

**Testimony of Mauricio Guardado, General Manager United Water Conservation District
House Committee on Natural Resources
Subcommittee on Water, Wildlife and Fisheries Legislative Hearing**

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Good afternoon, Subcommittee Chairman Bentz, Ranking Member Huffman and Members of the Subcommittee.

On behalf of United Water Conservation District (United), I thank you for the opportunity to present this testimony today.

My name is Mauricio Guardado. I serve as general manager of United, which covers approximately 214,000 acres in Ventura County, California and serves a population of approximately 400,000 residents including the U.S. Naval Base Ventura County, the cities of Oxnard, Port Hueneme, Ventura, Santa Paula, and Fillmore. Considered one of the prime agricultural areas of the world, the year-round growing season supports high value crops such as avocados, strawberries, lemons, raspberries, row crops and flowers.

United administers a “basin management” program for all the hydrologically connected groundwater basins within its boundaries utilizing the surface flow of the Santa Clara River and its tributaries. This program includes the capture of stormwater flows, groundwater recharge, supplemental wholesale drinking water deliveries and other water supply activities enabling beneficial use by various cities, industry, military bases, and agriculture throughout Ventura County.

United is one of California’s few legislatively established Water Conservation Districts. In performing its District-wide watershed management efforts, United not only stores water at its Santa Felicia Dam and Lake Piru reservoir, it also directly recharges the groundwater aquifers via its Freeman Diversion. United also provides surface water deliveries to agricultural groundwater users to minimize groundwater extractions near the coastline in its fight to mitigate seawater intrusion from contaminating the aquifers.

I would like to focus my comments on the dire need to reform the Endangered Species Act (ESA) and the accompanying legislative discussion draft aimed at achieving that goal. United has direct and painful experience with the damage that can happen when an agency abuses the ESA for its own agenda. United’s service area is home to numerous endangered species and United works collaboratively with many federal agencies on complex permitting efforts. Agencies such as the U.S. Fish and Wildlife Service (USFWS), the U.S. Army Corps of Engineers, and the Federal Energy Regulatory Commission (FERC) are tough but fair regarding their regulatory requirements; however, time and again, the National Marine Fisheries Service (NMFS) has used the ESA as a weapon to punish water agencies for its own political agenda. NMFS arbitrary decision making, ignoring of best available science, and routine “moving of the goal posts” is unacceptable and unattainable for water entities working in good faith. NMFS has created such fear that water agencies are afraid to challenge these abuses, for fear of retribution from NMFS in their next permitting effort. For many

years, NMFS has used the *Chevron* case as a shield and has boldly cited poor science for its egregious biological opinions. Now that the Supreme Court has overturned *Chevron*, there is an opportunity for change.

The ESA Reform draft legislation addresses definitions of habitat and baseline, incentives for the recovery of listed species, increased transparency and accountability in ESA decisions including the disclosure of data used in listing decisions, and rightfully requires limitations on overreach in mitigation requirements, all of which are critical issues for United's operations. In United's view, this legislation would improve the regulatory process by adding important clarification to the ESA, and United would like to voice our support for this important piece of legislation.

In United's experience, ambiguities under the ESA have long been exploited by federal agencies, specifically NMFS. With the United States Supreme Court's recent decision to overturn *Chevron*, we feel that the improvements to the ESA under the draft legislation will aid both agency interpretation and legal decisions in the future implementation of the law. United's specific experiences with the ESA regulatory process described below offer some insight into real-world implementation challenges faced by applicants, such as United, that provide critical public services.

NMFS Overreach and Impact on Santa Felicia Dam Safety Concerns

United owns and operates the Santa Felicia Dam on Piru Creek, located approximately 6 miles upstream of the confluence with the Santa Clara River. The Santa Felicia Dam was completed in 1956, and United currently operates the facility under a license from FERC. More recently, United has been designing safety improvements to its Santa Felicia Dam to replace the original outlet works that is vulnerable to damage from earthquakes, and to increase the size of its spillway to handle larger flood flows. Moving this project forward expeditiously is critical for the safety of 400,000 people who live downstream of the dam. Because of the large population below the dam, the California Division of Safety of Dams considers the Santa Felicia Dam to be an "extremely high hazard dam." While working to move forward the critical safety improvements to the dam, United has run into roadblock after roadblock by NMFS and their exploitation of the ESA. In our numerous meetings and correspondence on the project, the human safety element is never acknowledged as a consideration for NMFS.

