Civil No.

IN THE
COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KERN COUNTY WATER AGENCY,
Petitioner,

v.

KERN COUNTY SUPERIOR COURT,
Respondent,

BRING BACK THE KERN, et al.
Real Parties in Interest.

Appeal from Superior Court of Kern County,
Case No. BCV-22-103220; Hon. Gregory Pulskamp Presiding

PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

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Certificate of Interested Entities or Persons

Pursuant to California Rules of Court, Rule 8.208, Petitioner, by and through its counsel of record, submits the following Certificate of Interested Entities or Persons. Petitioner states that it knows of no person or entity that must be listed in this Certificate under California Rule of Court, Rule 8.208.

DATED: July 1, 2025 SOMACH SIMMONS & DUNN

By_____

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INTRODUCTION: WHY A WRIT SHOULD ISSUE

On April 2, 2025, this Court issued its opinion in *Bring Back the Kern v. City of Bakersfield (Bring Back the Kern)* (2025) 110 Cal.App.5th 322. The *Bring Back the Kern* opinion reversed orders issued by the Honorable Gregory Pulskamp, judge of the Respondent Kern County Superior Court (Respondent), granting a preliminary injunction that established a mandatory Kern River instream flow program. (*Id.,* at p. 344.) The reversal was on both substantive and procedural grounds – including Respondent's misapplication of the key legal principle used to determine Plaintiffs' "likelihood of success on the merits." This Court remanded the matter back to Respondent "for proceedings consistent with the views expressed in this opinion." (*Bring Back the Kern* at p. 369.)

On May 30, 2025 Petitioner Kern County Water Agency (Petitioner) filed a Motion for Peremptory Challenge (Peremptory Challenge Motion) with Respondent, seeking to disqualify Judge Pulskamp and confirm transfer of the matter to another judge of the Respondent court. True and correct copies of the Peremptory Challenge Motion pleadings are attached as Exhibit A to this petition. On June 10, 2025, Respondent summarily denied the

Peremptory Challenge Motion. A true and correct copy of that order is attached as Exhibit B to this petition.

Respondent abused its discretion in denying the Peremptory Challenge Motion. Code of Civil Procedure section 170.6, subdivision (a)(2) authorizes the peremptory challenge of a Superior Court judge "following reversal on appeal of a trial court's decision … if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter." The term "new trial" is interpreted broadly to include any reexamination of factual or legal issues in controversy in the prior proceedings, provided that these matters are not ministerial in nature. (*Paterno v. Superior Court* (2004) 123 Cal.App.4th 548, 560; *Geddes v. Superior Court* (2005) 126 Cal.App.4th 417, 424; see also *C.C. v. Superior Court* (2008) 166 Cal.App.4th 1019, 1022 (*C.C.*) [ministerial act].)

On remand, the Superior Court may re-examine the two primary issues associated with a preliminary injunction:

> … (1) the likelihood that the plaintiffs will prevail on the merits at trial, and (2) the interim harm that the plaintiffs are likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued.

(*Bring Back the Kern, supra*, at p. 349, quoting *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1299.)

Or plaintiffs may decide not to renew the motion for preliminary injunction and instead the Superior Court will proceed to re-examine the merits of the case to determine whether a permanent injunction should issue. Whether the Superior Court immediately re-examines the motion for preliminary injunction issues or proceeds to trial on the merits of the requested permanent injunction, the Superior Court will re-examine the legal and factual merits of the case. As set forth in more detail below, these are the exact circumstances that trigger the right to a peremptory challenge under Code of Civil Procedure section 170.6, subdivision (a)(2).

Petitioner has no adequate, legal remedy other than writ relief, as Code of Civil Procedure section 170.3, subdivision (d) provides that "the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate."

PETITION FOR WRIT OF MANDATE

Kern County Water Agency ("KCWA" or "Petitioner") petitions this Court for a writ of mandate or other appropriate

relief, directing Respondent Kern County Superior Court to vacate its order denying KCWA's Motion for Peremptory Challenge of Judge Gregory A. Pulskamp under Code of Civil Procedure section 170.6 and to enter a different order granting said motion.

To this end, Petitioner alleges as follows:

1. The City of Bakersfield (City) operates multiple weirs on the Kern River used to divert water for its own use and the use of several other entities, including Petitioner.

2. In 2022 several organizations, including Bring Back the Kern (BBTK) and Water Audit California (collectively "Plaintiffs"), filed suit alleging that the City operates the weirs in violation of the Public Trust Doctrine and Fish and Game Code section 5937.

3. The Honorable Gregory A. Pulskamp, Judge of the Kern County Superior Court, is assigned for all purposes to the underlying matter.

4. In 2023 the Plaintiffs sought and obtained a preliminary injunction prohibiting the City from operating the weirs "in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good

condition." (*Bring Back the Kern, supra,* 110 Cal.App.5th at p. 334, citation omitted.)

5. The preliminary injunction was imposed by three orders of the Superior Court. The initial order directed "defendant and plaintiffs to engage in good faith consultation to establish flow rates necessary for compliance with this order." *Bring Back the Kern, supra,* p. 341.) If said consultation was unsuccessful, either party could file a request for the court to "make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after reasonable notice to all parties including the Real Parties in Interest." (*Id.,* at p. 341, quotations in original.) A true and correct copy of the initial order, filed November 9, 2023 is included in Exhibit A to this petition, pages 37-153.

6. "In its ruling, the trial court expressly refused to weigh the potential harm to the City of Bakersfield or the water agencies in determining whether applying section 5937 to the Kern River would result in 'an appropriate use of water.'" (*Bring Back the Kern, supra*, at p. 334.)

7. The Superior Court set a nominal $1,000 bond over objections from Petitioner and the other Real Parties. (*Bring Back the Kern, supra*, at p. 341.)

8. Shortly thereafter, in a second order (the "Implementation Order") the Superior Court established a Kern River flow program pursuant to a "stipulation" offered by City and plaintiffs, but not agreed to by Petitioner or any of the other real parties in interest (Real Parties) with rights to divert Kern River water via the weirs. A true and correct copy of the November 14, 2023 Implementation Order is included in Exhibit A to this petition, pages 75-104.

9. After the Real Parties filed motions for reconsideration, the Superior Court issued a third order (the "Reconsideration Order") that stayed the Implementation Order and modified the injunction. A true and correct copy of the January 9, 2024 Reconsideration Order is attached as Exhibit C to this petition.

10. On January 19, 2024, the Real Parties filed notices of appeal for all three preliminary injunction orders.

11. On April 19, 2024, the Real Parties filed a writ of supersedeas with this Court.

12. On May 3, 2024, this Court granted the writ of supersedeas and ordered:

> Pending further action of this court, the superior court's orders filed on November 9, 2023, and November 14, 2023, are both stayed, as are all proceedings embraced or affected by said orders, including proceedings on plaintiffs/respondents' "Motion to Compel Compliance with Preliminary Injunction.

13. On April 2, 2025, this Court issued its *Bring Back the Kern* published opinion.

14. The *Bring Back the Kern* opinion reversed the preliminary injunction orders and held as follows:

a. "… under the self-executing provisions of article X, section 2 of the state Constitution, courts must always consider reasonableness whenever adjudicating a use of water – even if the pertinent statutes do not call for a reasonableness determination themselves. Section 2 is 'the supreme law of the state, which the courts are bound to enforce, and it must be made effectual in all cases and as to all rights not protected by other constitutional guaranties.' [citations] The court's failure to directly consider the reasonableness of the water use it was ordering in the injunction was constitutional error." (*Bring Back the Kern, supra*, at p. 335, emphasis omitted.)

b. "In sum, because of California Constitution, article X, section 2, no judicial adjudication of competing water uses is complete until the court assesses whether the use is beneficial and reasonable. Since the reasonable-use requirement applies to all uses of water in the state – including in-stream public trust uses like the one envisioned by section 5937 – the trial court's approach of applying only the terms of section 5937 without giving direct effect to the reasonableness provisions of section 2 as to the 'underlying, substantive issue' of this case was error." (*Bring Back the Kern, supra*, at p. 356.)

c. "On remand, the court must determine whether and to what extent using the waters of the Kern River to keep fish in good condition is a reasonable and beneficial use of water under California Constitution, article X, section 2. Such a determination looks to the totality of the circumstances, which include effects on fish and other wildlife (Wat. Code, § 1243, subd. (a)), recreation *(ibid.*), water quality and the transportation of adequate water supplies where needed (*United States, supra*, 182 Cal.App.3d at p. 130), water supplies for the domestic needs of people such as the residents served by the City of Bakersfield (Wat. Code, § 106), irrigation (Wat. Code, § 106), effects on other

users of the watercourse[1] (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354 [158 Cal. Rptr. 350, 599 P.2d 656]), and any effects on 'appropriations essential to the economic development of this state' (*Audubon, supra*, 33 Cal.3d at p. 445; see also *Gin S. Chow, supra*, 217 Cal. at pp. 701–702)." (*Bring Back the Kern, supra*, at p. 356.)

d. "Consequently, if the court issues an injunction on remand, it would be advantageous to immediately set an objective standard for compliance upon a proper showing by the moving parties. (*Cal-Trout II*, 218 Cal.App.3d at p. 209 [appropriate for court to hold hearing to determine "amount of water that must be released to attain compliance with the statute"].)" (*Bring Back the Kern, supra*, at p. 358.)

e. "Consequently, we direct that '[n]o further preliminary injunction shall be issued unless its issuance is conditioned upon the furnishing of an adequate undertaking. We do not purport to determine what an adequate amount would be. Rather, we leave that determination to the trial court.' (*Abba*

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[1] "This would include the increased flood risks Boswell claims will result from an injunction. Boswell may raise these claims on remand for the court to consider in its reasonable use analysis."

Rubber, supra, 235 Cal.App.3d at p. 22.)" (*Bring Back the Kern, supra*, at p. 361.)

f. "It was error for the court to grant relief that was not requested by the moving parties pursuant to a stipulation that did not include the parties to be apparently disadvantaged thereby. Accordingly, we reverse the implementation order." (*Bring Back the Kern, supra*, at p. 367.)

g. "The order dated November 9, 2023, granting a preliminary injunction and setting a nominal bond is reversed. The order dated November 14, 2023, implementing the preliminary injunction is reversed. The matter is remanded for proceedings consistent with the views expressed in this opinion." (*Bring Back the Kern, supra,* at pp. 368-369.)

15. On May 30, 2025 Petitioner filed the Peremptory Challenge Motion with Respondent, seeking to disqualify Judge Pulskamp and confirm transfer of the matter to another judge of the Respondent court. True and correct copies of the Peremptory Motion Challenge pleadings are attached as Exhibit A to this petition.

16. The Peremptory Challenge Motion was in the proper form and brought pursuant to subdivision (a)(2) of Code of Civil

Procedure section 170.6 based on the remand back to Judge Pulskamp for "proceedings consistent with the views expressed in this opinion." (*Bring Back the Kern, supra*, at pp. 368-369.)

17. Whether those proceedings were in the form of another motion for preliminary injunction or a trial on the merits for a permanent injunction, Judge Pulskamp would necessarily re-examine the legal and factual bases for plaintiffs' arguments to prevail on the merits of the case, thereby satisfying the peremptory challenge standard of Code of Civil Procedure section 170.6, subdivision (a)(2).

18. Plaintiffs' operative complaint, the Third Amended Complaint, seeks a writ of mandate and injunctive relief that involves the same issues and remedies as the motion for preliminary injunction: a demand for instream flows associated with claims brought under the Public Trust Doctrine and Fish & Game Code section 5937. A true and correct copy of the Third Amended Complaint, dated November 17, 2022 is attached as Exhibit D to this Petition.

19. No prior peremptory challenge has been filed in this action.

20. Petitioner filed the Peremptory Challenge Motion with Kern County Superior Court Presiding Judge John W. Lua. Judge Lua transferred the motion to Judge L. Eric Bradshaw and on June 10, 2025 Judge Bradshaw issued a minute order denying the motion. A true and correct copy of Judge Bradshaw's minute order is attached as Exhibit B to this Petition.

21. The June 10, 2025 minute order contains no explanation for denial of the Peremptory Challenge Motion – simply stating that the motion was denied.

22. On June 18, 2025, Petitioner filed and served Notice of Entry of Order for the June 10, 2025 minute order. A true and correct copy of the Notice of Entry is attached as Exhibit E to this Petition.

23. KCWA has no adequate legal remedy other than writ relief. Code of Civil Procedure section 170.3, subdivision (d) provides that "the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate." (See *People v. Hull* (1991) 1 Cal.4th 266, -269-272.) "[W]hen writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a

formally and procedurally sufficient manner." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114.)

24. The Exhibits attached to this writ petition are true and correct copies of original documents filed with Respondent court or this Court. The exhibits are paginated consecutively together with this Petition as pages 37-218. Page references in this Petition are to that consecutive pagination.

PRAYER

WHEREFORE, Petitioner Kern County Water Agency prays that a writ of mandate issue from this Court commanding the respondent Superior Court to vacate its order denying the Peremptory Challenge Motion and to issue a new and different order granting the Peremptory Challenge Motion, and for such other relief as may be just.

DATED: July 1, 2025

SOMACH SIMMONS & DUNN

By_____
Nicholas A. Jacobs
Attorneys for Petitioner Kern County Water Agency

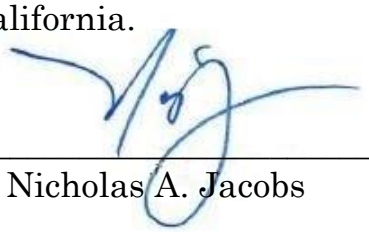
VERIFICATION

I, Nicholas A. Jacob, declare:

1. I am the attorney at law licensed to practice before the courts of the State of California. I am a shareholder with Somach Simmons & Dunn. I am counsel for Petitioner Kern County Water Agency in this case. I have read the foregoing Petition and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true.

2. Exhibits A-E attached to this writ petition are true and correct copies of original documents filed with Respondent court or this Court.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on this 1st day of July, 2025 at Sacramento, California.



Nicholas A. Jacobs

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

This case presents the exact scenario for which the California Legislature adopted Code of Civil Procedure section 170.6, subdivision (a)(2) [2]: (1) the Respondent court issued a preliminary injunction with factual/legal rulings on the elements of "likelihood to prevail on the merits," and "harm to the parties"; (2) this Court reversed the Respondent's rulings and remanded the matter back for "proceedings consistent with the views expressed in this opinion"; and (3) Petitioner timely filed the Peremptory Challenge Motion in order to allow a different judge of the Respondent court to conduct that re-examination of the legal and factual bases for Plaintiffs' injunctive relief.

II. Statement of the Case

The relevant factual and procedural background of this writ petition is set forth in the allegations of the Petition, *supra*, and will not *be repeated here*. (See Cal. Rules of Court, rule 8.486 (a)(5).)

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[2] Code of Civil Procedure section 170.6(a)(b) in hereinafter referred to as "Section 170.6(a)(b)."

III. Argument

The right to a peremptory challenge of a judge is an important one, intended to "preserve public confidence in the impartiality of the courts." (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 193.) Accordingly, "[w]hen a litigant has met the requirements of [Code of Civ. Proc., §] 170.6, disqualification of the judge is mandatory." (*Maas v. Superior Court* (2016) 1 Cal.5th 962, 972.) The statute must "be liberally construed in favor of allowing a peremptory challenge, and a challenge should be denied only if the statute absolutely forbids it." (*Id.,* at p. 973) Courts review an order granting or denying a peremptory challenge pursuant to Section 170.6 for an abuse of discretion, and "[a] trial court abuses its discretion when it erroneously denies a motion to disqualify a judge." (*People v. Superior Court (Maloy)* (2001) 91 Cal.App.4th 391, 395, quoting *Zilog, Inc. v. Superior Court* (2001) 86 Cal.App.4th 1309, 1315.)

A. KCWA's Peremptory Challenge Was In the Proper Form and Timely Filed.

To disqualify a judge under section 170.6, a party need only make "an oral or written motion without prior notice." (Code Civ. Proc., § 170.6, subd. (a)(2).) The motion "must be supported by

affidavit or declaration under penalty of perjury, or an oral statement under oath, that the judge … before whom the action or proceeding is pending … is prejudiced against a party or attorney, or the interest of the party or attorney, so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing before the judge, court commissioner, or referee." (*Ibid.*) KCWA's Peremptory Challenge was in precisely this form. (Exh. A, p. 4, Decl. of Nicholas Jacobs, p. 2.)

The challenge motion must be made within 60 days "after the party or the party's attorney has been notified of the assignment." (Code Civ. Proc., § 170.6, subd. (a)(2).) This Court issued the *Bring Back the Kern* opinion on April 2, 2025 and Petitioner filed the Peremptory Challenge Motion on May 30, 2025. Thus, the Petition was filed within the mandated 60-day period.

B. The Trial Court's Denial of the Peremptory Challenge Was an Abuse of Discretion.

Section 170.6(a)(2) provides for a peremptory challenge "following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if

the trial judge in the prior proceedings is assigned to conduct a new trial on the matter."

1. This Court's April 2, 2025 Opinion Reversed the Respondent Court's Orders Granting a Preliminary Injunction and Remanded the Matter for "Proceedings Consistent With the Views Expressed in This Opinion."

As set forth in the Petition, *supra*, this Court's *Bring Back the Kern* opinion reversed Judge Pulskamp's orders granting Plaintiffs' motion for a preliminary injunction. (Petition, ¶ 14.) This Court remanded the matter back to Respondent with directions to conduct "proceedings consistent with the views expressed in this opinion." (*Bring Back the Kern, supra*, at pp. 368-369.) Judge Pulskamp is assigned for all purposes to the underlying matter. (Petition, ¶ 3.) As such, once the remittitur issues, Judge Pulskamp will resume the trial court proceedings and apply this Court's rulings in any new preliminary injunction proceedings or just for the trial on the merits.

2. The Remand Directs a Re-Examination of the Preliminary Injunction Issues that Meets the "New Trial" Standard.

This Petition presents the issue of whether the *Bring Back the Kern* opinion remanded the preliminary injunction orders for

a "new trial" as that term is used in Section 170.6(a)(2). The provisions of Section 170.6(a)(2) were added to the statute by amendment in 1985. (Stats. 1985, ch. 715, § 1, pp. 2350-2353; cited in *Maloy, supra,* 91 Cal.App.4th at p. 395.) "The 1985 amendment arose out of concern that a judge who had been reversed might prove to be biased against the party who successfully appealed the judge's erroneous ruling." (*Ibid.*, citing *Matthews v. Superior Court* (1995) 36 Cal.App.4th 592, 597.)

There is no published appellate case law that specifically addresses whether the remand of a reversed preliminary injunction order qualifies as a "new trial" under Section 170.6(a)(2). As described below, however, this Court's reversal of the preliminary injunction orders with remand directions to conduct "proceedings consistent with the views expressed in this opinion" most certainly meets the "new trial" definition. The term "new trial" is defined in Code of Civil Procedure section 656 and, for purposes of applying Section 170.6(a)(2), has been refined by opinions of the Courts of Appeal and the California Supreme Court. (*Maloy, supra*, 91 Cal.App.4th at p. 397.) Section 656 defines a "new trial" as "re-examination of an issue of fact in the same court after a trial and decision by a jury, court,

or referee." With reference to re-examination of an issue of fact, "[a] literal reading of Section 656 would preclude a motion for new trial after a judgment entered on a motion for summary judgment, a dismissal after a demurrer, or a motion to dismiss." (*Ibid.*) However, as noted by this Court in the *Maloy* opinion, the California Supreme Court "rejected a literal reading of this statute over 40 years ago and held that a motion for new trial would be proper after any of these procedures resulted in judgment." (*Ibid.,* citing *Carney v. Simmonds* (1957) 49 Cal.2d 84, 88-91.) As further noted in *Maloy*, relevant appellate opinions "consistently apply a broad construction to section 170.6 to effectuate the purpose of the Legislature when it passed the 1985 amendment." (*Ibid*., citing *Stegs Investments v. Superior Court* (1991) 233 Cal.App.3d 572, 576 ["new trial" includes partial reversal of only a single issue after trial]; *Pandazos v. Superior Court* (1997) 60 Cal.App.4th 324, 327 [confirming application to jury trial]; *Overton v. Superior Court* (1994) 22 Cal.App.4th 112, 115 [confirming 170.6(a)(2) applies to writ reversal of denial of motion for mistrial]; *Hendershot v. Superior Court* (1993) 20 Cal.App.4th 860, 864 ["new trial" occurred based on partial reversal and remand for trial court to determine restitution].)

