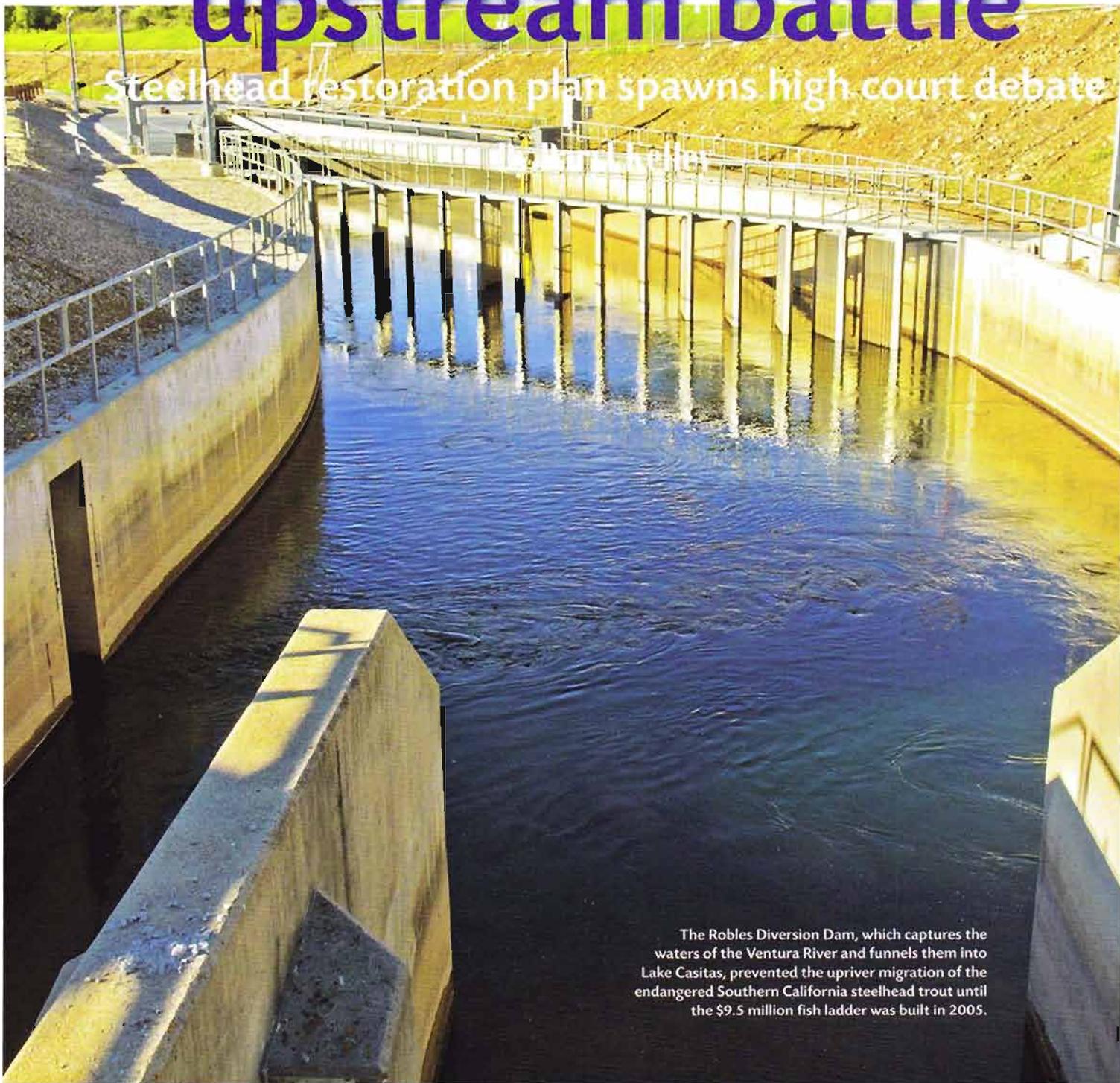




Natives face upstream battle

Steelhead restoration plan spawns high court debate

by David Keller



The Robles Diversion Dam, which captures the waters of the Ventura River and funnels them into Lake Casitas, prevented the upriver migration of the endangered Southern California steelhead trout until the \$9.5 million fish ladder was built in 2005.

The story of the vast, dry American West has always been one of finding water and then, inevitably, deciding who owns it. The Ojai Valley, despite its surrounding wall of rain-catching mountains, was typically thirsty, depending on fleeting winter rains and balky ground-water wells -- until a half-century ago, when the federal government agreed that local farms and businesses needed a stable

water supply. Finally, the United States Bureau of Reclamation agreed to spend \$31 million to capture the sometimes-torrential flows of the Ventura River and several large creeks.