Unfortunately, the people of Ventura County are familiar with the consequences of dam failures. In 1928, the Saint Francis Dam failed catastrophically, sending a 70-foot wave through the Santa Clara River valley, killing hundreds of downstream residents, destroying properties, and leaving extensive damage across a two-mile wide flood path. This took place in United's service area. Additionally, the community is aware of the near disastrous failure of the Lake Oroville spillway in 2017. Fortunately, both the California Division of Safety of Dams and FERC are actively engaged in United's design effort to begin construction soon. United is designing the project to address both the human safety needs and requirements of the ESA. However, NMFS is now holding the human safety project hostage and making numerous demands concerning ocean run steelhead that have never been documented at the project site. Through its participation in the FERC license amendment process, NMFS is once again exploiting its jurisdiction under the ESA to, among other things, attempt to reinitiate consultation on United's existing FERC license, which has led to delays in the project design and permitting process. For example, NMFS recently filed a motion to

intervene in the FERC dam safety license amendment proceeding six years after NMFS advised the project would require formal consultation. FERC denied NMFS' motion as untimely and unjustified.

Piru Creek is Not Occupied by Ocean Run Steelhead

NMFS listed the southern California steelhead in 1997 and designated critical habitat for the species in 2005, at the time designating only "occupied" habitat and declining to designate any "unoccupied" areas as critical habitat. Effectively, by designating lower Piru Creek as critical habitat, NMFS made a determination that the reach was "occupied" by the listed unit (ocean run steelhead) at that time. Although the ESA and its implementing regulations do not define "occupied," the Courts have interpreted this term to refer to when a species "uses [the area] with sufficient regularity that it is likely to be present during any reasonable span of time." *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010). The ESA is clear that the USFWS and NMFS must designate critical habitat based on the occupancy status as it exists at the time the species is listed. 16 U.S.C. § 1532(5)(A)(i). The designated critical habitat in lower Piru Creek was not – and still is not – occupied by ocean run steelhead and the available habitat within lower Piru Creek does not meet the intent of the ESA.

In their review of areas for designation of critical habitat, the NMFS Critical Habitat Analytical Review Team (CHARTs) report evaluated reaches at Hydrologic Unit scale. The unit that lower Piru Creek fell into also included Hopper Creek and a portion of the Santa Clara River mainstem. Hopper Creek and this portion of the SCR mainstem often run dry. Yet, NMFS designated migration, spawning, and rearing critical habitat for the entire Hydrologic Unit concluding that it contains habitat of "high conservation value" for the species. In the same year that NMFS designated critical habitat in lower Piru Creek, in correspondence related to United's FERC license, NMFS made contradictory statements about the quality of the habitat in lower Piru Creek for steelhead, including the characterization of the habitat as "severely degraded" and "unsuitable for the rearing of juvenile steelhead". Clearly, NMFS' contradictory statements exhibit the arbitrary and capricious nature of their actions in implementing the ESA, whereby NMFS has taken advantage of its jurisdiction to exert its will on the regulated community, which results in substantial costs in terms of time, money, water, resources, and person hours with no justification for the requirements being imposed.

Since the early 1900s, documentation from federal and state fish biologists and other regulatory and research agencies has stated that the Piru Creek watershed in Ventura and Los Angeles Counties is not conducive to ocean run steelhead. In fact, across the breadth of available literature, these researchers have never found ocean run steelhead in this watershed. Related to United's operation of Santa Felicia Dam, FERC submitted a Biological Assessment that supports this assertion. However, despite clear historical data, consistently dry conditions, natural migration barriers and assessments of the region, NMFS reaches a different conclusion because they like to operate under the assumption of "absence of evidence is not the evidence of absence." Not only does NMFS' Biological Opinion attest to the possibility of a steelhead resource, it also requires the construction of a very expensive fish passage structure and continuous water releases from

United's infrastructure into lower Piru Creek (designated critical habitat). Again, this is for fish that have never been documented in that reach.

