish passage, thereby preventing the unimpeded upstream migration and spawning of adult steelhead;
2. Diverting waters from the Ventura River to Casitas Lake at the Robles Diversion without any fish screens to prevent the capture and entrainment of downstream migrating smolts and adult steelhead;
3. Diverting waters from the Ventura River without adequate bypass flows below the Robles Diversion Dam to; (a) prevent direct death and injury to steelhead and (b) maintain habitat adequate to prevent indirect harm and to ensure the continued survival and recovery of steelhead in the Ventura River.

The above activities have caused, are causing, and if not enjoined, will continue to cause actual death and injury to steelhead eggs, fry, smolts, and adult fish, either directly through entrainment, suffocation and other forms of direct harm, or indirectly through significant habitat modification and/or degradation which actually kills or injures steelhead by significantly impairing their essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding and sheltering. The final listing rule admits that the primary cause of the decline of southern California steelhead is "extensive loss of steelhead habitat due to water development, including impassable dams and dewatering." (62 Fed. Reg. 43949; see also NMFS Factors for Decline, p. 52 (citing water diversion/extraction and habitat blockages as primary causes of steelhead decline in Southern California ESU); Entrix Ventura River Steelhead Recovery Plan, p. 3-7 (citing dams and water diversions as major factors in steelhead decline).)

CalTrout will also demonstrate that BOR has violated section 7(a)(2) by failing to consult with the National Marine Fisheries Service regarding its ongoing operation, and proposed retrofitting, of the Robles Diversion Dam and associated canal and reservoir. Operation and retrofitting of the dam and facilities are both federal agency actions that may affect southern California steelhead, thus requiring formal consultation under section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2). In addition to seeking relief under section 7(a)(2), CalTrout will also seek to enjoin any project operations that may result in the irreversible and irretrievable commitment of resources that may foreclose formulation or implementation of reasonable and prudent alternatives that would not violate section 7(a)(2), pursuant to section 7(d) of the ESA. 16 U.S.C. §1536(d).

For the same reasons operation of the dam and facilities are causing take of steelhead, such actions clearly "may affect," and in fact are likely to jeopardize the continued existence of, the southern California steelhead. The final listing rule for the steelhead estimates the total run size for five Southern California streams (including the Ventura River) to be less than 200 adult fish. (62 Fed. Reg. 43949.) Steelhead populations have been extirpated from all streams south of Ventura County, except Malibu Creek in Los Angeles County. As a result, "[t]he sustainability of steelhead populations in the Southern California ESU continues to be a major concern." (Id.; see also Ventura River Steelhead Recovery Plan, p. 3-34 (Ventura River steelhead population at high risk of extinction).) The California Department of Fish and Game Steelhead Restoration and Management Plan states that "[t]he Ventura River at one time probably supported one of the largest runs of southern steelhead on the coast. Restoring steelhead runs in this river will be crucial to restoring southern steelhead stocks." (p. 201.) Therefore, BOR must consult with NMFS under section 7(a)(2) regarding operation and retrofitting of the Robles Dam and associated facilities.

Finally, CalTrout will demonstrate that BOR is in violation of section 7(a)(1) of the ESA, 16 U.S.C. §1536(a)(1), by failing to utilize its authorities in furtherance of the purposes of the ESA to conserve the southern California steelhead. "Conserve" is defined broadly under the ESA as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided pursuant to this chapter are no longer necessary," i.e. to the point of recovery. 16 U.S.C. §1532(3). By operating the Robles Diversion Dam and associated diversion canal and reservoir in the manner described above, the BOR is failing to carry out its duty to conserve the steelhead under the ESA. Thus, CalTrout will seek an order requiring the BOR to comply with section 7(a)(1) of the ESA.

In addition to temporary, preliminary, and permanent injunctive orders against further violations of sections 7 and 9 of the ESA, CalTrout will also seek declaratory relief pursuant to 28 U.S.C. §2201; cost of suit, including reasonable attorneys' fees and expert witness fees; and such other and further relief as the court deems proper.

The entity giving notice is California Trout, Inc., whose headquarters are located at 870 Market Street, Suite 859, San Francisco, California 94102. CalTrout's southern California office is located at 667 Country Club Drive, Suite 1215, Simi Valley, California 93065. CalTrout is a California non-profit, 501(c)(3) organization with more than 5,100 members, most of whom reside in the state of California. CalTrout is organized under the laws of the State of California.

CalTrout's mission is to protect and restore wild trout, native steelhead and the waters they inhabit throughout California, and to create high quality angling opportunities for the public to enjoy. In carrying out its mission to protect and restore wild trout and native steelhead, CalTrout works to prevent actions resulting in their take, including citizen suits, to enforce legal obligations to protect endangered trout species.

We believe this notice of intent to sue sufficiently states grounds for the complaint. If, however, you have any questions or wish to discuss the matter, feel free to contact the undersigned at (805) 584-9248, or our attorney Tara Mueller, of the Environmental Law Foundation in Oakland, California at (510) 208-4555.

It is CalTrout's policy to pursue effective, consensual remedies for violations of law. During the sixty-day notice period, we are willing to discuss remedies for the violations outlined in this letter. However, if you wish to pursue such discussions in the absence of litigation, we suggest you initiate those discussions within the next twenty days so that they may be completed before the end of the sixty-day notice period. We do not intend to delay the filing of a complaint in federal court if discussions are continuing when that period ends.

Very truly yours,

Jim Edmondson
Conservation Director

cc: (via regular U.S. Mail)

Tara Mueller, Environmental Law Foundation
Stuart M. Richter, Katten, Muchin & Zavis
Maurice Cardenas, CDFG
Sara Chubb, USFS
Jackie Schafer, CDFG
Mark Capelli, Friends of the Ventura River
Ed Henke, CalTrout
Mark Bergstrom, CalTrout
Tom Weseloh, CalTrout
Eric Schott, NMFS
Dennis McEwan, CDFG
John Slezak, Los Angeles Regional Water Quality Control Board