Appellate courts broadly interpret the term "new trial" to include any reexamination of factual or legal issues in controversy in the prior proceeding. (*Paterno v. Superior Court* (2004) 123 Cal.App.4th 548, 560; *Geddes v. Superior Court* (2005) 126 Cal.App.4th 417, 424.) The reversal, remand, and "new trial" must be on the merits and require "a 'reexamination' of a factual or legal issue that was in controversy in the prior proceeding." (*C.C. v. Superior Court* (2008) 166 Cal.App.4th 1019, 1022 (*C.C.*), quoting *Geddes, supra*, at p. 424.) "In order to conduct a reexamination, a court must revisit some factual or legal issue that was in controversy in the prior proceeding." (*Paterno v. Superior Court* (2004) 123 Cal.App.4th 548, 560.) Remands requiring only ministerial actions or reconsideration of a motion not involving the merits of the underlying proceeding do not trigger the "new trial" provision. (*C.C., supra*, at p. 1022 [ministerial act]; *Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530 [remand to prepare statement of decision]; *Akopyan v. Superior Court* (2020) 53 Cal.App.5th 1094, 1096 [reconsideration of *Batson/Wheeler* motion].) "[S]ection 170.6 is to be liberally construed in favor of allowing a peremptory challenge, and a challenge should be denied only if

the statute absolutely forbids it." (*Maas v. Superior Court* (2016) 1 Cal.5th 962, 973, quoting *Stephens v. Superior Court* (2002) 96 Cal.App.4th 54, 61-62, internal quotes omitted; accord, *Int'l Union of Operating Eng'rs v. Superior Court* (1989) 207 Cal.App.3d 340, 349.)

This Court's opinion in *Bring Back the Kern* remanded the matter back for a new trial involving issues of law and fact. (See Petition, ¶ 14.) A primary legal/factual issue is the application of the California Constitution's mandate of "reasonableness" in all allocations and uses of water, including when courts apply Fish & Game Code section 5937. (*Bring Back the Kern, supra*, at p. 356.) As explained in the *Bring Back the Kern* opinion, this legal and factual re-examination:

> … looks to the totality of the circumstances, which include effects on fish and other wildlife (Wat. Code, § 1243, subd. (a)), recreation (*ibid.*), water quality and the transportation of adequate water supplies where needed (*United States, supra*, 182 Cal.App.3d at p. 130), water supplies for the domestic needs of people such as the residents served by the City of Bakersfield (Wat. Code, § 106), irrigation (Wat. Code, § 106), effects on other users of the watercourse [3](*In re Waters of Long Valley Creek Stream System* (1979)

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[3] This would include the increased flood risks Boswell claims will result from an injunction. Boswell may raise these claims on remand for the court to consider in its reasonable use analysis.

> 25 Cal.3d 339, 354 [158 Cal. Rptr. 350, 599 P.2d 656]), and any effects on 'appropriations essential to the economic development of this state' (*Audubon, supra*, 33 Cal.3d at p. 445; see also *Gin S. Chow, supra*, 217 Cal. at pp. 701–702)."

(*Bring Back the Kern, supra*, at p. 356.)

The Court also directed that if the Superior Court issues an injunction establishing an instream fish flow program, then "it would be advantageous to immediately set an objective standard for compliance upon a proper showing by the moving parties." (*Cal. Trout v. Superior Court* (1990), 218 Cal.App.3d, 187, 209 (*Cal-Trout II*) [appropriate for court to hold hearing to determine "amount of water that must be released to attain compliance with the statute"].)" (*Bring Back the Kern, supra*, at p. 358.) Those issues must be resolved in any subsequent motion for preliminary injunction, as well as at any trial on the merits.

In addition, this Court ordered the re-examination of additional legal/factual issues on remand for any subsequent motion for preliminary injunction, including: (1) an adequate bond undertaking (*id.,* at p. 361); (2) that any subsequent order only grant relief actually sought in the motion (*id.,* at pp. 361, 367); and (3) that any relief based on "stipulation" include the actual stipulation of all affected parties (*id*., at p. 367).

This Court's remand triggers the peremptory challenge procedures of Section 170.6(a)(2) whether in the context of a renewed motion for preliminary injunction or at the trial on the merits. Plaintiffs' operative Third Amended Complaint seeks the same remedies, albeit in a permanent form, as were at issue in the motion for preliminary injunction. Namely, the Third Amended Complaint seeks to enjoin operation of the various Kern River diversion weirs in any manner that violates the Public Trust Doctrine and/or Fish and Game Code section 5937. The Prayer for Relief section of the Third Amended Complaint specifically references:

> 1. enjoining operation of the weirs in a manner that "reduced river flow below a volume that is sufficient to keep fish downstream of the Diversion Structures in good condition";
>
> 2. Compelling the City to release water of sufficient volume and with appropriate timing to provide reliable flows in the Kern River through the City, and to provide sufficient fish passage and habitat in the Kern River through the City;
>
> 3. Enjoining the City from operating the Diversion Structures in such a manner that water is diverted from the Kern River in excess of amounts required for: (a) regular and consistent flows of the Kern River; (b) preventing unreasonable harm to trust resources; and (c) providing sufficient water for

fish habitat downstream of the Diversion Structures; and

4. Enjoining the City from operating the Diversion Structures in such a manner that dewaters the Subject Reach of the Kern River, obstructing the free passage and/or use in the customary manner of the Kern River.

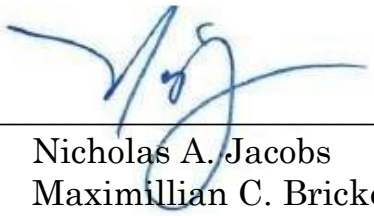
(Exhibit D, Third Amended Complaint, at p. 204-205.)

In resolving the Third Amended Complaint, the Superior Court will engage in a re-examination of the factual and legal issues that are the subject of the rulings in *Bring Back the Kern*. As such, these proceedings constitute a "new trial" under Section 170.6(a)(2) and this Court should issue a writ of mandate reversing the Respondent's order denying KCWA's Peremptory Challenge Motion.

IV. Conclusion

Plaintiff's Peremptory Challenge was in proper form and filed timely. Thus, the Respondent court had no discretion to deny it. A writ of mandate from this court is Petitioner's only recourse, and Petitioner respectfully requests that the Court grant the requested writ of mandate.

DATED: July 1, 2025 SOMACH SIMMONS & DUNN



By_____
Nicholas A. Jacobs
Maximillian C. Bricker
Attorneys for Petitioner Kern County Water Agency

CERTIFICATE OF WORD COUNT

I hereby certify that the **PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES** uses a 13-point Century Schoolbook font and contains 4,755 words, according to the word count function in Microsoft Word, the word-processing program used to create the documents.

DATED: July 1, 2025

SOMACH SIMMONS & DUNN

By_____

Nicholas A. Jacobs
Attorneys for Petitioner Kern County Water Agency

CERTIFICATE OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On July 1, 2025, I served the following document(s):

PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

XX VIA ELECTRONIC SERVICE: I transmitted the document(s) listed above, to the email address(es) of the person(s) set forth on the below service list. My electronic service address is: jestabrook@somachlaw.com. Service is deemed complete at the time of transmission of the document or at the time the electronic notification of service of the document is sent.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 1, 2025, at Sacramento, California.

/s/ *Jennifer Estabrook*
Jennifer Estabrook

SERVICE LIST

Counsel	**Parties Represented**
Adam F. Keats adam@keatslaw.org trettinghouse@biologicaldiversity.org	Plaintiffs/Petitioners: **Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity**
William McKinnon, Esq. legal@waterauditca.org Linda.asc@sbcglobal.net vstephan@waterauditca.org	Plaintiff/Petitioner **Water Audit California**
Bryan Wilson Chelsea Caylin Kehrer BWilson@mofo.com CKehrer@mofo.com hsmith@mofo.com MoFo_BBtK_Kern@mofo.com William Frentzen Anissa Chitour WFrentzen@mofo.com AChitour@mofo.com Mehran Arjomand Matt Robinson MArjomand@mofo.com MRobinson@mofo.com	Plaintiff/Petitioner **Bring Back the Kern**
Colin L. Pearce Jolie-Anne S. Ansley Ashley L. Barton clpearce@duanemorris.com jsansley@duanemorris.com baherrera@duanemorris.com Virginia A. Gennaro Matthew S. Collom vgennaro@bakersfieldcity.us mcollom@bakersfieldcity.us	Defendant/Respondent: **City of Bakersfield**

Robert E. Donlan Craig a. Carnes, Jr. Shawnda M. Grady Kevin William Bursey rdonlan@wjhattorneys.com ccarnes@wjhattorneys.com sgrady@wjhattorneys.com kbursey@wjhattorneys.com dwittenborn@wjhattorneys.com Richard Iger richard@kerndelta.org	Intervenor: **Kern Delta Water District**
Scott K. Kuney Brett A. Stroud skuney@youngwooldridge.com bstroud@youngwooldridge.com pbanda@youngwooldridge.com pmcnemar@youngwooldridge.com	Intervenor: **North Kern Water Storage District**
Isaac St. Lawrence James A. Worth Amanda M. Rodriguez isaac@mhwslegal.com jim@mhwslegal.com amanda@mhwslegal.com	Real Party in Interest: **Buena Vista Water Storage District**
Daniel N. Raytis Daniel M. Root dan@bbr.law droot@bbr.law heather@bbr.law Jennifer Spaletta Jennifer.spaletta@stoel.com James Ciampa jciampa@lagerlof.com Lauren Bauer lbauer@kcwa.com sprince@kcwa.com	Intervenor: **Rosedale-Rio Bravo Water Storage District**
Nathan A. Metcalf Rosslyn Hummer Sean G. Herman Jillian E. Ames nmetcalf@hansonbridgett.com bhummer@hansonbridgett.com sherman@hansonbridgett.com james@hansonbridgett.com ssingh@hansonbridgett.com	Intervenor-Defendant: **J.G. Boswell**

Served Via U.S. Mail:

Hon. Gregory A. Pulskamp
Kern County Superior Court
Division J
Metro Justice Building
1215 Truxtun Ave
Bakersfield, CA 93301

Hon J. Eric Bradshaw
Kern County Superior Court
Department 5
Metro Justice Building
1215 Truxtun Ave
Bakersfield, CA 93301

EXHIBIT A
to Petition for Writ of Mandate

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General Counsel for Real Party in Interest
KERN COUNTY WATER AGENCY

Exempt From Filing Fees Pursuant to Government Code Section 6103

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

BRING BACK THE KERN; WATER AUDIT CALIFORNIA; KERN RIVER PARKWAY FOUNDATION; KERN AUDUBON SOCIETY; SIERRA CLUB; and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs and Petitioners,

v.

CITY OF BAKERSFIELD, and DOES 1-500,

Defendants and Respondents,

BUENA VISTA WATER STORAGE DISTRICT; KERN DELTA WATER DISTRICT; NORTH KERN WATER STORAGE DISTRCT; ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT; KERN COUNTY WATER AGENCY; and DOES 501-999,

Real Parties in Interest.

Case No. BCV-22-103220-GAP
Currently Assigned for All Purposes to Hon. Gregory A. Pulskamp, Division J

MOTION FOR PEREMPTORY CHALLENGE [C.C.P. § 170.6]

JUDGE: Hon. John W. Lua, Presiding Judge
DEPT: 1

Action Filed: November 30, 2022

TO THE HONORABLE JOHN W. LUA, PRESIDING JUDGE OF THE KERN COUNTY SUPERIOR COURT:

Real Party in Interest Kern County Water Agency (KCWA) hereby moves that this matter, which has been assigned to the Honorable Gregory A. Pulskamp, be reassigned to another judge of the Kern County Superior Court, and that no matters hereinafter arising in this cause be heard or assigned to Judge Pulskamp on the grounds that said judge is prejudiced against KCWA. A peremptory challenge "may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter." (Code Civ. Proc., § 170.6(a)(2).) "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee." (Code Civ. Proc., § 656.)

The term "new trial" is interpreted broadly to include any reexamination of factual or legal issues in controversy in the prior proceeding. (*Paterno v. Superior Court* (2004) 123 Cal.App.4th 548, 560; *Geddes v. Superior Court* (2005) 126 Cal.App.4th 417, 424.) The reversal, remand, and "new trial" must be on the merits and require "a 'reexamination' of a factual or legal issue that was in controversy in the prior proceeding." (*C.C. v. Superior Court* (2008) 166 Cal.App.4th 1019, 1022 (*C.C.*), quoting *Geddes, supra*, at p. 424.) "In order to conduct a reexamination, a court must revisit some factual or legal issue that was in controversy in the prior proceeding." (*Paterno v. Superior Court* (2004) 123 Cal.App.4th 548, 560.) Remands requiring only ministerial actions or reconsideration of a motion not involving the merits of the underlying proceeding do not trigger the "new trial" provision. (*C.C., supra*, at p. 1022 [ministerial act]; *Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530 [remand to prepare statement of decision]; *Akopyan v. Superior Court* (2020) 53 Cal.App.5th 1094, 1096 [reconsideration of *Batson/Wheeler* motion].) "[S]ection 170.6 is to be liberally construed in favor of allowing a peremptory challenge, and a challenge should be denied only if the statute absolutely forbids it." (*Maas v. Superior Court* (2016) 1 Cal.5th 962, 973, quoting *Stephens v. Superior Court* (2002) 96 Cal.App.4th 54, 61-62, internal quotes omitted; accord, *Int'l Union of Operating Eng'rs v. Superior Court* (1989) 207 Cal.App.3d 340, 349.)

This motion is timely and appropriately filed following the Fifth District Court of Appeal's decision to reverse both Judge Pulskamp's November 9, 2023 order granting the motion for preliminary injunction and setting a nominal bond (Declaration of Nicholas A. Jacobs in Support of Motion for Peremptory Challenge ("Jacobs Decl.") Exh. A), and the November 14, 2023 stipulation and implementation order (Jacobs Decl. Exh. B), along with directions that this "matter is remanded for proceedings consistent with the views expressed in this opinion." (*Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322, 368-369 (*Bring Back the Kern*);[1] Code Civ. Proc., § 170.6(a)(2).) Among other rulings, the appellate opinion directed this Court to "determine whether and to what extent using the waters of the Kern River to keep fish in good condition is a reasonable and beneficial use of water under California Constitution, article X, section 2." (*Bring Back the Kern, supra*, at p. 356.) Resolution of this issue will involve new proceedings that are both factual and legal in nature; such proceedings will occur in the context of a subsequent motion for preliminary injunction and a trial on the merits.

The appellate opinion also directed that any subsequent preliminary injunction issued after remand must "immediately set an objective standard for compliance upon a proper showing by the moving parties." (*Bring Back the Kern, supra*, 110 Cal.App.5th at p. 358.) The Court of Appeal found error in the nominal bond imposed on the Plaintiffs, and directed that:

> [N]o further preliminary injunction shall be issued unless its issuance is conditioned upon the furnishing of an adequate undertaking. We do not purport to determine what an adequate amount would be. Rather, we leave that determination to the trial court.

(*Id.* at p. 361, quoting *Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 22, internal quotes omitted.) Finally, the Court of Appeal found that the "Implementation Order" violated the due process rights of KCWA and the other Real Parties in Interest (*Bring Back the Kern, supra*, at pp. 361-365) and conflicted with established water right priorities (*id.* at pp. 365-366).

Whether arising in a subsequent motion for preliminary injunction or at trial, these proceedings constitute a "new trial" on the same issues. As set forth in the attached Jacobs

[1] The *Bring Back the Kern* decision to remand the matter back to the Kern Superior Court was filed April 2, 2025. (Jacobs Decl. Exh. C.) Subsequently, on May 12, 2025, plaintiffs in this action filed a Petition for Review in the California Supreme Court (Case No. S290840).

Declaration, KCWA alleges that Judge Pulskamp is prejudiced against KCWA so that KCWA cannot have a fair and impartial trial or hearing before the judicial officer. Granting this peremptory challenge would be "consistent 'with the established rule that section 170.6, in guaranteeing a litigant the extraordinary right to disqualify a judge, should be liberally construed to effect its objects and to promote justice.'" (*Ghaffarpour v. Superior Court* (2012) 202 Cal.App.4th 1463, 1471, quoting *Hendershot v. Superior Court* (1993) 20 Cal.App.4th 860, 865; accord, *Ziesmer v. Superior Court* (2003) 107 Cal.App.4th 360, 366.)

Finally, Code of Civil Procedure section 170.6(a)(2) provides that this motion "shall be made within 60 days after the party or the party's attorney has been notified of the assignment." Exactly what constitutes "notification of the assignment" is not clear in the context of the instant action, where Judge Pulskamp has been assigned as the trial judge for all purposes. One interpretation of this time period is that it begins to run on April 2, 2025 – the date on which the Fifth District Court of Appeal published its *Bring Back the Kern* opinion. Although the remittitur has not yet issued in this matter, out of an abundance of caution, KCWA files this motion now in order to demonstrate clear compliance with the 60-day period. As such, if this Court determines that it lacks jurisdiction to rule on this motion until such time as the remittitur issues, KCWA respectfully requests that the Court hold this motion in abeyance and rule on it when jurisdiction has been returned to the Court.

SOMACH SIMMONS & DUNN
A Professional Corporation

Dated: May 30, 2025

By:_____
Nicholas A. Jacobs
Attorneys for Real Party in Interest
KERN COUNTY WATER AGENCY

Bring Back the Kern, et al. v. City of Bakersfield
Kern County Superior Court Case No. BCV-22-103220-GAP

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; my electronic service address is jestabrook@somachlaw.com; I am over the age of 18 years and am not a party to the foregoing action.

On May 30, 2025, I served the following document(s):

MOTION FOR PEREMPTORY CHALLENGE
[C.C.P. § 170.6]

on the following persons or parties:

XX: **(By Mail):** I enclosed the document(s) in a sealed envelope or package addressed to the person at the address set forth below and placed the envelope in the area designated for collection and mailing. Following our ordinary business practices, on the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

Hon. Gregory A. Pulskamp *Courtesy Copy*
Kern County Superior Court, Dept. J
Metro Justice Building
1415 Truxtun Avenue
Bakersfield, CA 93301

XX: **(Via Electronic Service):** I transmitted the document(s) listed above to the email address(es) of the person(s) set forth on the attached service list. My electronic service address is: jestabrook@somachlaw.com. Service is deemed complete at the time of transmission of the document or at the time the electronic notification of service of the document is sent.

SEE SERVICE LIST ATTACHED

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 30, 2025, at Sacramento, California.

Jennifer Estabrook

SERVICE LIST

Counsel	Parties Represented	Email
Adam F. Keats LAW OFFICE OF ADAM KEATS 2489 Mission Street, Suite 16 San Francisco, CA 94110 Telephone: (415) 964-0070	Plaintiffs/Petitioners: **Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity**	adam@keatslaw.org
William McKinnon, Esq. Attorney At Law 952 School Street, PMB 316 Napa, California 94559 Telephone: (530) 575-5335	Plaintiff/Petitioner **Water Audit California**	legal@waterauditca.org Linda.asc@sbcglobal.net vstephan@waterauditca.org
Bryan Wilson Chelsea Caylin Kehrer MORRISON & FOERSTER LLP 755 Page Mill Road Palo Alto, CA 94304-1018 Telephone: (650) 813-5600	Plaintiff/Petitioner **Bring Back the Kern**	BWilson@mofo.com CKehrer@mofo.com MoFo_BBtK_Kern@mofo.com
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Mehran Arjomand Matt Robinson MORRISON & FOERSTER LLP 12531 High Bluff Drive, Suite 100 San Diego, CA 92130-2040 Telephone: (858) 720-5100		MArjomand@mofo.com MRobinson@mofo.com
Colin L. Pearce Jolie-Anne S. Ansley Ashley L. Barton DUANE MORRIS LLP One Market Plaza, Suite 2200 San Francisco, CA 94105 Telephone: (415) 957-3000	Defendant/Respondent: **City of Bakersfield**	clpearce@duanemorris.com jsansley@duanemorris.com abarton@duanemorris.com baherrera@duanemorris.com
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Counsel	Parties Represented	Email
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Richard Iger General Counsel KERN DELTA WATER DISTRICT 501 Taft Highway Bakersfield, CA 93307		richard@kerndelta.org
Scott K. Kuney Brett A. Stroud YOUNG WOOLDRIDGE, LLP 10800 Stockdale Hwy, Suite 202 Bakersfield, CA 93311 Telephone: (661) 327-9661	Intervenor: **North Kern Water Storage District**	skuney@youngwooldridge.com bstroud@youngwooldridge.com pbanda@youngwooldridge.com
Isaac St. Lawrence James A. Worth Amanda M. Rodriguez MCMURTREY HARTSOCK WORTH & ST. LAWRENCE 2001 22nd Street, Suite 100 Bakersfield, CA 93301 Telephone: 661-322-4417 Facsimile: 661-322-8123	Real Party in Interest: **Buena Vista Water Storage District**	isaac@mhwslegal.com jim@mhwslegal.com amanda@mhwslegal.com
Daniel N. Raytis Daniel M. Root BELDEN BLAINE RAYTIS LLP 5016 California Avenue, Suite 3 Bakersfield, CA 93309 Telephone: (661) 864-7826	Intervenor: **Rosedale-Rio Bravo Water Storage District**	dan@bbr.law droot@bbr.law heather@bbr.law
Jennifer Spaletta STOEL RIVES LLP 500 Capitol Mall, Suite 1600 Sacramento, CA 95814 Telephone: (916) 319-4788		Jennifer.spaletta@stoel.com

Counsel	Parties Represented	Email
Nicholas A. Jacobs Max C. Bricker SOMACH, SIMMONS & DUNN 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 Phone: (916) 446-7979	Defendant and Respondent: **Kern County Water Agency**	njacobs@somachlaw.com mbricker@somachlaw.com pmacpherson@somachlaw.com jestabrook@somachlaw.com
James Ciampa LAGERLOF, LLP 155 North Lake Avenue Pasadena, CA 91101 Telephone: (626) 793-9400		jciampa@lagerlof.com
Gary A. Watt Nathan A. Metcalf Sean G. Herman Jillian E. Ames HANSON BRIDGETT LLP 425 Market Street, 26th Floor San Francisco, CA 94105 Telephone: (415) 777-3200	Intervenor-Defendant: **J.G. Boswell**	gwatt@hansonbridgett.com nmetcalf@hansonbridgett.com sherman@hansonbridgett.com james@hansonbridgett.com

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KERN COUNTY WATER AGENCY

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General Counsel for Real Party in Interest
KERN COUNTY WATER AGENCY

Exempt From Filing Fees Pursuant to Government Code Section 6103

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

BRING BACK THE KERN; WATER AUDIT CALIFORNIA; KERN RIVER PARKWAY FOUNDATION; KERN AUDUBON SOCIETY; SIERRA CLUB; and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs and Petitioners,

v.