NMFS' assumptions are based on the false premise that historical population data is not available or is not representative of southern California steelhead. United has conducted extensive research and provided our results to NMFS numerous times in the past; however, these facts are disregarded as they do not align with NMFS's narrative about the status of the species. Historical planting of steelhead from northern California rivers is one primary example. In southern California, the rise and fall of the steelhead population directly correlates with the planting of northern steelhead in southern California waters by the California Department of Fish and Game (now the California Department of Fish and Wildlife, CDFW) beginning in the 1890s and continuing up to the 1930s. In the 1910s, southern California rivers, including the Santa Clara and Ventura, along with their tributaries, were receiving up to 3 million steelhead from northern hatcheries per year. Prior to the planting from northern hatcheries, records of steelhead in the southern California rivers are minimal. For example, records from the missionary period never mention trout or steelhead, which contrasts with the rivers further north, and scarce records from the pre-colonial period. As noted in a scholarly review of steelhead in the Santa Ynez River (the watershed with the largest presumed historical run of ocean run steelhead in the range of the listed southern California steelhead), "we found relatively few explicit records of Chumash exploitation of riverine fish, such as steelhead in the Santa Ynez River, from Spanish, Mexican, and early American explorers and settlers" and continued "the only archaeological evidence for steelhead presence comes from several theses and a museum contribution describing excavations of sites in former inland Chumash villages with associated information on the identity of fish elements...6 salmonid bone elements found...constituted only 0.2% of the identifiable fish bones recovered at this site, with the rest assignable to marine species, and these bones appeared to come from immature steelhead or rainbow trout." Even more relevant to United's operations, in historical reviews of native American midden piles, over 152,000 fish remains were found, attributable to over 200 species of fish, and no steelhead were identified from Ventura County. Again, the narrative pushed by NMFS of a historical run size in the tens of thousands of ocean run steelhead is not supported by the available literature and this information is simply ignored as it runs counter to NMFS' stated position.

Following issuance of NMFS' Biological Opinion, since 2010, United has released over 45,000 acre-feet of water (over 14 billion gallons) much of which was released during a historic drought in the region between 2012-2017, the replacement value of which is \$22-36 million dollars. United has also spent over \$10 million dollars on scientific studies, consultants, and legal fees to comply with the Biological Opinion. Ultimately, NMFS is pushing for a volitional fish passage system over Santa Felicia Dam that would cost well over \$100 million dollars, and again, no ocean run steelhead have ever been observed. The requirements that United and our ratepayers are facing add up to hundreds of millions of dollars spent and tens of thousands of acre-feet of water lost to provide for a listed species that has never been observed in the affected area. Associated costs to our ratepayers could eventually add up to over a billion dollars spent. Unless there are changes to the ESA and the overreach by federal agencies is reined in, NMFS will continue to exploit the law and the result will be at the cost of rate payers.

NMFS Misinterpretation of Environmental Baseline Issues at the Freeman Diversion

Separately from our experiences at the Santa Felicia Dam, United has a long history of ESA consultation with NMFS in relation to our Freeman Diversion. The Freeman Diversion was constructed in 1991 following a decade-long project design and permitting process primarily involving the California State Water Resources Control Board and California Department of Fish and Game (now CDFW) and including input from NMFS and the USFWS. The Freeman Diversion is a surface water diversion facility utilized as the primary means to recharge the groundwater basins on the Oxnard Plain.

A fish passage facility was constructed as part of the existing facility; however, since the listing of southern California steelhead in 1997, United has been in various stages of ESA consultation with NMFS. Initially in a Section 7 consultation process with the U.S. Bureau of Reclamation (Reclamation) between 1997-2008, and currently a Section 10 consultation process that has been ongoing since 2008. With respect to southern California steelhead, NMFS' interpretation of environmental baseline in past biological opinions has effectively placed the species in a state of "baseline jeopardy". From a practical standpoint, this "baseline jeopardy" status severely limits the types of projects and activities that can receive a non-jeopardy biological opinion from NMFS. NMFS' interpretation of the ESA, primarily the environmental baseline, was the main driver in Reclamation making the determination that they could not accept or implement NMFS' biological opinion. Ultimately, Reclamation stepped away from the ESA consultation in 2008. Without a nexus to a federal agency, United has since been in the process of developing a Habitat Conservation Plan (HCP) under Section 10 of the ESA with NMFS and USFWS over the past 15+ years.