Now, the squat Casitas Dam stands near the mouth of the Ojai Valley, its sprawling reservoir a guarantee that residents of Ojai and west Ventura will have water even during drought, and regardless of snowfalls in the towering Sierras, which quench the rest of Southern California.

From the beginning, however, Ojai's solution to water problems has depended on an inherently testy relationship between local, state and federal agencies. And now that shaky alliance is being strained as never before by a 2005 lawsuit filed by the tiny Casitas Municipal Water District against the giant Bureau of Reclamation.

Casitas claims the federal government seized its water without compensation to assist the spawning migration of the endangered Southern California steelhead trout up the Ventura River. At stake is up to \$87 million and, perhaps, the reach of the federal Endangered Species Act. Casitas, based in Oak View, has spent \$830,000 on the case so far.

As in countless water disputes, the seminal question is who owns the precious liquid that turns desert to oasis: the local hands-on agency, the federal bank-rollers, or the state of California, which claims all legal rights to stream water? The state has weighed in against upstart Casitas, siding with federal

lawyers. But if this David vs. Goliath showdown seems a mismatch, consider that Casitas is winning so far, having prevailed in an appeal to a higher court that established this as a property rights case and not just a regulatory dispute.

Legal experts say the case could eventually reach the U.S. Supreme Court because of a constitutional question: Has the federal government taken Casitas' water -- its property -- without paying for it?

"The principal question before this court is whether the government's permanent physical annual taking of 3,492 acre-feet of Casitas' water is compensable under the Fifth Amendment and, if so, the amount of just compensation," according to a brief filed by Casitas in January, following an October trial in Washington.

The judge's decision in the case, which is expected by the summer, could not only award Casitas tens of millions of dollars

but, as a precedent, prompt other local agencies to sue for payment for water lost to help other endangered fish. In this case, Casitas wants the federal government to pay \$87.3 million, plus interest and attorney fees, for rain runoff water Casitas diverts down a 100-yard, metal fish ladder to help save the Southern California steelhead, an ocean-going variety of the common rainbow trout.

Local steelhead populations fell precipitously during the 20th Century as over-fishing occurred, fish stocking ended, urban pollution tainted spawning grounds, over-pumping drew down river flows, and the federal government built the Matilija Dam in the 1940s and Casitas and Robles dams in the 1950s, blocking fish from historic breeding areas upstream. An estimated 4,000 to 6,000 steelhead lived in the Ventura River watershed in the 1940s, experts say, but only about 200 were found in 1997 as the trout was declared endangered and subject to federal protections.

Over the past decade, the federal government has pushed Casitas to build a \$9.5-million fish ladder to



Steelhead taken from the Ventura River before the construction of the Matilija Dam in 1946. (Photo courtesy of Mark H. Capelli, Southern California Steelhead Watershed Archive.)

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— Peter Moyle

allow steelhead to get around the small upstream Robles Diversion Dam, which was built to direct Ventura River water into a five-mile canal to Lake Casitas. Federal officials have also directed Casitas to provide a flow of water during storms and for 10 days after them from January through May, instead of diverting that water to Lake Casitas for use by humans.

“This is Casitas’ water to use [but] Casitas does not have it any more,” Washington attorney Roger Marzulla wrote in his brief on behalf of the water district. “The fish do.”

Still, fewer than 20 steelhead have been counted climbing the fish ladder since it was completed in 2005, according to Casitas.

Casitas directors insist that they support saving the steelhead but don’t know why their customers should have to shoulder the costs alone, instead of spreading them across the nation in the federal budget.

Federal officials argue that Casitas has only limited rights under its state water permit and has not lost a dime in sales by providing for the steelhead migration, because Lake Casitas is naturally replenished by rainwater and Casitas has not bought any replacement water. (Indeed, Casitas would have to build a canal or pipeline to connect to a new supply. Lake Casitas is currently about three-fourths full, and has never fallen below half full, even during drought.)

The state of California, meanwhile, insists that it owns the water used for the steelhead and that Casitas is only a licensee to which it grants water rights for the public good. State and federal lawyers argue that even without a federal push, California codes would have required Casitas to set aside water for the steelhead. And under state law, Casitas is not entitled to just compensation for the government seizure of the water it controls, these lawyers

contend.

Casitas argues that it loses nearly 3,500 acre feet of water a year to steelhead diversions and clogged fish screens on the fish ladder, and that each acre foot is worth \$25,000, so losses total about \$87 million. Federal lawyers counter that the amount of water diverted for the steelhead is much less, and that the market value of “surplus” water is less than \$1 million.

Into this brew, toss the views of individual Casitas board members, some of whom have opposed the lawsuit on cost and environmental grounds, while most have backed it as a simple issue of fairness and certainty.