CITY OF BAKERSFIELD, and DOES 1-500,

Defendants and Respondents,

BUENA VISTA WATER STORAGE DISTRICT; KERN DELTA WATER DISTRICT; NORTH KERN WATER STORAGE DISTRCT; ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT; KERN COUNTY WATER AGENCY; and DOES 501-999,

Real Parties in Interest.

Case No. BCV-22-103220-GAP
Currently Assigned for All Purposes to Hon. Gregory A. Pulskamp, Division J

DECLARATION OF NICHOLAS A. JACOBS IN SUPPORT OF MOTION FOR PEREMPTORY CHALLENGE

C.C.P. § 170.6

JUDGE: Hon. John W. Lua, Presiding Judge
DEPT: 1

Action Filed: November 30, 2022

1. I am an attorney duly licensed to practice law in the State of California and an attorney with the law firm of Somach Simmons & Dunn, counsel for Kern County Water Agency. The following matters are within my personal knowledge, and if called as a witness, I could and would competently testify thereto.

2. Attached hereto and incorporated herein as Exhibit A is a true and correct copy of the November 9, 2023 Kern County Superior Court order granting the motion for preliminary injunction.

3. Attached hereto and incorporated herein as Exhibit B is a true and correct copy of the November 14, 2023 Kern County Superior Court stipulation and implementation order.

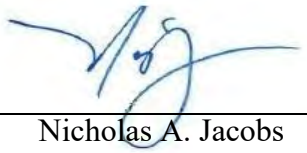
4. Attached hereto and incorporated herein as Exhibit C is a true and correct copy of the of the Fifth District Court of Appeal decision filed on April 2, 2025.

5. I am informed and believe, and on that basis allege, that the Honorable Gregory A. Pulskamp, assigned judge in the above-entitled matter pending in Division J, is prejudiced against the interests of Real Party in Interest Kern County Water Agency.

6. Declarant thus believes that Kern County Water Agency cannot have a fair and impartial trial or hearing before this judge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 30, 2025, in Sacramento, California.



Nicholas A. Jacobs

EXHIBIT A

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San Francisco, CA 94111
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Email: adam@keatslaw.org
Attorney for Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity

William McKinnon (SBN 129329)
ATTORNEY AT LAW
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Napa, CA 94559
Tel: 530-575-5335
Email: legal@waterauditca.org
Attorney for Water Audit California

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

BRING BACK THE KERN, WATER AUDIT CALIFORNIA, KERN RIVER PARKWAY FOUNDATION, KERN AUDUBON SOCIETY, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs and Petitioners, vs. CITY OF BAKERSFIELD and DOES 1 through 500, Defendants and Respondents, BUENA VISTA WATER STORAGE DISTRICT, KERN DELTA WATER DISTRICT, NORTH KERN WATER STORAGE DISTRICT, ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, KERN COUNTY WATER AGENCY, and DOES 501-999, Real Parties in Interest.	Case No.: BCV-22-103220 **~~(PROPOSED)~~ ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Assigned for All Purposes to: Judge: Hon. Gregory A. Pulskamp Dept: 8

Plaintiffs Bring Back the Kern, et al.'s Motion for Preliminary Injunction came before the above-captioned Court for hearing on October 13, 2023, at 9:00 a.m., in Department 8 of this Court, before the Honorable Judge Gregory A. Pulskamp. Adam Keats appeared on behalf of Plaintiffs Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity. William McKinnon appeared on behalf of Plaintiff Water Audit California. Colin Pearce and Matt Collum appeared on behalf Defendant City of Bakersfield. Brett Stroud and Scott Kuney specially appeared on behalf of Real Parties in Interest North Kern Water Storage District. Isaac St. Lawrence specially appeared on behalf of Real Party in Interest Buena Vista Water Storage District. Richard Iger and Craig Carnes specially appeared on behalf of Real Party in Interest Kern Delta Water District. Nicholas Jacobs specially appeared on behalf of Real Party in Interest Kern County Water Agency. Daniel Raytis specially appeared on behalf of Real Party in Interest Rosedale-Rio Bravo Storage District.

The Court, after considering the briefs of the parties and other documents on file in this matter, including the declarations and exhibits filed in support of the briefs and documents and matters to which the Court has taken judicial notice, and the arguments of counsel, for good cause appearing, issues the ruling attached hereto as Exhibit A. Pursuant to this ruling,

IT IS HEREBY ORDERED THAT:

1. *Plaintiffs' Motion for Preliminary Injunction is granted;*
2. Defendant City of Bakersfield and its officers, directors, employees, agents, and all persons acting on its behalf are prohibited from operating the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition;
3. Defendant and Plaintiffs shall engage in good faith consultation to establish flow rates necessary for compliance with this order;
4. The Court shall retain jurisdiction to ensure compliance with this order and to modify the terms and conditions thereof if reasonably necessitated by law or in the interests of justice. If after good faith consultation, Defendant and Plaintiffs are not successful in agreeing to

flow rates necessary for compliance, either Defendant or Plaintiffs may file a request for this Court to make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after reasonable notice to all parties including the Real Parties in Interest;

5. This order shall become effective immediately upon the posting of a bond in the amount of $1,000.00, or of cash or a check made out to the Clerk of the Kern County Superior Court in lieu thereof. The date and time of the posting of the bond, or of cash or a check in lieu thereof, shall be reflected in a Notice of Posting of Undertaking to be filed by Plaintiff and served on all parties.
6. This order shall remain in place until the conclusion of trial, further order of this Court, or further order by a court of higher jurisdiction.

DATED: November 9, 2023, 2023

Signed 11/9/2023 09:06 AM

Gregory A. Pulskamp

Honorable Gregory A. Pulskamp
Judge of the Kern County Superior Court

Exhibit A

Superior Court of California
County of Kern
Bakersfield Department 8

Date: 10/30/2023 Time: 8:00 AM - 5:00 PM

BCV-22-103220

BRING BACK THE KERN ET AL VS CITY OF BAKERSFIELD

Courtroom Staff

Honorable: Gregory Pulskamp Clerk: Stephanie Lockhart

NATURE OF PROCEEDING:

Ruling on Plaintiffs' Motion for Preliminary Injunction; heretofore submitted on October 13, 2023.

RULING:

The Court grants Plaintiffs' Motion for Preliminary Injunction.

DISCUSSION:

The Court considers the current case to be a very significant case on a very significant topic: management of water supplied by the Kern River. It is common knowledge that clean, fresh water is a critical natural resource and a necessary component to establish essentially all aspects of a healthy society. It is therefore not surprising that water management has been, and continues to be, addressed by the State Legislature and is a subject covered by the California State Constitution itself:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water

as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." (Cal. Const., Art. X, § 2.)

Consistent with the California Constitution, the legislature has enacted a series of specific statutes governing the use of water and the courts have issued numerous rulings regarding the interpretation and implementation of those statutes. Accordingly, the matter currently before this Court is neither a case of first impression, nor is it a case that affords this Court much – if any – discretion. To the contrary, it is a matter that involves established legal precedent and legislative mandate.

I. Brief Factual and Procedural History

A. Background

The following summary is taken from various documents and publications in evidence: The Kern River originates high in the Sierra Nevada mountain range in the vicinity of Mt. Whitney, draining a 2,420 square mile area of the southern Sierra Nevada. It is approximately 165 miles long. The river generally flows in a northeast to southwest direction through Bakersfield, before historically emptying into the Buena Vista Lake bed. Because of the variability of the Kern River environment, river management approaches have required planning for both severe flooding and drought.

In 1953, the U.S. Army Corps of Engineers (USACE) constructed Lake Isabella to address flood control and water conservation capacity. In order to determine the quantity of water available to various Kern River rights, the City of Bakersfield - on behalf of various Kern River interests - calculates the natural flow based on a series of measurements taken at Lake Isabella. Each day, the Kern River operator determines the flow in the river, the entitlement of each right, and then distributes the water up to the full entitlement.

Water is currently diverted from the Kern River by the City of Bakersfield and other entities pursuant to "pre-1914" appropriative water rights which were initially established through the filing of notices of appropriation around the time of the early settlement of the Bakersfield area (i.e., the 1860's and 1870's). The Kern River water rights now held by the City of Bakersfield were initially recognized in the 1888 "Miller-Haggin Agreement." The Miller-Haggin Agreement memorialized a compromise between the Kern River interests to end years of litigation and controversy on the river. The Miller-Haggin Agreement established two points of measurement of water flow: an upstream "First Point" of measurement and a downstream "Second Point" of measurement. The agreement was later modified by what is known as the "Shaw Decree." In 1976, the City of Bakersfield purchased some Kern River rights and diversion structures in the

river channel. The city and its predecessors in interest have continually measured, determined, and recorded the flow of water in the Kern River on a daily, monthly, and annual basis from 1893 to the present. These flow totals are recorded and reflected in the Kern River flow and diversion records.

The river flows before Lake Isabella was operational can be compared with the flows after it became operational by using a "computed natural flow" approach. The wet-year and dry-year flows at First Point show the large annual variation in discharge on the Kern River. The typical wet-year flow is 899,000 acre-feet and the typical dry-year flow is about 361,000 acre-feet. The monthly totals for median, average, dry-year, and wet-year flows show a similar pattern: the highest flows typically occur from April through June associated with the melting Sierra Nevada snowpack, and the lowest flows occur in September or October.

Flow rates on the Kern River in the Bakersfield area are managed by the mechanical manipulation of constructed weirs. With the exception of the First Point station, the basic function of the weirs is to raise or maintain water surface elevation in the channel to allow gravity to divert flows to specified destinations. The City of Bakersfield currently owns or operates six weirs on the river channel that control, divert, and measure water flow: the Beardsley Weir, Rocky Point Weir, Calloway Weir, River Canal Weir, Bellevue Weir, and McClung Weir. Each weir is unique to its location. All of the weirs require manual operation and require in-field personnel for any change in flow rates.

The First Point of measurement is located just west of the main entrance to Hart Park. The Beardsley Weir is located east of China Grande Loop. Downriver and to the west of the Beardsley Weir is the Rocky Point Weir, which diverts water south of the Kern River into the Carrier Canal. Approximately nine miles downstream of the First Point of measurement is the Calloway Weir. The next weir is the River Canal Weir located just east of Coffee Road, near the Kern River Parkway rest area. The Bellevue Weir is east of Stockdale Highway near The Park at River Walk. Lastly, the McClung Weir, is located west of the residential neighborhood Highgate at Seven Oaks and east of Enos Lane. The Second Point of measurement is located just east of Enos Lane.

Since the mid-20th century, major improvements, such as canal enlargements and concrete linings, were made to the canal systems to increase the diversion of water away from the Kern River. As a result, the vast majority of the Kern River water between First Point and the Calloway Weir has been diverted away from the river for agricultural use. As a result, the riverbed downstream of the Calloway Weir is completely dry throughout most of the year. Water has flowed in the Kern River channel downstream of the Calloway Weir primarily only during very wet, high-flow conditions or when water has been introduced from outside sources,

such as the State Water Project.

B. The Parties

Plaintiffs and Petitioners ("Plaintiffs") are a group of community-based, public benefit entities and other nonprofit organizations. Defendant and Respondent ("Defendant") is the City of Bakersfield. Real Parties in Interest ("RPI") are four local water storage districts that have contractual interests in the waters diverted from the Kern River, along with the Kern County Water Agency.

On November 30, 2022, Plaintiffs filed a verified Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate. The City of Bakersfield was named as a defendant and respondent. Buena Vista Water Storage District, Kern Delta Water Storage District, North Kern Water Storage District, and Rosedale-Rio Bravo Water District were named as real parties in interest. Defendant demurred to the complaint and the real parties filed a Motion to Strike and a Demurrer to the complaint. On March 6, 2023, before any hearing on the motions, Plaintiffs filed a verified First Amended Complaint ("FAC") for Declaratory and Injunctive Relief and Petition for Writ of Mandate. The FAC named the City of Bakersfield as a defendant and respondent but omitted the water districts as real parties. On May 2, 2023, the water districts and the Kern County Water Agency filed a Motion for Leave to File an Answer in Intervention. On May 22, 2023, Defendant demurred to the FAC. The hearings on both motions were continued by stipulation and order to September 6, 2023.

On August 10, 2023, Plaintiffs filed this Motion for Preliminary Injunction. On August 17, 2023, upon Defendant's ex parte application, the Court continued the hearing on the motion to October 13, 2023.

On September 29, 2023, the Court sustained Defendant's Demurrer to the FAC with leave to amend on the ground that Plaintiffs failed to name the four water districts and the Kern County Water Agency as necessary and indispensable parties; Defendant's Demurrer to the second cause of action was sustained with leave to amend because Plaintiffs' failed to state a claim for declaratory relief; Defendant's Demurrer to the fifth cause of action on the basis of failure to state a claim was denied. Plaintiffs were granted ten days leave to file a Second Amended Complaint ("SAC").

On October 2, 2023, Defendant filed an opposition, and the RPI filed a joint opposition, to Plaintiffs' Motion for Preliminary Injunction. Plaintiffs filed their SAC on October 4, 2023. Lastly, on October 6, 2023, Plaintiffs filed replies to the oppositions. Oral arguments were presented on October 13, and the matter was taken under submission at that time.

II. Ruling on Evidentiary Issues

A. Requests for Judicial Notice ("RJN")

1. Each RJN filed in this case is granted. The Court finds the documents to be admissible under California Rules of Court Section 3.1306 and one or more provisions of Evidence Code Section 452 and 454.

2. Defendant's objection to Plaintiffs' RJN of the August 2016 "Recirculated Draft

Environmental Impact Report" for the "Kern River Flow and Municipal Water Program" ("RDEIR for the Kern River Flow Program") is overruled. The report was prepared by Defendant and is relevant on a variety of topics presently before this Court.

B. Declarations

1. The declarations (including all attached exhibits) filed in support of, or in opposition to, the moving papers are admitted. The Court finds the information presented to be in admissible format and to be relevant.

2. Defendant's and RPI's objections to the Declaration of Theodore (Ted) Grantham are overruled. Dr. Grantham appears to be well qualified to render opinions on multiple topics that are within the scope of the issues framed by the moving papers and the oppositions thereto. To the extent Dr. Grantham's declaration may lack foundation or contain speculative opinions, the Court finds these concerns impact the issue of weight, not admissibility.

III. Law Regarding Preliminary Injunctions

The parties have raised a number of issues regarding the applicable law, which the Court will address as follows:

A. General Law

The issuance of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. Rather, it reflects the conclusion that, upon balancing the respective equities of the parties pending a trial on the merits, the defendant should or should not be restrained from exercising a right that the defendant claims. (*Brown v. Pacific Found., Inc.* (2019) 34 CA5th 915, 925 and *Jamison v. Department of Transp.* (2016) 4 CA5th 356, 361.) When evaluating a motion for preliminary injunction, the court must weigh 1) the likelihood that the moving party will ultimately prevail on the merits and 2) the relative harm to the parties from issuance or non-issuance of the injunction. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-442.) In addition, it is clear that the greater a plaintiff's showing on one variable, the less must be shown on the other in order to support the injunction. (See, e.g., *Butt v. State* (1992) 4 Cal.4th 668, 678 ("*Butt*") and *King v. Meese* (1987) 43 Cal.3d 1217, 1227-1228 ("*King*").) An injunction is an equitable remedy that is intended to prevent future harm, as opposed to punish past harm. (See, e.g., *Kachlon v. Markowitz* (2008) 168 CA4th 316, 348 and *Russell v. Douvan* (2003) 112 CA4th 399, 400–401.)

B. Type of Injunction

An injunction may be either mandatory or prohibitory. A prohibitory injunction is "a writ or order requiring a person to refrain from a particular act." (CCP Section 525.) A mandatory injunction requires a person to take affirmative action that changes the parties' position. (CC Section 3367(2).) The distinction between mandatory and prohibitory injunctions may be important because mandatory injunctions generally require a stronger showing by the moving party and because mandatory injunctions are automatically stayed on appeal, while prohibitory injunctions are not. (See, e.g., *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 CA5th 872, 884.) Despite the differences, "[c]ases have long recognized that the mandatory-prohibitory distinction can prove challenging to apply, that it is not always easy to distinguish a restraint from a command, and that there are no magic words that will distinguish the one from the other." (Nature of Injunctive Relief, Cal. Judges Benchbook Civ. Proc. Before Trial § 14.2.) Nevertheless, it is relatively clear that an injunction that is designed to restrain illegal conduct is prohibitory in nature, not mandatory. (See, e.g., *Oiye v. Fox* (2012) 211 CA4th 1036, 1048.) In addition, it is well established that a prohibitory injunction may involve some adjustment of the parties' respective rights to ensure that a defendant desists from a pattern of unlawful conduct. (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 C5th 1030, 1046.) As noted by our California Supreme Court:

> "[Our] decision makes clear that an injunction preventing the defendant from committing additional violations of the law may not be recharacterized as mandatory merely because it requires the defendant to abandon a course of repeated conduct as to which the defendant asserts a right of some sort. In such cases, the essentially prohibitory character of the order can be seen more clearly by measuring the status quo from the time before the contested conduct began." (*Id.*)

In this case, Plaintiffs' are seeking an order that would *prohibit* Defendant from making excessive diversions from the Kern River. Since the conduct to be restrained would prevent Defendant from engaging in a particular behavior, the injunction sought is prohibitory, not mandatory. Nevertheless, this Court would engage in essentially the exact same analysis and reach the same conclusion regardless of whether the injunction is classified as prohibitory or mandatory.

IV. Prevailing on the Merits

The first step in the "weighing" process is to gauge the likelihood that Plaintiffs will eventually prevail on the merits. In order to evaluate this factor, the Court must determine the credibility of Plaintiffs' argument that Fish & Game Code Section 5937 applies to Defendant and requires a certain amount of water to flow past weirs.

A. Application of Fish & Game Code Section 5937 to Defendant

Fish & Game Code Section 5937 reads in full as follows:

> "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway."

Further examination of this statute is required in order to determine if it applies to Defendant's weirs on the Kern River.

1. Definition of Dam

Fish & Game Code Section 5900(a) states that the definition of a "dam" includes "all artificial obstructions." The definition seems straightforward. The Court is not persuaded to use any alternative definition because the definition provided for in Section 5900(a) is in the same chapter as Section 5937 and clearly governs the interpretation of that statute. In this case, the weirs qualify as "dams" because they are "artificial obstructions" that may be used to control the flow of water in the Kern River.

2. Definition of Owner

Fish & Game Code Section 5900(c) states that the definition of "owner" includes "the United States [...], the State, a person, political subdivision, or district [...] owning, controlling or operating a dam . . ." Once again, the definition is straight-forward. It is undisputed that Defendant is a political subdivision of the State of California. It is also undisputed that Defendant owns or operates all of the weirs at-issue in this case. Defendant's and RPI's contention that Defendant does not have ownership of the Beardsley Weir or the Calloway Weir is of no import because it is conceded that Defendant *operates* those weirs and therefore falls within the legal definition of "owner."

3. Definition of Fish

Defendant and RPI argue that Fish & Game Code Section 5937 applies only to anadromous fish (i.e. those that migrate from freshwater rivers to the ocean and back to spawn in their natal

streams) and that the Kern River has no anadromous fish. The parties base their argument primarily on legislative history. Although anadromous fish were mentioned in the legislative history surrounding Section 5901, the limitation to anadromous fish was omitted from the final statute (Fish & Game Code Section 5901). In addition, this case involves the interpretation and application of Section 5937, not Section 5901. As discussed below, several appellate courts have discussed the applicability of Section 5937 in published cases, and not a single case limited the statute to anadromous fish. Finally, if the legislature intended Section 5937 to apply so narrowly, it would have so specified. Therefore, Section 5937 applies to all fish and not just to anadromous fish.