Habitat Conservation Plan Challenges

United has been working in earnest on HCP development for well over a decade and has dedicated significant staff and financial resources to moving it forward. While the USFWS has been helpful in providing their guidance throughout this process, NMFS has stifled the significant progress made on proposed infrastructure projects – including an agreement between United, NMFS, and CDFW on a \$200 million dollar fish passage facility renovation project at the Freeman Diversion – due to its interpretation of environmental baseline.

Revisions to the definition of environmental baseline proposed in the ESA Reform draft legislation are necessary to clarify the intention in the ESA to separate existing facilities and ongoing operations from new or modified facilities and operations. The status of a listed species is directly related to these existing facilities and ongoing operations and these "past and present effects" are appropriately included in the environmental baseline. The implementation of new or modified facilities and operations and their respective effects on a listed species are appropriately included in the effects of the action. NMFS' interpretation and application of the environmental baseline in past Biological Opinions for United's facilities have been applied inconsistently across the west coast region. The Calaveras River HCP is one recent example. The Biological Opinion issued for the Calaveras River HCP, which notably was issued by the NMFS California Central Valley office, concludes that, regarding an existing facility undergoing proposed design modifications, "Fish passage would still be impaired...and the adverse impacts described would still occur." Ultimately, however, the biological opinion concludes that the "long-term beneficial effects from the proposed action would outweigh both the short-term and long-term negative impacts" and concludes with the determination that the Calaveras River HCP is not likely to jeopardize the continued existence

of the listed species at issue (California Central Valley steelhead). In United's ongoing HCP development process, the NMFS Long Beach office, which notably has never approved any HCPs, has continually utilized its jurisdiction under the ESA to impose requirements that discount or outright ignore the measurable benefits of the proposed fish passage project at the Freeman Diversion, leading to obvious inconsistencies with these other ESA consultations. To date, NMFS has not provided the scientific justification for such requirements, even after multiple requests from United for this information, leading United to develop a project and HCP under threat of denial by NMFS.

The ESA includes assurances in both Section 7 and Section 10 that require the project proponent/applicant to improve conditions for the listed species through the implementation of a project. The current interpretation of environmental baseline by NMFS has resulted in years of delay on United's projects, and in receiving incidental take protection for our facilities. This delay has left United to face multiple third-party lawsuits, the most recent of which resulted in several additional years of delays and millions of dollars spent on legal fees. As a bright spot, through a process overseen by a federal judge, United and NMFS have agreed on a proposed project at United's Freeman Diversion to improve conditions for southern California steelhead within the Santa Clara River watershed. The project has been NMFS' preferred project for a number of years but it is significantly more costly than the other viable alternative. Nevertheless, United selected NMFS' preferred project, and along with the federal judge, all involved see this project as a huge leap forward for fish passage in the watershed. Yet, this progress has been overshadowed by NMFS' jurisdictional overreach under the ESA regarding the operation of the new facility. Although the proposed project would lead to measurable improvements to the listed species, NMFS has utilized its leverage under the ESA to refuse to acknowledge the overall benefits of the project. NMFS remains obstinate in its position and is determined to delay the project until its other demands are met.

Importance of the ESA Reform Draft Legislation

United is hopeful that the ESA Reform draft legislation can clarify some of the ambiguity in the implementation of the ESA and provide a more consistent process for applicants. In United's experience, NMFS has used their jurisdiction under the ESA as both a carrot and stick, and while we understand that NMFS will always have authority under the ESA, a more reasonable regulatory process will enable public and private entities to implement projects in a timely and cost-effective manner to benefit both the listed species and allow for important infrastructure improvements to be completed.

1. Habitat Definition

United is encouraged to see the addition of the definition of habitat as it relates to critical habitat in the ESA Reform draft legislation as this could provide a clearer interpretation for both the regulated community and the regulatory agency staff charged with implementing projects that balance our vital resources – whether they are water, land or minerals – in a way that provides a meaningful benefit to the listed species while allowing for our communities to receive what we need to be sustainable into the future. As described above, United's experience with the ESA regulatory process demonstrates that NMFS has repeatedly exploited their jurisdiction to overreach and impose arbitrary and capricious requirements that lack scientific justification. With the recent Supreme Court decision to overturn *Chevron*, United is hopeful that NMFS and the federal courts

will implement the ESA in a more practical manner and the language proposed, and in United's view the ESA Reform draft legislation is a positive step in that direction.