“We knew this was risky, a long shot,” veteran Casitas Director Jim Word said in an interview. “But we didn’t have too much choice. They could have kept coming back and demanding more water if this wasn’t enough [for the steelhead]. So we had to draw a line in the sand.”



Roger Marzulla



Paul Jenkin, underwater in the Ventura River near the confluence with San Antonio Creek, conducting a count amid a school of steelhead trout. (Photo by Matt Stoether)

In his testimony at trial, Word told a federal judge that Casitas was coerced into approving construction of the fish ladder and providing it with water, despite assertions by government lawyers that Casitas made that choice on its own after a formal federal recommendation by the National Marine Fishery Service in 2003.

“We either built it and managed it to their specifications,” Word testified, “or we would be subject to criminal prosecution for violation of the Endangered Species Act, in which case all diversion [to Lake Casitas] would cease, and they would start

arresting and fining staff.”

Former Casitas Director James Coultas testified that Casitas had “no intention of giving up any water whatsoever” but finally supported a \$2-million fish ladder under pressure, and the cost of



that ladder just kept rising because of federal design changes.

"It was like a runaway train," Coultas said. So Casitas ended up with a fish ladder that was "not the Chevrolet, [but] the Ferrari."

Coultas also noted that state and federal officials concluded in the 1950s, when the Casitas project was first proposed, that no steelhead fish ladder was needed because there were so few of the fish left and environmental conditions such as temperature and sporadic Ventura River flow would not allow them to make a comeback.

On the other hand, Casitas Director Russ Baggerly, who has opposed the lawsuit all along, said a Casitas loss would confirm the Casitas board's costly mistake in judgment, and a Casitas victory could be a disaster for threatened fish.

"Everybody in the country is looking at this lawsuit as a means of not having to provide water for endangered fish," Baggerly said. "There is not enough money in the U.S. Treasury to pay for this. So it could affect how the Bureau of Reclamation handles their constraints on water throughout the western states."

Casitas attorney Marzulla said in an interview that such concerns are those of the "little boy crying wolf."

"They're trying to get everybody wound up," Marzulla said, but the fact is that he won a similar case in Tulare County in 2003 and the Bureau of Reclamation never changed the way it does business.

But Baggerly also maintains that Casitas could now draw fire from the state Water Resources Control Board: "They may require a formal hearing about changing the water rights for Casitas, so that public trust issues, such as endangered species, are taken care of," he said. "There are a lot of ramifications associated with this suit which I don't think the full board of Casitas is aware of."

But if issues raised by the Casitas lawsuit are thorny, they may be less complicated than questions about the steelhead itself, not the least of which is whether it's really just another rainbow trout.

Since the DNA of the two fish is the same, and rainbow often birth steelhead, and the steelhead is officially classified as an ocean-run rainbow, there are plenty of doubters about the southern steelhead's distinctive nature and recent sightings of the fish in the Ventura River.

Coultas, in fact, testified that he never saw a steelhead in the

Ventura River during his 20 years on the Casitas board and a lifetime as an Ojai area fisherman. In testimony, he recalled his father taking him fishing in the Ventura River in the early 1950s, before Casitas Dam was built, and finding no steelhead. "I'm afraid they're gone, son," Coultas remembered his father saying.

Marine biologists say there's no doubt that the Southern California steelhead remains in the Ventura River and that it is a rainbow trout (*Oncorhynchus mykiss*). But most rainbow trout never venture into

the ocean; they stay home in the comfortable inland climes. Their steelhead brothers head to the ocean as juveniles for a journey that may last three years. When they return, the large, silvery steelheads bolt upstream, leaping out of the water to scale obstacles, to find a mating partner and a good place to lay and fertilize eggs. As they migrate, the silver steelhead turn a dark color, with red on the sides. And often upon return they're much larger than their rainbow siblings: up to two feet in length and 10 to 20 pounds, biologists testified in this case. Farther up the West Coast, other varieties of steelhead grow



Steve Wickstrum, general manager of Casitas Municipal Water District, with Casitas board member Russ Baggerly, at the Robles Dam.

even larger.

At the recent trial in Washington, federal Claims Court Judge John P. Wiese was curious about the uniqueness of the steelhead.

He asked Peter Moyle, a professor at UC Davis and author of the book, *Salmon, Steelhead and Trout in California*. "Is the steelhead a distinct species from trout?"

"That's a very complex issue," Moyle testified, "but it's regarded as a distinct variety of trout. ... The relationship between the rainbow trout, which is generally regarded as the resident species in upstream areas, and the steelhead is a very complex one. They in fact, from a pure Darwinian point of view, are one species, but they [have] two very different ways of living, and the fact that they intersect and interact is crucial to the survival of the steelhead."