4. Standing to Enforce Section 5937

Defendant's and RPI's contend that Plaintiff cannot enforce Section 5937 because the California Department of Fish and Wildlife has exclusive enforcement jurisdiction. In this regard, the California Supreme Court held that the public trust doctrine grants the State of California the duty to manage the state's public resources such as water, and that the doctrine "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 445-46 ("*National Audubon*").) Significantly, the Supreme Court specifically held that any member of the general public has standing to assert a claim of harm under the public trust doctrine. (*Id.* at p. 445-48.) Fish & Game Code Section 5937 has been held to be a "specific rule" concerning the public trust doctrine. (*California Trout v. St. Water Resources Ctrl. Bd.* (1989) 207 Cal.App.3d 585, 629-30 ("*CalTrout I*").) Plaintiffs are members of the "general public" and therefore have standing to assert a claim under Section 5937 since that statute is a specific expression of the public trust doctrine. In addition, a plain reading of Section 5937 reflects that the reference to the "department" pertains only to a very limited modification to the general applicability of the statute, not overall enforcement jurisdiction. Finally, as discussed thoroughly below, Section 5937 has already been the subject of many private enforcement actions, so this Court need not consider the matter as one of first impression.

Based on the foregoing, Section 5937 applies to the weirs owned or operated by Defendant on the Kern River and Plaintiffs have standing to enforce the statute.

B. Minimum Flow Requirements of Fish & Game Code Section 5937

1. Express Language of the Statute

Section 5937 certainly has minimum flow requirements. The express language of the statute requires dam owners to pass at least enough water to keep fish in "good condition." Flows of this quantity would also tend to sustain a healthy ecosystem consisting of birds, mammals, plants, natural aesthetics, and quality of life opportunities for residents. (See, e.g., *National Audubon, supra,* 33 Cal.3d at 430-31 ["continued diversions threaten to turn it into a desert wasteland" which "obviously diminishes its value as an economic, recreational, and scenic

resource."].) Therefore, a plain reading of the statute supports Plaintiffs' claim that Section 5937 prevents a dam owner from diverting all the water in a river.

2. Case Law Interpreting Section 5937

Several appellate courts have confirmed that Section 5937 means what it says. In these holdings, the courts have expressly rejected the argument that Section 5937 only applies to water that has not already been appropriated for beneficial uses (i.e. excess water). For example, the court in *CalTrout I* noted that "[t]he dams referred to in section 5937, as imported into section 5946, are dams placed at the point of diversion of the water which is appropriated." (*CalTrout I*, supra, 207 Cal.App.3d at 632.) The court made the following observation:

> "Compulsory compliance with a rule requiring the release of sufficient water to keep fish alive necessarily limits the water available for appropriation for other uses. Where that effects a reduction in the amount that otherwise might be appropriated, section [5937 via 5946] operates as a legislative choice among competing uses of water." (*Id.* at 601.)

The court further noted as follows:

> "[T]he mandate of section [5937 via 5946] is a specific legislative rule concerning the public trust. Since the Water Board has no authority to disregard that rule, a judicial remedy exists to require it to carry out its ministerial functions with respect to that rule. The Legislature, not the Water Board, is the superior voice in the articulation of public policy concerning the reasonableness of water allocation." (*Id.* at 631-32.)

In follow-up litigation, the same appellate court stated as follows:

> "First, as we said, section [5937 via 5946] takes this case outside the purview of statutes which may allow the Water Board to balance competing beneficial uses of water and to determine the priority of use. For that reason alone the statutory procedures applicable to the balancing of competing uses by the Water Board are not applicable. (citations omitted.) Thus the issues to be resolved in the enforcement of section [5937 via 5946] do not invoke the expertise of the Water Board in 'the intricacies of water law' and 'comprehensive planning' of importance to the *Audubon* court. (citation omitted.)" (*California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 203 ("*CalTrout II*").)

The court in *CalTrout II* once again emphasized the issue in the following passage:

> "[W]e are at pains to repeat, that the Legislature has already balanced the

> competing claims for water from the streams affected by section [5937 via 5946] and determined to give priority to the preservation of their fisheries. There is no discretion in the Water Board to do other than enforce its requirements." (*Id.* at 201.)

The court in *Natural Resources Defense v. Patterson* (E.D. Cal. 1992) 791 F. Supp. 1425, 1435 ("*Patterson I*"), similarly noted as follows:

> "By its terms, Section 5937 mandates that the owner of a dam allow water to pass over or through the dam for certain purposes [footnote omitted.] Without deciding whether Section 5937 is a water appropriation statute, vel non, the statute's plain language demonstrates that it was intended to limit the amount of water a dam owner desiring to collect water for eventual irrigation may properly impound from an otherwise naturally flowing stream. Thus, it is a prohibition on what water the [...] owner of the dam, may otherwise appropriate."

In subsequent litigation, the same court held that the owner of a dam violated Section 5937 by leaving "long stretches of the River downstream [...] dry most of the time" and rejected the defendants' technical arguments to avoid application of the statute. (*Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F. Supp. 2d 906, 925 ("*Patterson II*").) The court noted as follows:

> Thus, the statute's plain meaning, legislative history, and construction by the state's court all point in a single direction and require this court to reject the [...] defendants' proposed interpretation of the statute." (*Id.* at 918-19.)

Case law therefore very clearly confirms that Section 5937 was deliberately adopted by the State Legislature after balancing the competing uses of water and is enforceable as a legislative mandate. For the foregoing reasons, this Court must conclude that Plaintiffs have a very high likelihood of succeeding on the merits.

V. BALANCING THE HARMS

A. Impact to Defendant

Defendant and RPI submit that the issuance of a preliminary injunction ordering compliance with Section 5937 would cause great harm because it would bar Defendant from delivering a clean, safe, and reliable drinking water supply to more than 400,000 residents living in the Bakersfield area. In support of their position, Defendant and RPI rightfully point to various legal authorities establishing that domestic use is undisputably a "beneficial use" of the highest

order. For example, Water Code Section 106 provides as follows:

> "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation."

Case law confirms that "domestic purposes" as used in Section 106 includes humans and domesticated livestock, but not commercial herds of livestock maintained for profit. (See, e.g., *Deetz v. Carter* (1965) 232 Cal.App.2d 851, 854-57.) Water Code Section 106.3(a) further emphasis the importance of water for domestic use:

> "It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."

The California Supreme Court addressed the potential conflict between the legal framework of the California water rights system expressed in laws such as a Sections 106 and 106.3(a), and the public trust doctrine:

> "The federal court inquired first of the interrelationship between the public trust doctrine and the California water rights system, asking whether the 'public trust doctrine in this context [is] subsumed in the California water rights system, or ... function[s] independently of that system?' Our answer is 'neither.' The public trust doctrine and the appropriative water rights system are parts of an integrated system of water law. The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources." (*National Audubon, supra,* 33 Cal.3d at 452.)

Other courts have addressed the potential conflict between the California water rights system and Section 5937 in particular. For example, *CalTrout I* addressed the issue as follows:

> "In 1937, and for many preceding years, the Water Code provisions pertaining to appropriation declared as state policy that the use of water for domestic purposes is the highest use of water and the use of water for irrigation purposes is the next highest use. (citations omitted.) It apparently was assumed in some quarters at the time of adoption of those sections that the appropriation of water for "higher" domestic or irrigation uses must be approved regardless of

> the detriment to "lower" uses, e.g., in-stream use for fishery or recreation purposes. (citations omitted.) Given this assumption, so it is claimed, section 5937 is not meant to operate as a rule affecting the appropriation of water.
> ...
> We need not reach the question of the application of section 5937 alone as a rule affecting the appropriation of water." (*CalTrout I, supra*, 207 Cal.App.3d at 600-01.)

Similarly, the court in *Patterson II* addressed the issue as follows:

> "Thus, the question becomes whether the state statute, Section 5937, may in fact be implemented in such a way in this case. That question, as the Ninth Circuit recognized, is not a question of facial incompatibility, but rather one of actual application. For this reason, the court affirmed on the facial preemption question and left open the question of preemption at the remedy stage. (citations omitted.) Because the instant motions concern only liability under Section 5937, such a determination must await the remedial phase of this litigation." (*Patterson II, supra*, 333 F. Supp. 2d at 921.)

In this case, like the cases quoted above, the potential conflict between compliance with Section 5937 and providing a safe, clean, and affordable domestic water supply appears to be a theoretical legal issue, rather than a practical factual issue. For example, Defendant's "overall annual water demand" is approximately 130,000 acre-feet of water. (Defendant's Opp. Brief, p. 14-15 and Dec. of Maldonado, parag. 20.) Based on the 130-year record of flows in the Kern River, the all-time high was approximately 2.5 million acre-feet and the all-time low was approximately 138,000 acre-feet. (Defendant's Opposition Brief, p. 5 and Declaration of Maldonado, parag. 5 [lists low figure as 131,000].) Between 1893 and 2010, the typical "wet-year" flow (i.e. 75th percentile) was 899,000 acre-feet; the typical "dry-year" flow (i.e. 25th percentile) was 361,000 acre-feet; the average flow was 726,000 acre-feet; and the median flow was 550,000 acre-feet. (City of Bakersfield Water Resources Department, Water Availability Analysis dated March 2015, p. 7-8 and Exhibit B attached thereto; see, also, RDEIR for the Kern River Flow Program, p. 2-34.) Therefore, it appears that the Kern River has never failed to provide sufficient water for domestic use and, in the "average year," the river provides over five times Defendant's total current use. Accordingly, the present action does not appear to threaten the domestic water supply.

This conclusion is buttressed by the fact that: 1) Defendant does not rely exclusively on the Kern River to satisfy its demand and may have access to water from the State Water Project (Defendant's Opposition Brief, p. 6 and Declaration of Maldonado, parag. 8); 2) a significant percentage of water left to flow in the natural river channel would not be lost, but would be recouped in other forms such as replenished ground water (RDEIR for the Kern River Flow

Program, p. 2-39 and 2-40); and 3) the "overall" demand identified by Defendant may include secondary obligations or uses (such as waste water treatment facilities) for which alternative sources of water may be available. (RDEIR for the Kern River Flow Program, p. 2-36).

It is worth noting that Plaintiffs are not seeking any reductions or modifications to Defendant's current supply-demand profile for domestic use. Therefore, imposing Section 5937's flow requirements on Defendant would likely have no impact on the domestic water supply.

B. Impact to RPI

Defendant and RPI submit that the issuance of a preliminary injunction ordering compliance with Section 5937 would cause great harm because it would interfere with Defendant's and RPI's contractual obligations regarding the delivery of water for agricultural and other purposes. Once again, Defendant and RPI appropriately cite to legal authority such as Section 106 for the very valid proposition that agricultural use is a well-established "beneficial use" of a very high order. Although the use of water for agricultural purposes is very necessary and worthy, the State Legislature has determined that other uses are also worthy and of significant benefit to society. For example, Water Code Section 1243(a) states as follows:

> "The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, when it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources."

The courts in California have also made very similar findings. For example, the California Supreme Court in *National Audubon* held as follows:

> "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (citations omitted.) As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust (citations omitted), and to preserve, so far as consistent with the public interest, the uses protected by the trust.

> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.
>
> The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses." (*National Audubon, supra,* 33 Cal.3d at 446-47.)

As discussed in a previous section of this ruling, several courts expanded on the principles set forth in *National Audubon* to establish Section 5937 as a non-discretionary, specific legislative rule reflecting the public trust doctrine. (See, e.g., *CalTrout I, CalTrout II, Patterson I,* and *Patterson II.*) As such, the courts held that compliance with Section 5937 is compulsory, as is compliance with any other state law. It is well established that contractual obligations do not take precedence over compliance with state law. (See, e.g., *Patterson I,* supra, 791 F. Supp. 1425.)

In this case, the "overall annual water demand" for the RPI is not nearly as apparent as it is for Defendant. Therefore, it is more difficult to determine what impact, if any, compliance with Section 5973 might have on the RPI. What is clear, however, is that the average annual Kern River flows of approximately 726,000 acre-feet is an enormous amount of water that should suffice for the reasonable use of all interested stakeholders. In the words of the State Constitution, our vast water resources should be used in a manner that reflects the "reasonable and beneficial use thereof in the interest of the people and for the public welfare."

C. Impact to Plaintiffs

Plaintiffs' contend that a failure to issue the preliminary injunction will almost certainly result in a completely dry, dead river channel which has been witnessed by the City of Bakersfield's residents and visitors the majority of time during the past few decades. (See, e.g., Dec. of Love, parag. 4; Damian, parag. 3; Mayry, parag. 3; and McNeely, parag. 3.) Plaintiffs' position is simple: no water in the river means no aquatic life, including fish. In addition, declarations filed in support of the moving papers establish that a dry river greatly reduces other forms of life such as birds. (See, e.g., Dec. of Love, parag. 3-10 and McNeely, parag. 11.) The declarations also note that the quality of life for Bakersfield's residents and visitors suffer without a flowing river, such as when the Kern River Parkway Bike Trail has no actual river. (See, e.g., Dec. of Damian, parag. 3, 9; Mayry, parag. 7-12; McNeely, parag. 11.) Therefore, it

appears that significant harm would result to the general population and the environment if the injunction is not issued.

D. Purpose of Balancing the Harms

It is important to note that the Court weighed the potential harms to the respective parties in this case only on the procedural issue of deciding whether a preliminary injunction should issue. This discretionary analysis was not done as part of the process to determine the applicability of Section 5937 as an appropriate use of water. As discussed above, the State Legislature already considered the competing uses of water when they passed Section 5937 and came down on the side of minimum flow requirements. Therefore, this Court has no jurisdiction to override the State Legislature and re-weigh the competing interests when it comes to addressing the underlying, substantive issue. On that point, compliance with Section 5937 is required as a matter of law. This Court has a duty to uphold the law and has no option to exempt entities from compliance, even if compliance is burdensome. Second, as discussed above, Plaintiffs are very likely to prevail on the merits. Therefore, according to the principles set forth in the *Butt* and *King* cases, the weighing of harms on the procedural issue is given relatively less weight than the analysis regarding whether Plaintiffs are likely to prevail on the merits.

Based on the foregoing, the Court is obligated to issue a preliminary injunction prohibiting Defendant from diverting Kern River flows in a manner that reduces flows below the volume necessary to maintain fish in good condition.

VI. THE PRELIMINARY INJUNCTION

A. Terms and Language of the Injunction

Having determined that a preliminary injunction should issue, the Court is now faced with the task of composing the specific terms of the injunction. One option is to require Defendant to immediately comply with Section 5937 and entrust Defendant and Plaintiff, along with input from subject matter experts, to determine the specifics of the necessary flows. This method is legally permissibly because a dam owner has a non-discretionary, ministerial duty to comply with Section 5937, but is permitted some discretion in how it complies. (See, e.g., *CalTrout I, supra,* 207 Cal.App.3d at 632 [the court ordered compliance with the law and then left as a separate issue "[w]hether and to what extent enforcement proceedings might be necessitated].)

A second option is to require Defendant to immediately comply with Section 5937 and have this Court specify the flows necessary for compliance. This method is also legally permissible as

demonstrated by, for example, *CalTrout II* which expressly held that a dam owner's claim that it could not "readily ascertain the amount of water necessary to comply with its statutory obligation [...] may be addressed by means of interim judicial relief." (*CalTrout II*, supra, 218 Cal.App.3d at 200.) Under this scenario, the Court would impose the "best approximate compliance" and then thereafter "proceed with more elaborate study looking to refinement of those rates in subsequent proceedings." (*Id.* at 209.) Either way, the flow standards would be interim standards applicable only to the preliminary injunction. Each option has benefits and risks associated with it.

1. Flow Determined by Defendant and Plaintiff

The determination of flows necessary to keep fish in "good condition" may possibly be a complex undertaking that encompasses a wide variety of topics including the physical, biological, and hydrological sciences. It may also require deep knowledge of the local water systems. In this case, Defendant has an entire Water Resources Department. Plaintiff appears to have access to some of the most highly qualified subject matter experts in the country. (See, e.g., Dec. of Peter Moyle and Ted Grantham.) The resources of the California Department of Fish and Wildlife may also be available. Given these resources, it seems that Defendant and Plaintiff, along with input from subject matter experts, would be in a better position than the Court to quickly develop flow standards in good faith compliance with the law.

2. Flow Determined by Court Order

Court deferral of the specific flow rates may, however, set the stage for unreasonable delays in compliance if Defendant and Plaintiff are not willing to engage in the process in an expeditious and cooperative fashion. This is essentially what occurred in the *CalTrout* cases. The appellate court in *CalTrout I* ordered the dam owner to comply with the law but did not specify precise flow rates because the amount could not "be precisely calculated on the record before us." (*CalTrout I, supra,* 207 Cal.App.3d at 632.) Upon remand, the trial court allowed a multi-year delay for compliance due to several reasons including pending "studies" and because the dam owner requested "guidance . . . in fulfilling its statutory duty." (*CalTrout II, supra*, 218 Cal.App.3d at 194.) The delays led to *CalTrout II, in* which the appellate court held that the trial court "abused its discretion in countenancing this protracted disobedience of the statute" and directed the trial court to "expeditiously consider a request by petitioners that *it* [i.e. the court] set interim release rates." (*Id.*) This Court has no intention of countenancing "protracted disobedience of the statute" and is concerned that entrusting Defendant and Plaintiff to determine the flow rates might be setting the process up for failure. Imposing an immediate, court-ordered flow rate would negate those concerns.

B. Decision Regarding Flow

In evaluating the two options, the Court must consider the fact that Defendant has expressed reluctance to help establish appropriate flow rates. For example, Defendant argued that

"[p]laintiffs provide no details, guidance or data in the proposed order to allow the City, or the Court, to determine whether fish are in 'good condition' downstream of each of the named weirs" and that "[p]laintiffs provide no objective metrics or standards to establish compliance." (Defendant's Opp. Brief, p. 11.) They also note that if the Court were to issue the injunction, they would be left to "guess" about the flow requirements and "would not be able to determine with certainty whether any of its actions were in compliance at any particular time or season." (*Id.*). Finally, Defendant seemed to reject the concept that the flow rates could be "determined through some sort of unspecified interim judicial relief." (*Id.* at p. 12.)

On the other hand, Defendant has previously expressed a desire to see the Kern River flow through Bakersfield:

> "The City of Bakersfield, as Lead Agency under CEQA, proposes this Program to increase and restore more water flows to the Kern River channel with the goals of protecting and preserving the local water supply, environment, and quality of life for City residents." (RDEIR for the Kern River Flow Program, p. v.)

Defendant has apparently made past efforts to have the Kern River flow in its natural channel through Bakersfield:

> "In recent years, the City has worked to increase the flow of water below the Calloway Weir, but there are currently no quantities of water regularly dedicated to stream flow or instream uses below the Calloway Weir." (City of Bakersfield Water Resources Department, Water Availability Analysis dated March 2015, p. 8.)

In addition, counsel for Defendant made statements similar to these quotes during oral arguments on October 13. Defendant clearly has a deeply vested interest in the river and seems to harbor some sentiment that would make cooperation on establishing specific flow rates possible.

Based on the foregoing, the Court intends to proceed with the first option described above. To help facilitate the process, it should be noted that courts can include broad language in preliminary injunctions and do not need to itemize every detail of compliance. Several courts have addressed the issue as follows:

> "'An injunction must be sufficiently definite to provide a standard of conduct for those whose activities are to be proscribed, as well as a standard for the court to use in ascertaining an alleged violation of the injunction.' (*People ex rel. Dept. of Transportation v. Maldonado* (2001) 86 Cal.App.4th 1225, 1234 [citation omitted].) 'An injunction which forbids an act in terms so vague that men of common intelligence must

necessarily guess at its meaning and differ as to its application exceeds the power of the court.' (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651 [citation omitted].) However, '[t]he injunction need not etch forbidden actions with microscopic precision, but may instead draw entire categories of proscribed conduct. Thus, an injunction may have wide scope, yet if it is reasonably possible to determine whether a particular act is included within its grasp, the injunction is valid.' (*People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676, 681 [citation omitted].)" (*People ex rel. Gascon v. HomeAdvisor, Inc.* (2020) 49 Cal.App.5th 1073, 1082-83.)

In this case, as previously noted, the term "good condition" may potentially involve complex issues. However, the language is also subject to a reasonable, common sense interpretation that should guide the discussions between Defendant and Plaintiff regarding flow rates necessary to achieve compliance.

Moreover, Defendant, Plaintiff, and the Court are not without guidance regarding the meaning of "good condition." Multiple courts and regulatory entities have already spent very considerably efforts defining the term. (See, e.g., *CalTrout II, supra,* 218 Cal.App.3d at 209, 210; *Patterson II, supra,* 333 F.Supp.2d at 916; Walker River Irrigation District - SWRCB Order 90-18 (1990), WL 264521; *Putah Creek v. Solano Irrigation* 7 CSPA-294 District, Sacramento Superior Court No. CV515766 (April 8, 1996); Bear Creek - SWRCB Order 95-4 (1995), WL 418658; Lagunitas Creek – SWRCB Order 95-17 (1995), WL 17907885.) There is no reason, therefore, for Defendant, Plaintiff, and this Court to "reinvent the wheel" regarding the meaning of "good condition."

DISPOSITION:

Defendant City of Bakersfield and its officers, directors, employees, agents, and all persons acting on its behalf are prohibited from operating the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition.

Defendant and Plaintiff shall engage in good faith consultation to establish flow rates necessary for compliance with this order.