2. Environmental Baseline Definition

The additions to the definition of environmental baseline would help to clarify the ESA consultation process, specifically those effects that would fall into the environmental baseline versus those that would fall into the effects of the action. United has direct experience with the need for clarification on the definition of environmental baseline, which has been inconsistently interpreted by NMFS across the west coast region, causing delay or outright stopping projects, including those that provide an overall benefit to listed species.

I also serve on the Advisory Committee for the Family Farm Alliance, which represents farmers, ranchers and water districts in 16 Western states, including California. An Alliance subcommittee was established in 2018 to provide detailed recommendations to USFWS and NMFS in July 2018 on proposed revisions to regulations that implement portions of the ESA. Many of the important sections of the ESA Reform draft legislation we are discussing today are similar to those recommendations; the definition of "Environmental Baseline" was a top priority.

3. Title IV: Creating Greater Transparency and Accountability in Recovering Listed Species

In addition to the above remarks, United would like to voice our support for the ESA Reform draft legislation proposals to improve the transparency and accountability in recovering listed species. Regarding the availability of information related to a proposed regulation, United fully supports the intent of the ESA Reform draft legislation. In addition to a proposed regulation, the regulatory agencies, NMFS and USFWS, should provide all information that are the basis of regulatory decisions and/ or requirements under the ESA (e.g., Reasonable and Prudent Measures and Reasonable and Prudent Alternative) to improve agency and regulatory process transparency. In our experience, some of which is described in detail above, NMFS has repeatedly failed to provide adequate justification for several decisions, requirements, or recommendations, which calls into question the reasoning and appropriateness of their actions.

Related to actual observations of steelhead at United's Freeman Diversion, NMFS has failed to produce evidence requested by United on multiple occasions related to the genetics of individuals recovered by United and provided to NMFS as part of our responsible and transparent operation of our facility. NMFS has instead chosen not to reveal this information and stonewalled United's attempts to better characterize these individuals and the overall species. Through direct agency outreach and Freedom of Information Act requests, United has attempted to gain a more complete understanding of decisions issued by NMFS that have significant implications for not only the listed species but also United's facilities, our ratepayers, and the communities we serve with only limited success. With a complete understanding of the reasoning behind a decision, we would have an opportunity to develop creative multi-benefit solutions. Without a complete understanding, we are left to implement a decision, no matter how detrimental, or risk enforcement action or third-party lawsuit. Improvements in the sharing and distribution of information related to a proposed regulation – and ideally expanded to all regulatory decisions and/ or requirements – would only benefit the ESA regulatory process and provide needed clarity in regulatory decisions.

4. Title V: Limitation on Reasonable and Prudent Measures

Lastly, United would also like to voice our support for the ESA Reform draft legislation proposal to add a limitation on Reasonable Prudent Measures to align with the existing language of the ESA. As noted above, United is currently in the process of developing an HCP under Section 10 of the ESA for our Freeman Diversion and anticipates entering consultation under Section 7 of the ESA for our Santa Felicia Dam Safety Improvement Project soon. Both consultation processes require United to adhere to the impact avoidance and minimization provisions set forth in the ESA, which require extensive and costly mitigation measures. Without the proposed language in the ESA Reform draft legislation, NMFS and USFWS could potentially apply additional Reasonable and Prudent Measures unilaterally in their issuance of a Biological Opinion, leading to potential permitting delays and exorbitant project costs for applicants such as United. As with many critical infrastructure projects, United's facilities are located in areas which limit design alternatives, and thus, limit the options for minimizing or offsetting impacts associated with their implementation.

Conclusion

In closing, United fully supports the ESA Reform draft legislation and the regulatory changes that would result from enacting this piece of legislation. We remain committed to working with your Committee and the Congress to share our concerns and perspectives. Thank you for this opportunity to present this testimony to you today.