What Moyle was saying was that steelhead returning to the Ventura River have a hard time finding a mature steelhead with which to breed, so they often choose a "resident" rainbow.

"Think of them as like a salmon," he said. In fact, many of them, especially males, will develop salmon-like hooked noses as they migrate upstream, and they're sometimes called salmon trout.

"They're special because they can survive historically in one of

“It’s essentially rescuing these fish from surefire extinction in the watershed by providing them some access to the upstream areas.”

— Peter Moyle

the most demanding environments for salmon or trout anywhere in the world,” Moyle said. The stream water they require comes and goes with the winter season, and Southern California is extremely warm for steelhead, he said. “And they’re remarkable because for the first people who arrived ... they were just amazed at these runs of big silvery fish going up these semi-desert streams. ... The Ventura River was famous for its big steelhead. ... There are lots of photographs of people with stringers of big fish.”

Moyle, a federal government witness, said there were thousands of steelhead in the Ventura River watershed before construction of Matilija Dam blocked spawning up Matilija Creek, construction of Casitas Dam blocked spawning up Coyote Creek and construction of the Robles Diversion Dam blocked spawning up the Ventura River and the North Fork of Matilija Creek.

Moyle said of the new fish ladder around the Robles dam: “It’s essentially rescuing these fish from surefire extinction in the watershed by providing them some access to the upstream areas.”

Below the three dams in the Ventura River watershed, experts say, there are still scattered adult steelhead and many more juveniles. Researcher Paul Jenkin, founder of a coalition to remove the silt-filled Matilija Dam, said steelhead are often found in pools near the confluence of the Ventura River and San Antonio Creek, where underground flows filter through layers of gravel to the surface.

Jenkin and his colleague Matt Stoecker, under government grants, dive into those pools to count the fish. They estimate the rainbow and steelhead populations at several thousand, but it’s hard to say just how many of those are steelhead, Jenkin said.

“We have resident mature rainbow trout, and their offspring attempt to migrate out to the ocean and become steelhead,” Jenkin said. “Our count is very important when discussing an endangered species about which very little is known. There are people out there who say there are no steelhead left. And if no one is out there looking, you don’t know if there are.”

Jenkin insists that removal of the obsolete Matilija Dam would open a floodgate of steelhead migration up and down Matilija Creek to the Ventura River. The federal government has approved removal, but issues about what to do with sediment from behind the dam have stalled the project. Now, as the cost has grown past \$160 million, there may not be enough money in the overdrawn federal budget for it.

On a recent winter morning, Casitas General Manager Steve Wickstrum and Director Baggerly showed visitors around the Robles Diversion Dam, explaining how Casitas’ new fish ladder is intended to work.

The incredible steelhead athletes enter the metal ladder from a pool in the Ventura River below the dam, then leap out of the water through the air from rung to rung for perhaps 110 yards, sometimes resting in eddies built into the ladder.

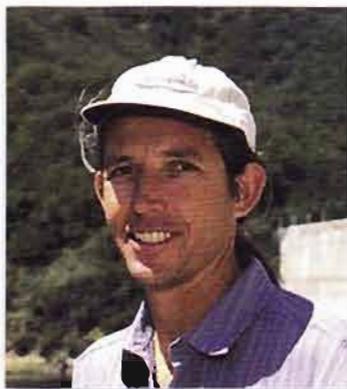
It’s an arduous climb, and Wickstrum said that fewer than two dozen steelhead have been caught on camera making the climb since the ladder was built six years ago.

“I’ve never seen one in person,” Wickstrum said. Baggerly said he had seen just one, “and it was a big one.”

Indeed there are encouraging signs, the officials said. A fish ladder video caught a 23-inch steelhead passing through not long ago. And two two-footers were photographed last year near an upstream quarry, which was blocking their migration up the North Fork of Matilija Creek.

Biologists have found two steelhead “redds,” spawning areas, along the small reservoir just upstream from the Robles dam, they said. These burying grounds for fertilized eggs are three to four feet in diameter, they said, about twice the size of those usually constructed by resident rainbow trout.

“The positive part of all this,” Wickstrum said, “is that the fish are getting through. We’re starting to see them get into the upper reaches. They’re navigating this facility successfully without getting harmed.” ■



Paul Jenkin, founder of the Matilija Dam Ecosystem Restoration Project, which seeks to have the dam removed and open up steelhead spawning areas. The dam’s removal would also restore sand to Ventura County beaches. The cost of the dam’s removal has risen to \$160 million, because of the massive amounts of sediment piled up behind the obsolete structure.