The Court shall retain jurisdiction to ensure compliance with this order and to modify the terms and conditions thereof if reasonably necessitated by law or in the interests of justice. If after good faith consultation, Defendant and Plaintiff are not successful in agreeing to flow rates necessary for compliance, either Defendant or Plaintiff may file a request for this Court to make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after reasonable notice to all parties including the RPI.

This order shall become effective immediately upon the posting of a bond in the amount of $1,000.00, or of cash or a check made out to the Clerk of the Kern County Superior Court in lieu thereof. The date and time of the posting of the bond, or of cash or a check in lieu thereof, shall be reflected in a Notice of Posting of Undertaking to be filed by Plaintiff and served on all parties.

This order shall remain in place until the conclusion of trial, further order of this Court, or further order by a court of higher jurisdiction.

Plaintiffs shall prepare a formal order consistent with this ruling for the Court's signature pursuant to California Rule of Court 3.1312.

Copy of minutes mailed to all parties as stated on the attached certificate of mailing.

FUTURE HEARINGS:

No future hearings are currently set.

BRING BACK THE KERN ET AL VS CITY OF BAKERSFIELD
BCV-22-103220

CERTIFICATE OF MAILING

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, and not a party to the within action, that I served the ***Ruling dated October 30, 2023*** attached hereto on all interested parties and any respective counsel of record in the within action by depositing true copies thereof, enclosed in a sealed envelope(s) with postage fully prepaid and placed for collection and mailing on this date, following standard Court practices, in the United States mail at Bakersfield California addressed as indicated on the attached mailing list.

Date of Mailing: October 30, 2023

Place of Mailing: Bakersfield, CA

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Tara Leal
CLERK OF THE SUPERIOR COURT

Date: October 30, 2023

By: *Stephanie Lockhart*
Stephanie Lockhart, Deputy Clerk

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Attorneys for Defendant and Respondent
CITY OF BAKERSFIELD

EXEMPT FROM FILING FEE
[GOV. CODE § 6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

METROPOLITAN

BRING BACK THE KERN, WATER AUDIT CALIFORNIA, KERN RIVER PARKWAY FOUNDATION, KERN AUDUBON SOCIETY, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs and Petitioners,

v.

CITY OF BAKERSFIELD, and DOES 1 - 500,

Defendants and Respondents.

BUENA VISTA WATER STORAGE DISTRICT, KERN DELTA WATER STORAGE DISTRICT, NORTH KERN WATER STORAGE DISTRICT, ROSEDALE-RIO BRAVO WATER DISTRICT, and DOES 501 – 999,

Real Parties in Interest.

Case No. BCV-22-103220-GAP

Assigned For All Purposes To:
Judge: Honorable Gregory A. Pulskamp
Dept.: 8

JOINT STIPULATION FOR IMPLEMENTATION OF PRELIMINARY INJUNCTION; ~~[PROPOSED]~~ ORDER

Complaint Filed: November 30, 2022
FAC Filed: March 6, 2023
SAC Filed: October 4, 2023

Plaintiffs Bring Back the Kern, Water Audit California, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity ("Plaintiffs"), and Defendant City of Bakersfield ("Bakersfield"), by and through counsel, hereby stipulate and agree as follows:

WHEREAS, following an October 13, 2023, hearing, this Court issued a Ruling on October 30, 2023, ("Ruling") granting the Motion for Preliminary Injunction filed by Plaintiffs;

WHEREAS, on November 9, 2023, this Court signed an Order Granting Plaintiffs' Motion for Preliminary Injunction ("Order") which is attached hereto as Exhibit A and which incorporated the Ruling;

WHEREAS, as directed by this Court in the Ruling, Plaintiffs and Bakersfield have negotiated in good faith to determine the flow rates necessary for compliance with the Ruling and Order;

WHEREAS, in the course of those discussions, Plaintiffs proposed and Bakersfield agreed to allocate forty percent (40%) of the flow of water in the Kern River as an interim standard for "fish flows" to comply with the Ruling and Order;

WHEREAS, Plaintiffs and Bakersfield wish to implement an Interim Flow Regime for the Kern River as soon as possible to best protect environmental flows and municipal needs;

THEREFORE, Plaintiffs and Bakersfield hereby stipulate as follows:

1. Bakersfield will implement, on an interim basis, an Interim Flow Regime ("Interim Flow Regime") for the Kern River whereby forty percent (40%) of the total measured daily flow of available water will remain in the river channel past the McClung Weir, subject to Bakersfield's municipal needs and demands (currently 130,000 acre-feet per year, with an average daily flow of 180 cubic feet per second ("cfs")). By way of example, using the average annual Kern River flow as stated in the Ruling on page 14 of 726,000 acre-feet per year, which converts to approximately 1,000 cfs average daily flow, Bakersfield will multiply that amount by 40% to arrive at 400 cfs to be left in the river for interim fish flows. Bakersfield will allocate 180 cfs of the 1000 cfs flow for the City's demands, leaving a balance of 820 cfs. 400 cfs will be left in the river for fish flows, and the

remaining 420 cfs of flow (1,000 cfs minus 180 cfs and 400 cfs) would be available for diversion by the Real Parties in Interest.

2. By stipulating to this Interim Flow Regime, Plaintiffs and Bakersfield do not make any admissions regarding, or waiver of, their legal arguments about the priority of the use of flows under Fish and Game Code section 5937, the Public Trust Doctrine, the California Constitution, or otherwise.

3. Plaintiffs and Bakersfield shall continue to monitor flows of water in the Kern River and commit to sharing information regarding the sufficiency of the Interim Flow Regime. Specifically, Bakersfield shall forthwith provide the Plaintiffs with access to historical, current and available real time monitoring data, inclusive of the total measured daily flow of available water and the bypass flows at each weir, and allow the Plaintiffs access to observe and record environmental conditions during the pendency of the Order.

Dated: Duane Morris LLP

By: _____
Colin L. Pearce
Attorneys for Defendant
City of Bakersfield

Dated: November 13, 2023 Law Office of Adam Keats PC

By: _____
Adam Keats
Attorney for Plaintiffs and Petitioners
Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity

Dated: November 13, 2023 William McKinnon, Attorney at Law

By: _____
Willian McKinnon
Attorney for Plaintiff and Petitioner
Water Audit California

~~[PROPOSED]~~ ORDER

1. The Court, having considered the parties' Joint Stipulation for Implementation of Preliminary Injunction, hereby ORDERS Defendant City of Bakersfield to implement the Interim Flow Regime described in Paragraph 1, above.

2. The Parties are further ORDERED to monitor flows of the Kern River and share information regarding the sufficiency of the interim flow rates.

3. This Court shall retain jurisdiction to ensure compliance with this Order for Implementation of Preliminary Injunction and to modify the terms and conditions thereof if reasonably necessitated by law or in the interests of justice.

4. This Order for Implementation of Preliminary Injunction shall remain in place until the conclusion of trial, further order of this Court, or further order by a court of higher jurisdiction.

Signed: 11/14/2023 11:07 AM

DATED: November 14, 2023

Gregory A. Pulskamp

THE HONORABLE GREGORY A. PULSKAMP
JUDGE OF THE KERN COUNTY SUPERIOR COURT

EXHIBIT A

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

BRING BACK THE KERN, WATER AUDIT CALIFORNIA, KERN RIVER PARKWAY FOUNDATION, KERN AUDUBON SOCIETY, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs and Petitioners, vs. CITY OF BAKERSFIELD and DOES 1 through 500, Defendants and Respondents, BUENA VISTA WATER STORAGE DISTRICT, KERN DELTA WATER DISTRICT, NORTH KERN WATER STORAGE DISTRICT, ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, KERN COUNTY WATER AGENCY, and DOES 501-999, Real Parties in Interest.	Case No.: BCV-22-103220 **~~(PROPOSED)~~ ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Assigned for All Purposes to: Judge: Hon. Gregory A. Pulskamp Dept: 8

Plaintiffs Bring Back the Kern, et al.'s Motion for Preliminary Injunction came before the above-captioned Court for hearing on October 13, 2023, at 9:00 a.m., in Department 8 of this Court, before the Honorable Judge Gregory A. Pulskamp. Adam Keats appeared on behalf of Plaintiffs Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity. William McKinnon appeared on behalf of Plaintiff Water Audit California. Colin Pearce and Matt Collum appeared on behalf Defendant City of Bakersfield. Brett Stroud and Scott Kuney specially appeared on behalf of Real Parties in Interest North Kern Water Storage District. Isaac St. Lawrence specially appeared on behalf of Real Party in Interest Buena Vista Water Storage District. Richard Iger and Craig Carnes specially appeared on behalf of Real Party in Interest Kern Delta Water District. Nicholas Jacobs specially appeared on behalf of Real Party in Interest Kern County Water Agency. Daniel Raytis specially appeared on behalf of Real Party in Interest Rosedale-Rio Bravo Storage District.

The Court, after considering the briefs of the parties and other documents on file in this matter, including the declarations and exhibits filed in support of the briefs and documents and matters to which the Court has taken judicial notice, and the arguments of counsel, for good cause appearing, issues the ruling attached hereto as Exhibit A. Pursuant to this ruling,

IT IS HEREBY ORDERED THAT:

1. *Plaintiffs' Motion for Preliminary Injunction is granted;*
2. Defendant City of Bakersfield and its officers, directors, employees, agents, and all persons acting on its behalf are prohibited from operating the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition;
3. Defendant and Plaintiffs shall engage in good faith consultation to establish flow rates necessary for compliance with this order;
4. The Court shall retain jurisdiction to ensure compliance with this order and to modify the terms and conditions thereof if reasonably necessitated by law or in the interests of justice. If after good faith consultation, Defendant and Plaintiffs are not successful in agreeing to

flow rates necessary for compliance, either Defendant or Plaintiffs may file a request for this Court to make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after reasonable notice to all parties including the Real Parties in Interest;

5. This order shall become effective immediately upon the posting of a bond in the amount of $1,000.00, or of cash or a check made out to the Clerk of the Kern County Superior Court in lieu thereof. The date and time of the posting of the bond, or of cash or a check in lieu thereof, shall be reflected in a Notice of Posting of Undertaking to be filed by Plaintiff and served on all parties.

6. This order shall remain in place until the conclusion of trial, further order of this Court, or further order by a court of higher jurisdiction.

DATED: November 9, 2023, 2023

Signed 11/9/2023 09:06 AM

Gregory A. Pulskamp

Honorable Gregory A. Pulskamp
Judge of the Kern County Superior Court

Exhibit A

Superior Court of California
County of Kern
Bakersfield Department 8

Date: 10/30/2023 Time: 8:00 AM - 5:00 PM

BCV-22-103220

BRING BACK THE KERN ET AL VS CITY OF BAKERSFIELD

Courtroom Staff

Honorable: Gregory Pulskamp Clerk: Stephanie Lockhart

NATURE OF PROCEEDING:

Ruling on Plaintiffs' Motion for Preliminary Injunction; heretofore submitted on October 13, 2023.

RULING:

The Court grants Plaintiffs' Motion for Preliminary Injunction.

DISCUSSION:

The Court considers the current case to be a very significant case on a very significant topic: management of water supplied by the Kern River. It is common knowledge that clean, fresh water is a critical natural resource and a necessary component to establish essentially all aspects of a healthy society. It is therefore not surprising that water management has been, and continues to be, addressed by the State Legislature and is a subject covered by the California State Constitution itself:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water

as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." (Cal. Const., Art. X, § 2.)

Consistent with the California Constitution, the legislature has enacted a series of specific statutes governing the use of water and the courts have issued numerous rulings regarding the interpretation and implementation of those statutes. Accordingly, the matter currently before this Court is neither a case of first impression, nor is it a case that affords this Court much – if any – discretion. To the contrary, it is a matter that involves established legal precedent and legislative mandate.

I. Brief Factual and Procedural History

A. Background

The following summary is taken from various documents and publications in evidence: The Kern River originates high in the Sierra Nevada mountain range in the vicinity of Mt. Whitney, draining a 2,420 square mile area of the southern Sierra Nevada. It is approximately 165 miles long. The river generally flows in a northeast to southwest direction through Bakersfield, before historically emptying into the Buena Vista Lake bed. Because of the variability of the Kern River environment, river management approaches have required planning for both severe flooding and drought.

In 1953, the U.S. Army Corps of Engineers (USACE) constructed Lake Isabella to address flood control and water conservation capacity. In order to determine the quantity of water available to various Kern River rights, the City of Bakersfield - on behalf of various Kern River interests - calculates the natural flow based on a series of measurements taken at Lake Isabella. Each day, the Kern River operator determines the flow in the river, the entitlement of each right, and then distributes the water up to the full entitlement.

Water is currently diverted from the Kern River by the City of Bakersfield and other entities pursuant to "pre-1914" appropriative water rights which were initially established through the filing of notices of appropriation around the time of the early settlement of the Bakersfield area (i.e., the 1860's and 1870's). The Kern River water rights now held by the City of Bakersfield were initially recognized in the 1888 "Miller-Haggin Agreement." The Miller-Haggin Agreement memorialized a compromise between the Kern River interests to end years of litigation and controversy on the river. The Miller-Haggin Agreement established two points of measurement of water flow: an upstream "First Point" of measurement and a downstream "Second Point" of measurement. The agreement was later modified by what is known as the "Shaw Decree." In 1976, the City of Bakersfield purchased some Kern River rights and diversion structures in the

river channel. The city and its predecessors in interest have continually measured, determined, and recorded the flow of water in the Kern River on a daily, monthly, and annual basis from 1893 to the present. These flow totals are recorded and reflected in the Kern River flow and diversion records.

The river flows before Lake Isabella was operational can be compared with the flows after it became operational by using a "computed natural flow" approach. The wet-year and dry-year flows at First Point show the large annual variation in discharge on the Kern River. The typical wet-year flow is 899,000 acre-feet and the typical dry-year flow is about 361,000 acre-feet. The monthly totals for median, average, dry-year, and wet-year flows show a similar pattern: the highest flows typically occur from April through June associated with the melting Sierra Nevada snowpack, and the lowest flows occur in September or October.

Flow rates on the Kern River in the Bakersfield area are managed by the mechanical manipulation of constructed weirs. With the exception of the First Point station, the basic function of the weirs is to raise or maintain water surface elevation in the channel to allow gravity to divert flows to specified destinations. The City of Bakersfield currently owns or operates six weirs on the river channel that control, divert, and measure water flow: the Beardsley Weir, Rocky Point Weir, Calloway Weir, River Canal Weir, Bellevue Weir, and McClung Weir. Each weir is unique to its location. All of the weirs require manual operation and require in-field personnel for any change in flow rates.

The First Point of measurement is located just west of the main entrance to Hart Park. The Beardsley Weir is located east of China Grande Loop. Downriver and to the west of the Beardsley Weir is the Rocky Point Weir, which diverts water south of the Kern River into the Carrier Canal. Approximately nine miles downstream of the First Point of measurement is the Calloway Weir. The next weir is the River Canal Weir located just east of Coffee Road, near the Kern River Parkway rest area. The Bellevue Weir is east of Stockdale Highway near The Park at River Walk. Lastly, the McClung Weir, is located west of the residential neighborhood Highgate at Seven Oaks and east of Enos Lane. The Second Point of measurement is located just east of Enos Lane.

Since the mid-20th century, major improvements, such as canal enlargements and concrete linings, were made to the canal systems to increase the diversion of water away from the Kern River. As a result, the vast majority of the Kern River water between First Point and the Calloway Weir has been diverted away from the river for agricultural use. As a result, the riverbed downstream of the Calloway Weir is completely dry throughout most of the year. Water has flowed in the Kern River channel downstream of the Calloway Weir primarily only during very wet, high-flow conditions or when water has been introduced from outside sources,

such as the State Water Project.

B. The Parties

Plaintiffs and Petitioners ("Plaintiffs") are a group of community-based, public benefit entities and other nonprofit organizations. Defendant and Respondent ("Defendant") is the City of Bakersfield. Real Parties in Interest ("RPI") are four local water storage districts that have contractual interests in the waters diverted from the Kern River, along with the Kern County Water Agency.

On November 30, 2022, Plaintiffs filed a verified Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate. The City of Bakersfield was named as a defendant and respondent. Buena Vista Water Storage District, Kern Delta Water Storage District, North Kern Water Storage District, and Rosedale-Rio Bravo Water District were named as real parties in interest. Defendant demurred to the complaint and the real parties filed a Motion to Strike and a Demurrer to the complaint. On March 6, 2023, before any hearing on the motions, Plaintiffs filed a verified First Amended Complaint ("FAC") for Declaratory and Injunctive Relief and Petition for Writ of Mandate. The FAC named the City of Bakersfield as a defendant and respondent but omitted the water districts as real parties. On May 2, 2023, the water districts and the Kern County Water Agency filed a Motion for Leave to File an Answer in Intervention. On May 22, 2023, Defendant demurred to the FAC. The hearings on both motions were continued by stipulation and order to September 6, 2023.

On August 10, 2023, Plaintiffs filed this Motion for Preliminary Injunction. On August 17, 2023, upon Defendant's ex parte application, the Court continued the hearing on the motion to October 13, 2023.

On September 29, 2023, the Court sustained Defendant's Demurrer to the FAC with leave to amend on the ground that Plaintiffs failed to name the four water districts and the Kern County Water Agency as necessary and indispensable parties; Defendant's Demurrer to the second cause of action was sustained with leave to amend because Plaintiffs' failed to state a claim for declaratory relief; Defendant's Demurrer to the fifth cause of action on the basis of failure to state a claim was denied. Plaintiffs were granted ten days leave to file a Second Amended Complaint ("SAC").

On October 2, 2023, Defendant filed an opposition, and the RPI filed a joint opposition, to Plaintiffs' Motion for Preliminary Injunction. Plaintiffs filed their SAC on October 4, 2023. Lastly, on October 6, 2023, Plaintiffs filed replies to the oppositions. Oral arguments were presented on October 13, and the matter was taken under submission at that time.

II. Ruling on Evidentiary Issues

A. Requests for Judicial Notice ("RJN")

1. Each RJN filed in this case is granted. The Court finds the documents to be admissible under California Rules of Court Section 3.1306 and one or more provisions of Evidence Code Section 452 and 454.

2. Defendant's objection to Plaintiffs' RJN of the August 2016 "Recirculated Draft

Environmental Impact Report" for the "Kern River Flow and Municipal Water Program" ("RDEIR for the Kern River Flow Program") is overruled. The report was prepared by Defendant and is relevant on a variety of topics presently before this Court.

B. Declarations

1. The declarations (including all attached exhibits) filed in support of, or in opposition to, the moving papers are admitted. The Court finds the information presented to be in admissible format and to be relevant.

2. Defendant's and RPI's objections to the Declaration of Theodore (Ted) Grantham are overruled. Dr. Grantham appears to be well qualified to render opinions on multiple topics that are within the scope of the issues framed by the moving papers and the oppositions thereto. To the extent Dr. Grantham's declaration may lack foundation or contain speculative opinions, the Court finds these concerns impact the issue of weight, not admissibility.

III. Law Regarding Preliminary Injunctions

The parties have raised a number of issues regarding the applicable law, which the Court will address as follows:

A. General Law

The issuance of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. Rather, it reflects the conclusion that, upon balancing the respective equities of the parties pending a trial on the merits, the defendant should or should not be restrained from exercising a right that the defendant claims. (*Brown v. Pacific Found., Inc.* (2019) 34 CA5th 915, 925 and *Jamison v. Department of Transp.* (2016) 4 CA5th 356, 361.) When evaluating a motion for preliminary injunction, the court must weigh 1) the likelihood that the moving party will ultimately prevail on the merits and 2) the relative harm to the parties from issuance or non-issuance of the injunction. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-442.) In addition, it is clear that the greater a plaintiff's showing on one variable, the less must be shown on the other in order to support the injunction. (See, e.g., *Butt v. State* (1992) 4 Cal.4th 668, 678 ("*Butt*") and *King v. Meese* (1987) 43 Cal.3d 1217, 1227-1228 ("*King*").) An injunction is an equitable remedy that is intended to prevent future harm, as opposed to punish past harm. (See, e.g., *Kachlon v. Markowitz* (2008) 168 CA4th 316, 348 and *Russell v. Douvan* (2003) 112 CA4th 399, 400–401.)

B. Type of Injunction

An injunction may be either mandatory or prohibitory. A prohibitory injunction is "a writ or order requiring a person to refrain from a particular act." (CCP Section 525.) A mandatory injunction requires a person to take affirmative action that changes the parties' position. (CC Section 3367(2).) The distinction between mandatory and prohibitory injunctions may be important because mandatory injunctions generally require a stronger showing by the moving party and because mandatory injunctions are automatically stayed on appeal, while prohibitory injunctions are not. (See, e.g., *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 CA5th 872, 884.) Despite the differences, "[c]ases have long recognized that the mandatory-prohibitory distinction can prove challenging to apply, that it is not always easy to distinguish a restraint from a command, and that there are no magic words that will distinguish the one from the other." (Nature of Injunctive Relief, Cal. Judges Benchbook Civ. Proc. Before Trial § 14.2.) Nevertheless, it is relatively clear that an injunction that is designed to restrain illegal conduct is prohibitory in nature, not mandatory. (See, e.g., *Oiye v. Fox* (2012) 211 CA4th 1036, 1048.) In addition, it is well established that a prohibitory injunction may involve some adjustment of the parties' respective rights to ensure that a defendant desists from a pattern of unlawful conduct. (*Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 C5th 1030, 1046.) As noted by our California Supreme Court:

> "[Our] decision makes clear that an injunction preventing the defendant from committing additional violations of the law may not be recharacterized as mandatory merely because it requires the defendant to abandon a course of repeated conduct as to which the defendant asserts a right of some sort. In such cases, the essentially prohibitory character of the order can be seen more clearly by measuring the status quo from the time before the contested conduct began." (*Id.*)

In this case, Plaintiffs' are seeking an order that would *prohibit* Defendant from making excessive diversions from the Kern River. Since the conduct to be restrained would prevent Defendant from engaging in a particular behavior, the injunction sought is prohibitory, not mandatory. Nevertheless, this Court would engage in essentially the exact same analysis and reach the same conclusion regardless of whether the injunction is classified as prohibitory or mandatory.

IV. Prevailing on the Merits

The first step in the "weighing" process is to gauge the likelihood that Plaintiffs will eventually prevail on the merits. In order to evaluate this factor, the Court must determine the credibility of Plaintiffs' argument that Fish & Game Code Section 5937 applies to Defendant and requires a certain amount of water to flow past weirs.

A. Application of Fish & Game Code Section 5937 to Defendant

Fish & Game Code Section 5937 reads in full as follows:

> "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway."

Further examination of this statute is required in order to determine if it applies to Defendant's weirs on the Kern River.

1. Definition of Dam

Fish & Game Code Section 5900(a) states that the definition of a "dam" includes "all artificial obstructions." The definition seems straightforward. The Court is not persuaded to use any alternative definition because the definition provided for in Section 5900(a) is in the same chapter as Section 5937 and clearly governs the interpretation of that statute. In this case, the weirs qualify as "dams" because they are "artificial obstructions" that may be used to control the flow of water in the Kern River.

2. Definition of Owner

Fish & Game Code Section 5900(c) states that the definition of "owner" includes "the United States [...], the State, a person, political subdivision, or district [...] owning, controlling or operating a dam . . ." Once again, the definition is straight-forward. It is undisputed that Defendant is a political subdivision of the State of California. It is also undisputed that Defendant owns or operates all of the weirs at-issue in this case. Defendant's and RPI's contention that Defendant does not have ownership of the Beardsley Weir or the Calloway Weir is of no import because it is conceded that Defendant *operates* those weirs and therefore falls within the legal definition of "owner."

3. Definition of Fish

Defendant and RPI argue that Fish & Game Code Section 5937 applies only to anadromous fish (i.e. those that migrate from freshwater rivers to the ocean and back to spawn in their natal

streams) and that the Kern River has no anadromous fish. The parties base their argument primarily on legislative history. Although anadromous fish were mentioned in the legislative history surrounding Section 5901, the limitation to anadromous fish was omitted from the final statute (Fish & Game Code Section 5901). In addition, this case involves the interpretation and application of Section 5937, not Section 5901. As discussed below, several appellate courts have discussed the applicability of Section 5937 in published cases, and not a single case limited the statute to anadromous fish. Finally, if the legislature intended Section 5937 to apply so narrowly, it would have so specified. Therefore, Section 5937 applies to all fish and not just to anadromous fish.

4. Standing to Enforce Section 5937

Defendant's and RPI's contend that Plaintiff cannot enforce Section 5937 because the California Department of Fish and Wildlife has exclusive enforcement jurisdiction. In this regard, the California Supreme Court held that the public trust doctrine grants the State of California the duty to manage the state's public resources such as water, and that the doctrine "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 445-46 ("*National Audubon*").) Significantly, the Supreme Court specifically held that any member of the general public has standing to assert a claim of harm under the public trust doctrine. (*Id.* at p. 445-48.) Fish & Game Code Section 5937 has been held to be a "specific rule" concerning the public trust doctrine. (*California Trout v. St. Water Resources Ctrl. Bd.* (1989) 207 Cal.App.3d 585, 629-30 ("*CalTrout I*").) Plaintiffs are members of the "general public" and therefore have standing to assert a claim under Section 5937 since that statute is a specific expression of the public trust doctrine. In addition, a plain reading of Section 5937 reflects that the reference to the "department" pertains only to a very limited modification to the general applicability of the statute, not overall enforcement jurisdiction. Finally, as discussed thoroughly below, Section 5937 has already been the subject of many private enforcement actions, so this Court need not consider the matter as one of first impression.

Based on the foregoing, Section 5937 applies to the weirs owned or operated by Defendant on the Kern River and Plaintiffs have standing to enforce the statute.

B. Minimum Flow Requirements of Fish & Game Code Section 5937

1. Express Language of the Statute

Section 5937 certainly has minimum flow requirements. The express language of the statute requires dam owners to pass at least enough water to keep fish in "good condition." Flows of this quantity would also tend to sustain a healthy ecosystem consisting of birds, mammals, plants, natural aesthetics, and quality of life opportunities for residents. (See, e.g., *National Audubon, supra,* 33 Cal.3d at 430-31 ["continued diversions threaten to turn it into a desert wasteland" which "obviously diminishes its value as an economic, recreational, and scenic

resource."].) Therefore, a plain reading of the statute supports Plaintiffs' claim that Section 5937 prevents a dam owner from diverting all the water in a river.

2. Case Law Interpreting Section 5937

Several appellate courts have confirmed that Section 5937 means what it says. In these holdings, the courts have expressly rejected the argument that Section 5937 only applies to water that has not already been appropriated for beneficial uses (i.e. excess water). For example, the court in *CalTrout I* noted that "[t]he dams referred to in section 5937, as imported into section 5946, are dams placed at the point of diversion of the water which is appropriated." (*CalTrout I*, supra, 207 Cal.App.3d at 632.) The court made the following observation:

> "Compulsory compliance with a rule requiring the release of sufficient water to keep fish alive necessarily limits the water available for appropriation for other uses. Where that effects a reduction in the amount that otherwise might be appropriated, section [5937 via 5946] operates as a legislative choice among competing uses of water." (*Id.* at 601.)

The court further noted as follows:

> "[T]he mandate of section [5937 via 5946] is a specific legislative rule concerning the public trust. Since the Water Board has no authority to disregard that rule, a judicial remedy exists to require it to carry out its ministerial functions with respect to that rule. The Legislature, not the Water Board, is the superior voice in the articulation of public policy concerning the reasonableness of water allocation." (*Id.* at 631-32.)

In follow-up litigation, the same appellate court stated as follows:

> "First, as we said, section [5937 via 5946] takes this case outside the purview of statutes which may allow the Water Board to balance competing beneficial uses of water and to determine the priority of use. For that reason alone the statutory procedures applicable to the balancing of competing uses by the Water Board are not applicable. (citations omitted.) Thus the issues to be resolved in the enforcement of section [5937 via 5946] do not invoke the expertise of the Water Board in 'the intricacies of water law' and 'comprehensive planning' of importance to the *Audubon* court. (citation omitted.)" (*California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 203 ("*CalTrout II*").)

The court in *CalTrout II* once again emphasized the issue in the following passage:

> "[W]e are at pains to repeat, that the Legislature has already balanced the

> competing claims for water from the streams affected by section [5937 via 5946] and determined to give priority to the preservation of their fisheries. There is no discretion in the Water Board to do other than enforce its requirements." (*Id.* at 201.)

The court in *Natural Resources Defense v. Patterson* (E.D. Cal. 1992) 791 F. Supp. 1425, 1435 ("*Patterson I*"), similarly noted as follows:

> "By its terms, Section 5937 mandates that the owner of a dam allow water to pass over or through the dam for certain purposes [footnote omitted.] Without deciding whether Section 5937 is a water appropriation statute, vel non, the statute's plain language demonstrates that it was intended to limit the amount of water a dam owner desiring to collect water for eventual irrigation may properly impound from an otherwise naturally flowing stream. Thus, it is a prohibition on what water the [...] owner of the dam, may otherwise appropriate."

In subsequent litigation, the same court held that the owner of a dam violated Section 5937 by leaving "long stretches of the River downstream [...] dry most of the time" and rejected the defendants' technical arguments to avoid application of the statute. (*Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F. Supp. 2d 906, 925 ("*Patterson II*").) The court noted as follows:

> Thus, the statute's plain meaning, legislative history, and construction by the state's court all point in a single direction and require this court to reject the [...] defendants' proposed interpretation of the statute." (*Id.* at 918-19.)

Case law therefore very clearly confirms that Section 5937 was deliberately adopted by the State Legislature after balancing the competing uses of water and is enforceable as a legislative mandate. For the foregoing reasons, this Court must conclude that Plaintiffs have a very high likelihood of succeeding on the merits.

V. BALANCING THE HARMS

A. Impact to Defendant

Defendant and RPI submit that the issuance of a preliminary injunction ordering compliance with Section 5937 would cause great harm because it would bar Defendant from delivering a clean, safe, and reliable drinking water supply to more than 400,000 residents living in the Bakersfield area. In support of their position, Defendant and RPI rightfully point to various legal authorities establishing that domestic use is undisputably a "beneficial use" of the highest

order. For example, Water Code Section 106 provides as follows:

> "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation."

Case law confirms that "domestic purposes" as used in Section 106 includes humans and domesticated livestock, but not commercial herds of livestock maintained for profit. (See, e.g., *Deetz v. Carter* (1965) 232 Cal.App.2d 851, 854-57.) Water Code Section 106.3(a) further emphasis the importance of water for domestic use:

> "It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."

The California Supreme Court addressed the potential conflict between the legal framework of the California water rights system expressed in laws such as a Sections 106 and 106.3(a), and the public trust doctrine:

> "The federal court inquired first of the interrelationship between the public trust doctrine and the California water rights system, asking whether the 'public trust doctrine in this context [is] subsumed in the California water rights system, or ... function[s] independently of that system?' Our answer is 'neither.' The public trust doctrine and the appropriative water rights system are parts of an integrated system of water law. The public trust doctrine serves the function in that integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources." (*National Audubon, supra,* 33 Cal.3d at 452.)

Other courts have addressed the potential conflict between the California water rights system and Section 5937 in particular. For example, *CalTrout I* addressed the issue as follows:

> "In 1937, and for many preceding years, the Water Code provisions pertaining to appropriation declared as state policy that the use of water for domestic purposes is the highest use of water and the use of water for irrigation purposes is the next highest use. (citations omitted.) It apparently was assumed in some quarters at the time of adoption of those sections that the appropriation of water for "higher" domestic or irrigation uses must be approved regardless of

> the detriment to "lower" uses, e.g., in-stream use for fishery or recreation purposes. (citations omitted.) Given this assumption, so it is claimed, section 5937 is not meant to operate as a rule affecting the appropriation of water.
> ...
> We need not reach the question of the application of section 5937 alone as a rule affecting the appropriation of water." (*CalTrout I, supra*, 207 Cal.App.3d at 600-01.)

Similarly, the court in *Patterson II* addressed the issue as follows:

> "Thus, the question becomes whether the state statute, Section 5937, may in fact be implemented in such a way in this case. That question, as the Ninth Circuit recognized, is not a question of facial incompatibility, but rather one of actual application. For this reason, the court affirmed on the facial preemption question and left open the question of preemption at the remedy stage. (citations omitted.) Because the instant motions concern only liability under Section 5937, such a determination must await the remedial phase of this litigation." (*Patterson II, supra*, 333 F. Supp. 2d at 921.)

In this case, like the cases quoted above, the potential conflict between compliance with Section 5937 and providing a safe, clean, and affordable domestic water supply appears to be a theoretical legal issue, rather than a practical factual issue. For example, Defendant's "overall annual water demand" is approximately 130,000 acre-feet of water. (Defendant's Opp. Brief, p. 14-15 and Dec. of Maldonado, parag. 20.) Based on the 130-year record of flows in the Kern River, the all-time high was approximately 2.5 million acre-feet and the all-time low was approximately 138,000 acre-feet. (Defendant's Opposition Brief, p. 5 and Declaration of Maldonado, parag. 5 [lists low figure as 131,000].) Between 1893 and 2010, the typical "wet-year" flow (i.e. 75th percentile) was 899,000 acre-feet; the typical "dry-year" flow (i.e. 25th percentile) was 361,000 acre-feet; the average flow was 726,000 acre-feet; and the median flow was 550,000 acre-feet. (City of Bakersfield Water Resources Department, Water Availability Analysis dated March 2015, p. 7-8 and Exhibit B attached thereto; see, also, RDEIR for the Kern River Flow Program, p. 2-34.) Therefore, it appears that the Kern River has never failed to provide sufficient water for domestic use and, in the "average year," the river provides over five times Defendant's total current use. Accordingly, the present action does not appear to threaten the domestic water supply.

This conclusion is buttressed by the fact that: 1) Defendant does not rely exclusively on the Kern River to satisfy its demand and may have access to water from the State Water Project (Defendant's Opposition Brief, p. 6 and Declaration of Maldonado, parag. 8); 2) a significant percentage of water left to flow in the natural river channel would not be lost, but would be recouped in other forms such as replenished ground water (RDEIR for the Kern River Flow

Program, p. 2-39 and 2-40); and 3) the "overall" demand identified by Defendant may include secondary obligations or uses (such as waste water treatment facilities) for which alternative sources of water may be available. (RDEIR for the Kern River Flow Program, p. 2-36).

It is worth noting that Plaintiffs are not seeking any reductions or modifications to Defendant's current supply-demand profile for domestic use. Therefore, imposing Section 5937's flow requirements on Defendant would likely have no impact on the domestic water supply.

B. Impact to RPI

Defendant and RPI submit that the issuance of a preliminary injunction ordering compliance with Section 5937 would cause great harm because it would interfere with Defendant's and RPI's contractual obligations regarding the delivery of water for agricultural and other purposes. Once again, Defendant and RPI appropriately cite to legal authority such as Section 106 for the very valid proposition that agricultural use is a well-established "beneficial use" of a very high order. Although the use of water for agricultural purposes is very necessary and worthy, the State Legislature has determined that other uses are also worthy and of significant benefit to society. For example, Water Code Section 1243(a) states as follows:

> "The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. In determining the amount of water available for appropriation for other beneficial uses, the board shall take into account, when it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources."

The courts in California have also made very similar findings. For example, the California Supreme Court in *National Audubon* held as follows:

> "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (citations omitted.) As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust (citations omitted), and to preserve, so far as consistent with the public interest, the uses protected by the trust.

> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.
>
> The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses." (*National Audubon, supra,* 33 Cal.3d at 446-47.)

As discussed in a previous section of this ruling, several courts expanded on the principles set forth in *National Audubon* to establish Section 5937 as a non-discretionary, specific legislative rule reflecting the public trust doctrine. (See, e.g., *CalTrout I, CalTrout II, Patterson I,* and *Patterson II.*) As such, the courts held that compliance with Section 5937 is compulsory, as is compliance with any other state law. It is well established that contractual obligations do not take precedence over compliance with state law. (See, e.g., *Patterson I,* supra, 791 F. Supp. 1425.)

In this case, the "overall annual water demand" for the RPI is not nearly as apparent as it is for Defendant. Therefore, it is more difficult to determine what impact, if any, compliance with Section 5973 might have on the RPI. What is clear, however, is that the average annual Kern River flows of approximately 726,000 acre-feet is an enormous amount of water that should suffice for the reasonable use of all interested stakeholders. In the words of the State Constitution, our vast water resources should be used in a manner that reflects the "reasonable and beneficial use thereof in the interest of the people and for the public welfare."

C. Impact to Plaintiffs

Plaintiffs' contend that a failure to issue the preliminary injunction will almost certainly result in a completely dry, dead river channel which has been witnessed by the City of Bakersfield's residents and visitors the majority of time during the past few decades. (See, e.g., Dec. of Love, parag. 4; Damian, parag. 3; Mayry, parag. 3; and McNeely, parag. 3.) Plaintiffs' position is simple: no water in the river means no aquatic life, including fish. In addition, declarations filed in support of the moving papers establish that a dry river greatly reduces other forms of life such as birds. (See, e.g., Dec. of Love, parag. 3-10 and McNeely, parag. 11.) The declarations also note that the quality of life for Bakersfield's residents and visitors suffer without a flowing river, such as when the Kern River Parkway Bike Trail has no actual river. (See, e.g., Dec. of Damian, parag. 3, 9; Mayry, parag. 7-12; McNeely, parag. 11.) Therefore, it

appears that significant harm would result to the general population and the environment if the injunction is not issued.

D. Purpose of Balancing the Harms

It is important to note that the Court weighed the potential harms to the respective parties in this case only on the procedural issue of deciding whether a preliminary injunction should issue. This discretionary analysis was not done as part of the process to determine the applicability of Section 5937 as an appropriate use of water. As discussed above, the State Legislature already considered the competing uses of water when they passed Section 5937 and came down on the side of minimum flow requirements. Therefore, this Court has no jurisdiction to override the State Legislature and re-weigh the competing interests when it comes to addressing the underlying, substantive issue. On that point, compliance with Section 5937 is required as a matter of law. This Court has a duty to uphold the law and has no option to exempt entities from compliance, even if compliance is burdensome. Second, as discussed above, Plaintiffs are very likely to prevail on the merits. Therefore, according to the principles set forth in the *Butt* and *King* cases, the weighing of harms on the procedural issue is given relatively less weight than the analysis regarding whether Plaintiffs are likely to prevail on the merits.

Based on the foregoing, the Court is obligated to issue a preliminary injunction prohibiting Defendant from diverting Kern River flows in a manner that reduces flows below the volume necessary to maintain fish in good condition.

VI. THE PRELIMINARY INJUNCTION

A. Terms and Language of the Injunction

Having determined that a preliminary injunction should issue, the Court is now faced with the task of composing the specific terms of the injunction. One option is to require Defendant to immediately comply with Section 5937 and entrust Defendant and Plaintiff, along with input from subject matter experts, to determine the specifics of the necessary flows. This method is legally permissibly because a dam owner has a non-discretionary, ministerial duty to comply with Section 5937, but is permitted some discretion in how it complies. (See, e.g., *CalTrout I, supra,* 207 Cal.App.3d at 632 [the court ordered compliance with the law and then left as a separate issue "[w]hether and to what extent enforcement proceedings might be necessitated].)

A second option is to require Defendant to immediately comply with Section 5937 and have this Court specify the flows necessary for compliance. This method is also legally permissible as

demonstrated by, for example, *CalTrout II* which expressly held that a dam owner's claim that it could not "readily ascertain the amount of water necessary to comply with its statutory obligation [...] may be addressed by means of interim judicial relief." (*CalTrout II*, supra, 218 Cal.App.3d at 200.) Under this scenario, the Court would impose the "best approximate compliance" and then thereafter "proceed with more elaborate study looking to refinement of those rates in subsequent proceedings." (*Id.* at 209.) Either way, the flow standards would be interim standards applicable only to the preliminary injunction. Each option has benefits and risks associated with it.

1. Flow Determined by Defendant and Plaintiff

The determination of flows necessary to keep fish in "good condition" may possibly be a complex undertaking that encompasses a wide variety of topics including the physical, biological, and hydrological sciences. It may also require deep knowledge of the local water systems. In this case, Defendant has an entire Water Resources Department. Plaintiff appears to have access to some of the most highly qualified subject matter experts in the country. (See, e.g., Dec. of Peter Moyle and Ted Grantham.) The resources of the California Department of Fish and Wildlife may also be available. Given these resources, it seems that Defendant and Plaintiff, along with input from subject matter experts, would be in a better position than the Court to quickly develop flow standards in good faith compliance with the law.

2. Flow Determined by Court Order

Court deferral of the specific flow rates may, however, set the stage for unreasonable delays in compliance if Defendant and Plaintiff are not willing to engage in the process in an expeditious and cooperative fashion. This is essentially what occurred in the *CalTrout* cases. The appellate court in *CalTrout I* ordered the dam owner to comply with the law but did not specify precise flow rates because the amount could not "be precisely calculated on the record before us." (*CalTrout I, supra,* 207 Cal.App.3d at 632.) Upon remand, the trial court allowed a multi-year delay for compliance due to several reasons including pending "studies" and because the dam owner requested "guidance . . . in fulfilling its statutory duty." (*CalTrout II, supra*, 218 Cal.App.3d at 194.) The delays led to *CalTrout II, in* which the appellate court held that the trial court "abused its discretion in countenancing this protracted disobedience of the statute" and directed the trial court to "expeditiously consider a request by petitioners that *it* [i.e. the court] set interim release rates." (*Id.*) This Court has no intention of countenancing "protracted disobedience of the statute" and is concerned that entrusting Defendant and Plaintiff to determine the flow rates might be setting the process up for failure. Imposing an immediate, court-ordered flow rate would negate those concerns.

B. Decision Regarding Flow

In evaluating the two options, the Court must consider the fact that Defendant has expressed reluctance to help establish appropriate flow rates. For example, Defendant argued that

"[p]laintiffs provide no details, guidance or data in the proposed order to allow the City, or the Court, to determine whether fish are in 'good condition' downstream of each of the named weirs" and that "[p]laintiffs provide no objective metrics or standards to establish compliance." (Defendant's Opp. Brief, p. 11.) They also note that if the Court were to issue the injunction, they would be left to "guess" about the flow requirements and "would not be able to determine with certainty whether any of its actions were in compliance at any particular time or season." (*Id.*). Finally, Defendant seemed to reject the concept that the flow rates could be "determined through some sort of unspecified interim judicial relief." (*Id.* at p. 12.)

On the other hand, Defendant has previously expressed a desire to see the Kern River flow through Bakersfield:

> "The City of Bakersfield, as Lead Agency under CEQA, proposes this Program to increase and restore more water flows to the Kern River channel with the goals of protecting and preserving the local water supply, environment, and quality of life for City residents." (RDEIR for the Kern River Flow Program, p. v.)

Defendant has apparently made past efforts to have the Kern River flow in its natural channel through Bakersfield:

> "In recent years, the City has worked to increase the flow of water below the Calloway Weir, but there are currently no quantities of water regularly dedicated to stream flow or instream uses below the Calloway Weir." (City of Bakersfield Water Resources Department, Water Availability Analysis dated March 2015, p. 8.)

In addition, counsel for Defendant made statements similar to these quotes during oral arguments on October 13. Defendant clearly has a deeply vested interest in the river and seems to harbor some sentiment that would make cooperation on establishing specific flow rates possible.

Based on the foregoing, the Court intends to proceed with the first option described above. To help facilitate the process, it should be noted that courts can include broad language in preliminary injunctions and do not need to itemize every detail of compliance. Several courts have addressed the issue as follows:

> "'An injunction must be sufficiently definite to provide a standard of conduct for those whose activities are to be proscribed, as well as a standard for the court to use in ascertaining an alleged violation of the injunction.' (*People ex rel. Dept. of Transportation v. Maldonado* (2001) 86 Cal.App.4th 1225, 1234 [citation omitted].) 'An injunction which forbids an act in terms so vague that men of common intelligence must

necessarily guess at its meaning and differ as to its application exceeds the power of the court.' (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651 [citation omitted].) However, '[t]he injunction need not etch forbidden actions with microscopic precision, but may instead draw entire categories of proscribed conduct. Thus, an injunction may have wide scope, yet if it is reasonably possible to determine whether a particular act is included within its grasp, the injunction is valid.' (*People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676, 681 [citation omitted].)" (*People ex rel. Gascon v. HomeAdvisor, Inc.* (2020) 49 Cal.App.5th 1073, 1082-83.)

In this case, as previously noted, the term "good condition" may potentially involve complex issues. However, the language is also subject to a reasonable, common sense interpretation that should guide the discussions between Defendant and Plaintiff regarding flow rates necessary to achieve compliance.

Moreover, Defendant, Plaintiff, and the Court are not without guidance regarding the meaning of "good condition." Multiple courts and regulatory entities have already spent very considerably efforts defining the term. (See, e.g., *CalTrout II, supra,* 218 Cal.App.3d at 209, 210; *Patterson II, supra,* 333 F.Supp.2d at 916; Walker River Irrigation District - SWRCB Order 90-18 (1990), WL 264521; *Putah Creek v. Solano Irrigation* 7 CSPA-294 District, Sacramento Superior Court No. CV515766 (April 8, 1996); Bear Creek - SWRCB Order 95-4 (1995), WL 418658; Lagunitas Creek – SWRCB Order 95-17 (1995), WL 17907885.) There is no reason, therefore, for Defendant, Plaintiff, and this Court to "reinvent the wheel" regarding the meaning of "good condition."

DISPOSITION:

Defendant City of Bakersfield and its officers, directors, employees, agents, and all persons acting on its behalf are prohibited from operating the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition.

Defendant and Plaintiff shall engage in good faith consultation to establish flow rates necessary for compliance with this order.

The Court shall retain jurisdiction to ensure compliance with this order and to modify the terms and conditions thereof if reasonably necessitated by law or in the interests of justice. If after good faith consultation, Defendant and Plaintiff are not successful in agreeing to flow rates necessary for compliance, either Defendant or Plaintiff may file a request for this Court to make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after reasonable notice to all parties including the RPI.

This order shall become effective immediately upon the posting of a bond in the amount of $1,000.00, or of cash or a check made out to the Clerk of the Kern County Superior Court in lieu thereof. The date and time of the posting of the bond, or of cash or a check in lieu thereof, shall be reflected in a Notice of Posting of Undertaking to be filed by Plaintiff and served on all parties.

This order shall remain in place until the conclusion of trial, further order of this Court, or further order by a court of higher jurisdiction.

Plaintiffs shall prepare a formal order consistent with this ruling for the Court's signature pursuant to California Rule of Court 3.1312.

Copy of minutes mailed to all parties as stated on the attached certificate of mailing.

FUTURE HEARINGS:

No future hearings are currently set.

BRING BACK THE KERN ET AL VS CITY OF BAKERSFIELD
BCV-22-103220

CERTIFICATE OF MAILING

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, and not a party to the within action, that I served the ***Ruling dated October 30, 2023*** attached hereto on all interested parties and any respective counsel of record in the within action by depositing true copies thereof, enclosed in a sealed envelope(s) with postage fully prepaid and placed for collection and mailing on this date, following standard Court practices, in the United States mail at Bakersfield California addressed as indicated on the attached mailing list.

Date of Mailing: October 30, 2023

Place of Mailing: Bakersfield, CA

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Tara Leal
CLERK OF THE SUPERIOR COURT

Date: October 30, 2023

By: *Stephanie Lockhart*
Stephanie Lockhart, Deputy Clerk

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EXHIBIT C

Bring Back the Kern v. City of Bakersfield

Court of Appeal of California, Fifth Appellate District

April 2, 2025, Opinion Filed

No. F087487

Reporter
110 Cal. App. 5th 322 *; 2025 Cal. App. LEXIS 212 **; 2025 LX 70494

BRING BACK THE KERN et al., Plaintiffs and Respondents, v. CITY OF BAKERSFIELD, Defendant and Respondent; NORTH KERN WATER STORAGE DISTRICT et al., Real Parties in Interest and Appellants. [And five other cases.*]

Subsequent History: Petition for review filed by, 05/12/2025

Prior History: [1]** APPEAL from orders of the Superior Court of Kern County, No. BCV-22-103220, Gregory A. Pulskamp, Judge.

Bring Back the Kern v. City of Bakersfield, 2024 Cal. LEXIS 4528 (Aug. 14, 2024)

Case Summary

Overview

HOLDINGS: [1]-In granting a preliminary injunction prohibiting a city from reducing river flows below the volume sufficient to keep fish downstream in good condition, the trial court erred by applying only *Fish & G. Code, § 5937*, without assessing reasonableness because *Cal. Const., art. X, § 2*, required consideration of whether all uses of water were beneficial and reasonable, whether described as higher or lower uses in statutes such as *Wat. Code, §§ 106*, *107*, 1243, subd. (a), including in-stream public trust uses; [2]-Because a motion for reconsideration extended the appeal deadline under *Cal. Rules of Court, rules 8.104(a)(1)*, *8.108(e)*, the water agencies timely challenged the adequacy of the undertaking; [3]-Ordering a nominal bond was error because *Code Civ. Proc., § 529, subd. (a)*, required that an undertaking for a preliminary injunction be tethered to potential damages.

Outcome
Orders reversed.

Counsel: Young Wooldridge, Scott K. Kuney and Brett A. Stroud for Real Party in Interest and Appellant North Kern Water Storage District.

McMurtrey, Hartsock, Worth & St. Lawrence and Isaac Lee St. Lawrence for Real Party in Interest and Appellant Buena Vista Water Storage District.

Ellison Schneider Harris & Donlan; Wanger Jones Helsey, Robert Edward Donlan, Craig A. Carnes, Jr., Kevin William Bursey; and Richard L. Iger for Real Party in Interest and Appellant Kern Delta Water District.

Belden Blaine Raytis, Daniel N. Raytis, Daniel M. Root; Stoel Rives and Jennifer Lynn Spaletta for Real Party in Interest and Appellant Rosedale-Rio Bravo Water Storage District.

Somach Simmons & Dunn, Nicholas A. Jacobs, Louinda V. Lacey and Michelle E. Chester for Real Party in Interest and Appellant Kern County Water Agency.

Hanson Bridgett, Gary A. Watt, Nathan A. Metcalf, Sean G. Herman and Jillian E. Ames for Real Party in Interest and Appellant J. G. Boswell Company.

Duane Morris, Colin L. Pearce, Jolie-Anne S. Ansley; Virginia A. Gennaro, City Attorney, and Matthew S. Collom, Deputy City Attorney, for Defendant **[**2]** and Respondent.

Law Office of Adam Keats and Adam F. Keats for Plaintiffs and Respondents Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club and Center for Biological Diversity. **[*334]**

William Albert McKinnon for Plaintiff and Respondent Water Audit California.

Amanda Cooper and Walter Collins for California Trout, Inc., as Amici Curiae on behalf of Plaintiffs and

* *Bring Back the Kern v. City of Bakersfield* (No. F087503); *Bring Back the Kern v. City of Bakersfield* (No. F087549); *Bring Back the Kern v. City of Bakersfield* (No. F087558); *Bring Back the Kern v. City of Bakersfield* (No. F087560); *Bring Back the Kern v. City of Bakersfield* (No. F087702).

Respondents Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, Center for Biological Diversity and Water Audit California.

Rob Bonta, Attorney General, Tracy L. Winsor, Assistant Attorney General, Eric M. Katz, Tara L. Mueller and Jeffrey P. Reusch for the California Attorney General and Department of Fish & Wildlife as Amici Curiae on behalf of Plaintiffs and Respondents Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, Center for Biological Diversity and Water Audit California.

Judges: Opinion by Snauffer, J., with Detjen, Acting P. J., and Peña, J., concurring.

Opinion by: Snauffer, J.

Opinion

SNAUFFER, J.—The City of Bakersfield (City) operates multiple weirs on the Kern River used to divert water for its own use and the use of several other **[**3]** entities, including appellants. Appellants are several water agencies, including the North Kern Water Storage District (NKWSD), the Buena Vista Water Storage District and others. (See *Wat. Code, § 12970*; Stats. 1961, ch. 1003, pp. 2651–2652.)[1]

Respondents Bring Back the Kern (BBTK), Water Audit California (WAC), the Sierra Club and other environmental groups sought and obtained a preliminary injunction in the trial court.[2] The injunction prohibited Bakersfield from operating the weirs in question "in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition." (See *Fish & G. Code, § 5937*.)[3] In its ruling, the trial court expressly refused to weigh the potential harm to the City of Bakersfield or the water agencies in determining whether applying *section 5937* to the Kern River would result in "an appropriate use of water."

Shortly thereafter, the trial court established a flow rate pursuant to a stipulation offered by City and BBTK, but not agreed to by appellants. After appellants filed motions for reconsideration, the court stayed the flow rate order and modified the injunction.
[*335]

(1) Appellants appeal the injunction and the order setting a flow rate. We hold that under the self-executing provisions of *article X, section 2 of the state Constitution*, courts must **[**4]** always consider reasonableness whenever adjudicating a use of water—even if the pertinent statutes do not call for a reasonableness determination themselves. *Section 2* is "the supreme law of the state, which the courts are bound to enforce, *and it must be made effectual in all cases* and as to all rights not protected by other constitutional guaranties." (*Gin S. Chow v. City of Santa Barbara (1933) 217 Cal. 673, 700 [22 P.2d 5], italics added (Gin S. Chow)*.) The court's failure to directly consider the reasonableness of the water use it was ordering in the injunction was constitutional error.

Consequently, we reverse the injunction and the order setting a flow rate, and remand for further proceedings.[4]

I. BACKGROUND

The Kern River originates atop Mount Whitney in the Sierra Nevada Mountains. After flowing in a southerly

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[1] Appellant and intervener J.G. Boswell (Boswell) asserts that it owns Kern River water rights as well as agricultural property it claims could flood under high riverflow conditions.

[2] We will generally refer to the environmental plaintiffs collectively as BBTK, except where we refer to Water Audit California specifically as a separately represented party.

[3] All statutory references are to the Fish and Game Code unless otherwise stated.

[4] We also rule on several requests for judicial notice filed in this court.

Bakersfield's request for judicial notice is denied, as the matters to be noticed were either filed after the trial court made the decisions being challenged herein, concern matters immaterial to resolution of the appeal, and/or were not before the trial court when it made the challenged orders. (See *In re Marriage of LaMoure (2011) 198 Cal.App.4th 807, 812, fn. 1 [132 Cal. Rptr. 3d 1] (LaMoure)*.)

J.G. Boswell's unopposed motion for judicial notice is granted. While exhibits 6 and 7 were filed after the challenged orders were made, they are only being relied upon to explain the procedural history of the case.

The request for judicial notice filed by the water agencies on October 28, 2024, is denied. The matters to be noticed were filed after the orders challenged on appeal. (See *LaMoure, supra, 198 Cal.App.4th at p. 812, fn. 1*.)

BBTK's unopposed request for judicial notice filed January 30, 2025, is granted.

direction, its waters are impounded by Isabella Dam. From there, it flows approximately 33 river miles down a steep canyon to the eastern edge of Bakersfield.

There is a complex web of claims to the waters of the Kern River. In order to manage and implement the water rights and contracts governing the Kern River, its flows are measured at two points. The first point of measurement is approximately 10 river miles downstream of the mouth of Kern River Canyon (First **[**5]** Point). The second point of measurement is approximately 21 river miles downstream of First Point, just east of Interstate 5 (Second Point).

Miller-Haggin Agreement

"Under the 1888 Miller-Haggin Agreement, water rights were allocated into three groups: First point rights, second point rights, and lower river **[*336]** rights. Water allocations are based on the computed natural flow at the first point, and allocations of the first and second point flows are made on a daily basis. Any water that is not stored or diverted by the first and second point rights holders and which passes State Highway 46 via the Kern flood channel belongs to lower river rights holders. Allocations to lower river rights holders are typically only available in wet years." (*Buena Vista Water Storage Dist. v. Kern Water Bank Authority (2022) 76 Cal.App.5th 576, 582 [291 Cal. Rptr. 3d 438]*, fn. omitted.)

Shaw Decree

"As a result of litigation among certain Kern River water users, a declaratory judgment was entered in 1901, known as the Shaw Decree, which formalized the existing common law rights. [Citation.] That decree memorialized each appropriator's right in terms of [cubic feet per second], a figure referred to as the appropriator's 'paper entitlement.' In addition, the decree established that at each particular stage of the river (that is, the flow **[**6]** of the river in its natural channel), measured daily at a fixed point, each junior appropriator was entitled to all, some, or none of the water for which it had appropriative rights, a figure referred to as an appropriator's 'theoretical entitlement.' Thus, under the Shaw Decree, an appropriator with, for example, a 100 [cubic feet per second] paper entitlement might have only an 85 cfs theoretical entitlement when the river stage is 512 cfs, but a 100 cfs theoretical entitlement if the river stage is 527 cfs or greater." (*North Kern Water Storage Dist. v. Kern Delta Water Dist. (2007) 147 Cal.App.4th 555, 561–562 [54 Cal. Rptr. 3d 578] (North Kern Water)*.)

(2) "In addition to paper and theoretical entitlements, an appropriator is entitled to divert water if a senior appropriator does not claim its entire allocation that day. When an appropriator has not diverted its entire theoretical entitlement on a given day, the excess water is 'released to the river.' In that case, the next most senior appropriator is entitled to divert released water to, in effect, augment the stage or natural flow of the river; the junior appropriator then may divert water for which it has no theoretical entitlement, up to the full paper entitlement of that user. Any release water not claimed by a more senior user becomes available to the **[**7]** next junior user in the same manner until the water supply is exhausted." (*North Kern Water, supra, 147 Cal.App.4th at p. 562*.)

Kern River Water Rights and Storage Agreement

On December 31, 1962, various water districts entered into an agreement titled the Kern River Water Rights and Storage Agreement. The agreement distinguished two groups. The first was the "upstream group," which included **[*337]** North Kern and Buena Vista. The second was the "downstream group," which included Tulare Lake Basin Water Storage District and Hacienda Water District. The agreement set forth the percentages of natural flow as measured at the First Point that would be allocated to the downstream group. The agreement also generally obligated North Kern to transport the waters allocated to the downstream group to the Second Point. North Kern and Buena Vista agreed their apportionment would be divided pursuant to the Miller-Haggin Agreement as amended (with limited enumerated exceptions).

Agreement 76-36

The City entered into an agreement with Tenneco West, Inc., among others, dated April 12, 1976. Pursuant to the agreement, the City acquired the water rights interests in the Kern River that had belonged to Tenneco West, Inc., Kern Island Water Company, and Kern River **[**8]** Canal and Irrigating Company.

Agreement 76-36 further provided that the City would "assume all public service obligations of Kern Island [Water Company] and [Kern River Canal and Irrigating

Company] existing at the time of Closing, including without limitation, the obligations of such companies to furnish water service to the customers of their respective service areas, and obligations described in Exhibits attached hereto." The Miller-Haggin Agreement and Shaw Decree were both exhibits attached to Agreement 76-36.

Riverflow Variability

Measurements taken at First Point reflect that the flow of Kern River can vary drastically from year to year. For example, the river's annual flow in 1983 was nearly 2.5 million acre-feet; however, in 2015, it was 139,000 acre-feet.

Administration of Kern River Flows

In order to administer this complicated web of water contracts, deliveries and rights—only some of which have been described above—the flows of the river are monitored and reported daily.

Sample Record of Kern River for August 29, 2023

For example, on August 29, 2023, it was recorded that the natural flow entering Isabella Reservoir was 1,679 cubic feet per second (cfs), and the amount **[**9]** of water then-stored in the reservoir was 489,430 acre-feet. It was further recorded that the U.S. Army Corps of Engineers had requested an increase of outflows in the amount of 280 cfs to begin at 7:00 p.m.
[*338]

In total, the requested outflows from Isabella on August 29, 2023, were 3,460 cfs—which was the sum of the natural water entering Isabella (i.e., 1,679 cfs) plus requests from water agencies in the amount of 1,781 cfs. It was further estimated that seven cfs would flow into the river downstream of Isabella.

In order to deliver the water to the appropriate requester, specific amounts of water must be diverted at each weir and canal along the Kern River channel. This amount is set daily at a specific flow rate. For example, on August 29, 2023, a diversion of 560 cfs was to occur at the Bearsley Canal; a diversion of 425 cfs was to occur at the Carrier Headgate, and so on.

City's Role

The daily water orders from water agencies and the City are administered by the City of Bakersfield—specifically by the hydrographic unit of its water resources department. Each water user informs the City's hydrographic unit of its needs, and daily operations are constantly revised pursuant to supply **[**10]** and demand.

Flows Past the McClung Weir

The last weir before the Kern River enters Bakersfield is the McClung Weir. For nearly half a century prior to 2023, the Kern River had not been recorded flowing past the McClung Weir on a sustained basis, according to the deputy general manager of the NKWSD.[5] As a result of major infrastructure improvements increasing diversions of the river's waters, the riverbed downstream of the Calloway Weir is completely dry most of the year, and water only flows during "very wet; high-flow conditions" or when water is introduced from outside sources.

However, after an abnormally large snowpack, the flows of the Kern River did begin to flow past the McClung Weir on a sustained basis on March 15, 2023. This flow continued for several months to August, when BBTK filed the present action.
[*339]

Procedural History

In a verified complaint and petition for writ of mandate dated November 30, 2022, BBTK sued the City of Bakersfield.[6] The complaint also listed NKWSD and the other appellant water agencies as real parties in interest.[7]

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[5] Even then—the year was 1983—the largest annual flow in 128 years of recorded flows.

[6] Like many other documents, the complaint in appellant's appendix does not bear a file stamp. However, it has a printed date at the signature block of November 30, 2022. While a file-stamped copy is much preferred, it is technically not required because "[f]iling an appendix constitutes a representation that the appendix consists of accurate copies of documents in the superior court file." (***Cal. Rules of Court, rule 8.124(g)***.) See also Advisory Com. com., ***Cal. Rules of Court, rule 8.124(d)*** [not requiring conformed copy so long as date is shown.].) Throughout this opinion we will use the dates on the signature blocks of various filings.

[7] Kern County Water Agency was not listed as it was added as

The water agencies filed a demurrer. In March 2023, plaintiffs filed an amended complaint, **[**11]** which omitted the water agencies as named parties. Bakersfield filed a demurrer to the amended complaint on several grounds, including that the amended complaint failed to join the water agencies, which were necessary and indispensable parties. The water agencies moved to intervene in the case on May 2, 2023.

The court sustained Bakersfield's demurrer on the ground that it failed to include the water agencies as necessary parties. The court also ruled that while it was inclined to grant the water agencies' motion to intervene, that the motion was now moot in light of the sustaining of the demurrer.

A third amended complaint and petition for writ of mandate dated November 17, 2023, alleged that Bakersfield operates several weirs in the Kern River in a manner that violates the law, including section 5937. That provision requires that dam owners allow sufficient water to pass through, over or around in order to keep fish in "good condition." (§ 5937.)

Motion for Preliminary Injunction

BBTK and WAC filed a motion for a preliminary injunction dated August 10, 2023. The motion argued that the chronically dry riverbeds below each weir on the Kern River were prima facie evidence that Bakersfield was violating section 5937 **[**12]** and the public trust doctrine. Accordingly, the motion sought injunctive relief "restrain[ing] the City from diverting water that is required to keep in good condition the fish that currently exist below each of the Weirs." The motion stated that a "[r]emedy can be accomplished by a simple reiteration of the statutory directive without quantification of the amount of water required to satisfy the directi[ve]." A proposed order **[*340]** submitted with the motion would have prohibited Bakersfield from operating the weirs "in any manner that reduces river flows below a volume that is sufficient to keep fish downstream of said weirs in good condition." The motion also expressly stated that it was *not* seeking to change Bakersfield's management of the Kern River "allocations."

In support of the motion, plaintiffs sought and obtained judicial notice of a recirculated draft environmental impact report for Kern River Flow and Municipal Water Program dated August 2016. The program sought to use up to 160,000 acre-feet "to create a permanent, consistent, and regular flow of water in the Kern River channel through the City." The draft environmental impact report indicated that Kern River obligations to Bakersfield's water treatment plants were 19,000 **[**13]** acre-feet annually, and obligations to "water feature amenities" were 5,000 acre-feet annually. Another "demand" on Bakersfield's Kern River water rights was an average of 20,000 acre-feet per year of canal seepage and evaporative losses. This did not include Bakersfield's legal obligations to provide water to other entities.

Bakersfield has rights to Kern River waters from a variety of legal sources. In a wet year, these rights may yield as much as 179,000 acre-feet from the Kern River. In a dry year, the rights may yield an average of 55,000 acre-feet from the Kern River, resulting in a median yield of 99,000 acre-feet.

Opposition

The water agencies opposed the preliminary injunction motion, observing that it did not request a specific flow rate be imposed, nor did it identify any particular fish species. They argued such preliminary relief would be improper because injunctions "must be definite enough to provide a standard of conduct for those whose activities are proscribed, as well as a standard for the ascertainment of violations of the injunctive order by the courts called upon to apply it." (Pitchess v. Superior Court (1969) 2 Cal.App.3d 644, 651 [83 Cal. Rptr. 35].)

The water agencies adduced evidence that NKWSD's supply from the Kern River is nearly **[**14]** 400,000 acre-feet in a wet year and 10,000 acre-feet in a dry year. NKWSD's annual agricultural water requirements are 160,000 acre-feet. The less water NKWSD gets from the Kern River, the more it has to rely on groundwater pumping.

Bakersfield also opposed the motion, offering a declaration from its assistant water resources director, Daniel Maldonado, asserting: "If Kern River diversions into unlined canals, including for the Kern Delta Water District, the North Kern Water Storage District and the City, are limited or **[*341]** interrupted, groundwater levels will decline, the underground drinking water supply will be negatively affected and potentially cause undesirable results. Groundwater quality will decrease, arsenic levels will likely increase, water delivery to

a real party in interest in the second amended complaint.

customers will be impacted because the pumps cannot deliver the required quantity of water or maintain the proper pressure for drinking water, and health and safety issues will arise as the City's ability to provide a safe and reliable drinking water supply is threatened."

Mr. Maldonado also stated, "Any restrictions on the City's diversion of water would further threaten the City's ability to deliver water to its residents, particularly **[**15]** in the areas of the City not served by groundwater. Further, restrictions on diversions, as described above, will cause declines in groundwater levels, causing negative environmental effects and impacting the supply of groundwater available to serve Bakersfield residents. The requested injunction would therefore put the public health and safety of 400,000 residents at risk."

Injunction

On November 9, 2023, the court filed an order granting the motion for preliminary injunction. The injunction prohibited the City of Bakersfield "from operating the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition." The order directed "defendant and plaintiffs to engage in good faith consultation to establish flow rates necessary for compliance with this order." If said consultation was unsuccessful, either party could file a request for the court to "make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after reasonable notice to **[**16]** all parties including the Real Parties in Interest." The court also required plaintiffs to post a $1,000 bond.

The injunction did not set a specific flow rate that Bakersfield had to allow past the last weir. The court considered setting a specific flow rate, but decided against it for several reasons. The court said it would not countenance protracted disobedience of the statute and acknowledged "that entrusting Defendant and Plaintiff to determine the flow rates might be setting the process up for failure." However, the court concluded that the defendant and plaintiffs, with input from experts, were in a better position to develop a flow rate. The court also noted that Bakersfield had previously indicated a willingness to have the Kern River flow in its natural channel through the city. As a result of these various considerations, the court decided to have defendant and plaintiffs work together to establish a flow rate.
[*342]

Stipulation and Implementation Order

On November 13, 2023, Bakersfield, WAC and BBTK filed a stipulation. The water agencies did not agree to the stipulation. The stipulation provided that Bakersfield would operate the weirs such that 40 percent of the total measured daily **[**17]** flow of the Kern River would be allowed to flow past the McClung Weir. This fish flow would be "subject to" Bakersfield's municipal needs and demands. Any remaining flow would be available for diversion by real parties in interest.

The court signed an order implementing the stipulation the next day. We will refer to this as the implementation order.

Motions for Reconsideration

The water agencies filed motions for the court to reconsider its orders granting the preliminary injunction and implementing the stipulation. They made several arguments, including that "the Implementation Order was issued without any notice or opportunity to be heard by the Real Parties in Interest, who are the only parties potentially harmed by the Implementation Order." They further contended that the implementation order improperly "provides for a new, first-priority diversion by Bakersfield" and that the interim flow regime was not supported by scientific evidence.

Bakersfield insisted that its agreement to elevating its own rights above the water agencies was made "in good faith."

BBTK and WAC responded that they were "agnostic" as to the issues of priority between the City and the water agencies. They contended **[**18]** that the issues of priority between the City and the water agencies "are not part of this litigation."

WAC's Ex Parte Application

In an *ex parte* application dated December 18, 2023, WAC sought an "immediate order giving environmental flows of 200 cubic feet of water per second ('CFS') first priority to meet the bypass requirements of *Fish and Game Code, section 5937* and other public trust

interests." The application indicated that plaintiffs had become aware that the U.S. Army Corps of Engineers planned to reduce discharges from Isabella Dam to 25 cfs. WAC cited declarations from its experts stating that a flow of 200 cfs appeared to be sufficient to keep fish in good condition.

The January 9, 2024, Modification Order

On January 9, 2024, the court ordered that the water agencies' motion for reconsideration and stay were "denied in part and granted in part." The order **[*343]** also denied WAC's *ex parte* application, and overruled several evidentiary objections submitted by the parties.

The court observed that "recent circumstances demonstrate the potential for exceptionally low periodic flow rates from Lake Isabella, requiring this Court to make at least a partial determination regarding priority **[**19]** of flows."

The order stated, in pertinent part:

"The Court's "ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION" filed on November 9, 2023 is hereby modified as follows (changes are in *italics*):

"IT IS HEREBY ORDERED THAT:

"1. Plaintiff's Motion for Preliminary Injunction is granted;

"2. Defendant City of Bakersfield and its officers, directors, employees, agents, and all persons acting on its behalf are prohibited from operating the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition, *unless exempted by dire necessity to sustain human consumption through the domestic water supply*.

"3. Defendant, Plaintiffs, *and Real Parties in Interest* shall engage in good faith consultation to establish flow rates necessary for compliance with this order;

"4. The Court shall retain jurisdiction to ensure compliance with this order and to modify the terms and conditions thereof if reasonably necessitated by law or in the interests of justice. If after good faith consultation, Defendant, Plaintiffs, *and* ***[**20]*** *Real Parties in Interest* are not successful in agreeing to flow rates necessary for compliance, *any party* may file a request for this Court to make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after reasonable notice to *all the parties*;

"5. This order shall become effective immediately upon the posting of a bond in the amount of $1,000.00, or of cash or a check made out to the Clerk of the Kern County Superior Court in lieu thereof. The date and time of the posting of the bond, or of cash or a check in lieu thereof, shall be reflected in a Notice of Posting of Undertaking to be filed by Plaintiff and served on all parties.
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"6. This order shall remain in place until the conclusion of trial, further order of this Court, or further order by a court of higher jurisdiction."

"10. The Court's 'Order for Implementation of Preliminary Injunction' filed on November 14, 2023 is stayed."

We will refer to the January 9, 2024, order as the modification order.

Intervention of J.G. Boswell

On January 18, 2024, appellant J.G Boswell moved to intervene in the case. Pursuant to a stipulation with plaintiffs, Boswell was joined **[**21]** to the action as a real party in interest on February 15, 2024.

II. LEGAL ISSUES

Water rights

(3) In California, private parties cannot own water, but they can acquire the right to use water. (*Wat. Code, § 102*.) However, even the right to use water only extends to those uses of water that are "beneficial" and "reasonable." (*Cal Const., art. X, § 2*.)

(4) These water rights can arise through (1) ownership of land that is riparian (i.e., containing/bordering a watercourse), or (2) by appropriation. (*Wat. Code, §§ 101*, *102*.) After 1914, anyone seeking to appropriate water must get a permit or license from the State Water Resources Control Board (Board). (*Millview County Water Dist. v. State Water Resources Control Bd. (2014) 229 Cal.App.4th 879, 889 [177 Cal. Rptr. 3d*

735].) However, the Board has no permitting or license jurisdiction over riparian or pre-1914 appropriative water rights. (See Young v. State Water Resources Control Bd. (2013) 219 Cal.App.4th 397, 404 [161 Cal. Rptr. 3d 829].)

(5) "[O]nce rights to use water are acquired, they become vested property rights." (United States v. State Water Resources Control Bd. (1986) 182 Cal.App.3d 82, 101 [227 Cal. Rptr. 161] (United States).)

(6) This water rights regime operates alongside another legal principle: the public trust doctrine.

Public Trust Doctrine

(7) From Roman and English common law comes "the concept of the public trust, under which the sovereign owns 'all of its navigable waterways **[*345]** and the lands lying beneath them "as trustee of a public trust for the benefit of the people."'" (National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 434 [189 Cal. Rptr. 346, 658 P.2d 709] (Audubon).) An important corollary to this premise is that "parties **[**22]** acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust." (Audubon, supra, 33 Cal.3d at p. 437.) It has been assumed "that 'trust uses' relate to uses and activities in the vicinity of the lake, stream, or tidal reach at issue." (Id. at p. 440.)

(8) The public trust doctrine operates simultaneously with the water rights regime, with neither completely yielding to the other. (Audubon, supra, 33 Cal.3d at p. 445.) Both are crucial to give effect to the diverse interests in the proper allocation of water. (Id. at p. 445.) On the one hand, the state has a valid interest in preserving water courses for public trust purposes, including recreation and wildlife preservation. On the other hand, "[t]he population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values." (Id. at p. 446.)

(9) Consequently, "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." (Audubon, supra, 33 Cal.3d at p. 446.) At the same time, "[a]s a matter of practical necessity[,] the state may have to approve appropriations despite foreseeable harm to public trust **[**23]** uses." (Id. at p. 446.) "[A]nalysis of the public trust and reasonable use doctrines therefore must take into account not only the relevant environmental concerns, but also the beneficial uses served by [private] operations, the longevity and history of those operations, and the state policy favoring delivery and use of domestic water." (Casitas Mun. Water Dist. v. U.S. (Fed.Cl. 2011) 102 Fed.Cl. 443, 459.)

Fish and Game Code Section 5937

One legislative expression of public trust values is section 5937. (California Trout, Inc. v. State Water Resources Control Bd. (1989) 207 Cal.App.3d 585, 626 [255 Cal. Rptr. 184] (Cal-Trout I).) That statute provides in its first sentence: "The owner of any dam shall allow sufficient water at all times to pass through a fishway, *or in the absence of a fishway, allow sufficient water to pass over, around or through the dam*, to keep in good condition any fish that may be planted or exist below the dam." (§ 5937, italics added.)

The statute can trace much of its language back to 1915, when the Legislature charged the state board of fish and game commissioners with **[*346]** examining all rivers and streams naturally frequented by fish.[8] (Stats. 1915, ch. 491, § 1, p. 820.) If the commissioners concluded fish could not pass freely over and around any dam, the "owners or occupants" of the dam were required to construct a fishway. (*Ibid.*) The owners or occupants were required to "allow sufficient water at all times to pass through such fishway **[**24]** to keep in good condition any fish that may be planted or exist below said dam or obstruction." (*Ibid.*) In 1937, the present language extending the predecessor statute to "all releases of water 'over, around or through the dam' was enacted." (Cal-Trout I, supra, 207 Cal.App.3d at p. 600.)

Article X, Section 2

Text of Article X, Section 2

In 1928, the electorate adopted a constitutional provision proposed by the Legislature concerning the use of water in California. (Gin S. Chow, supra, 217 Cal.

[8] Other statutes concerning fish passage around or through dams existed even before that time.

at pp. 699–700.) This provision, currently designated California Constitution, article X, section 2, was passed in response to a Supreme Court decision holding that the reasonable use doctrine was inapplicable as between a riparian right-holder and an appropriator. (Cal-Trout I, supra, 207 Cal.App.3d at p. 623.) However, section 2 as ultimately enacted is far broader in scope than the specific context of disputes between riparian-right holders and appropriators. The current provision, which is almost identical in text to its original state,[9] states, in part: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised **[**25]** with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." (Cal. Const., art. X, § 2.)

California Constitution, article X, section 2 further provides that its terms may not be construed "as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled." (Cal. Const., art. X, § 2.)
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California Constitution, article X, section 2 concludes, "This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained." (Cal. Const., art. X, § 2.)

Scope and Effect

(11) California Constitution, article X, section 2 declares that the right to use water "does not extend to unreasonable use or unreasonable method of use or … diversion of water." (Peabody v. City of Vallejo (1935) 2 Cal.2d 351, 367 [40 P.2d 486].) The mandates of section 2 "are plain, they are positive, and admit of no exception." (Peabody, at p. 367.) They "apply **[**26]** to the use of all water, under whatever right the use may be enjoyed" and to "every method of diversion." (*Ibid.*) Indeed, section 2's reasonable use requirement "is now 'the overriding principle governing the use of water in California.'" (Light v. State Water Resources Control Bd. (2014) 226 Cal.App.4th 1463, 1479 [173 Cal. Rptr. 3d 200] (Light).)

Beneficial Use

(12) In addition to being reasonable, uses of water must be beneficial. The Legislature has expressly recognized several uses of water as beneficial. The highest use of water is "domestic purposes" (Wat. Code, § 106), such as drinking water, household uses, and domestic livestock. (Prather v. Hoberg (1944) 24 Cal.2d 549, 562 [150 P.2d 405]; Deetz v. Carter (1965) 232 Cal.App.2d 851, 855 [43 Cal. Rptr. 321].) The second highest use of water is for irrigation. (Wat. Code, § 106.) Other beneficial uses of water include recreation, and the preservation of fish and wildlife resources. (Wat. Code, § 1243, subd. (a).)

(13) It is important to note that while these uses are sometimes expressed in a hierarchical fashion ("highest use," "next highest use"), that does not mean that the highest use always prevails to the greatest extent possible over a lesser beneficial use. The reason is that, in addition to being beneficial, all uses of water must also be reasonable. "The fact that a diversion of water may be for a purpose 'beneficial' in some respect … does not make such use 'reasonable' when compared with demands, or even future demands, **[**27]** for more important uses." (Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 225 Cal.App.3d 548, 570–571 [275 Cal. Rptr. 250] (Imperial).) No single use of water—not even using water for domestic purposes—has an "absolute priority." (Audubon, supra, 33 Cal.3d at p. 447, fn. 30.)

Traditional Versus Self-executing Constitutional Provisions

Crucial to this case is understanding what California Constitution, article X, section 2 means when it establishes itself as self-executing.
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[9] **(10)** The provision was relocated, and a few instances of gendered language in the original were changed.

(14) Traditionally, constitutional provisions only operated upon the government. (*Winchester v. Howard (1902) 136 Cal. 432, 439 [69 P. 77]*.) They established limitations on the power of the Legislature, outlined government functions, or directed that legislation be crafted. (See *Ibid.*) However, around the turn of the 20th century, a different type of constitutional provision became common. These provisions were "of a statutory character" (*ibid.*) and operated not only upon the Legislature, but also applied directly in court cases. "These are in fact but laws, made directly by the people instead of by the [L]egislature, and they are to be construed and enforced, in all respects, as though they were statutes." (*Ibid.*)

This is the essence of a self-executing constitutional provision. Self-executing provisions are directly enforced by courts in individual cases like a statute. (See *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist. (1980) 26 Cal.3d 183, 198 [161 Cal. Rptr. 466, 605 P.2d 1]*.) In contrast, nonself-executing constitutional provisions only manifest effect in court **[**28]** cases *indirectly* through, for example, the statutes they authorize, repeal or prohibit.

(15) *California Constitution, article X, section 2* operates both upon the Legislature *and* is to be applied directly in court cases like a statute. First, it limits legislative authority by "supersed[ing] all state laws inconsistent therewith" (*Gin S. Chow, supra, 217 Cal. at p. 700*), and by prohibiting the Legislature from sanctioning manifestly unreasonable uses of water. (See *Cal-Trout I, supra, 207 Cal.App.3d at p. 625*.) Second, it directly governs decisions in individual court cases, like a statute. Put another way, its provisions are "now the supreme law of the state, *which the courts are bound to enforce, and it must be made effectual in all cases* and as to all rights not protected by other constitutional guaranties." (*Gin S. Chow, supra, 217 Cal. at p. 700*, italics added.)

Court Determinations

(16) Consequently, whether a use of water is beneficial and reasonable under *California Constitution, article X, section 2* "is a judicial question to be determined in the first instance by the trial court." (*Gin S. Chow, supra, 217 Cal. at p. 706*.) This analysis involves multiple factors (see *Wat. Code, § 100.5*) and requires the court to engage in "a comparison of uses." (*Imperial, supra, 225 Cal.App.3d at p. 570*.)

(17) "What constitutes reasonable use is case specific. 'California courts have never defined … what constitutes an unreasonable use of water, perhaps because the reasonableness of any particular use depends **[**29]** largely on the circumstances.'" (*Santa Barbara Channelkeeper v. City of San Buenaventura (2018) 19 Cal.App.5th 1176, 1185 [228 Cal. Rptr. 3d 584]*.) **[*349]** "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time." (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. (1935) 3 Cal.2d 489, 567 [45 P.2d 972]*.) Reasonableness under *California Constitution, article X, section 2* is a question of fact, and usually unresolvable on the pleadings. (*Channelkeeper, supra, 19 Cal.App.5th at p. 1185*.)

Uses of water found to be unreasonable by the Supreme Court include "flooding … land to kill gophers and squirrels … [citation]" and "the use of floodwaters solely to deposit sand and gravel on flooded land [citation.]" (*Light, supra, 226 Cal.App.4th at p. 1480*.)

Injunctions

(18) "We review an order granting a preliminary injunction, under an abuse of discretion standard, to determine whether the trial court abused its discretion in evaluating the two interrelated factors pertinent to issuance of a preliminary injunction—(1) the likelihood that the plaintiffs will prevail on the merits at trial, and (2) the interim harm that the plaintiffs are likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued. [Citation.] Abuse of discretion **[**30]** as to either factor warrants reversal."[10] (*Alliant Ins. Services, Inc. v. Gaddy (2008) 159 Cal.App.4th 1292, 1299 [72 Cal. Rptr. 3d 259] (Alliant)*.)

[10] The water agencies cite cases indicating that appellate courts apply greater scrutiny to mandatory injunctions compared to prohibitory injunctions. (See *Board of Supervisors v. McMahon (1990) 219 Cal.App.3d 286, 295 [268 Cal. Rptr. 219]*.) This sets off a dispute about whether the injunction was indeed prohibitory or mandatory. However, we conclude the injunction must be reversed on an issue of law even under the usual standard of review, and therefore do not delve into that dispute here.

(19) However, "[w]here the likelihood of prevailing on the merits depends upon a question of law such as statutory construction, the question on appeal is whether the trial court correctly interpreted and applied the law, which we review de novo." (*Alliant, supra, 159 Cal.App.4th at p. 1300*.)

III. CONTENTIONS OF THE PARTIES

The parties have identified various issues for the court, including: (a) Did the trial court fail to properly consider whether the requested use of water was reasonable; (b) Whether an injunction, if any, issued on remand should set a manner of compliance; (c) Whether the appeal by the water agencies **[*350]** was timely; (d) Did the trial court fail to impose the type of undertaking required by *Code of Civil Procedure section 529*; (e) Whether the implementation order violated the due process rights of the parties; (f) Whether the appeals are moot; and (g) Whether the injunction or implementation order was nonappealable. Each will be considered in turn.

IV. DISCUSSION

A. *The Court Erred by Failing To Properly Consider Whether the Requested Use of Water Was Reasonable*

The trial court ruled that *section 5937* is a "non-discretionary, specific legislative rule reflecting the public trust doctrine." Therefore, the trial court reasoned, **[**31]** "compliance with *Section 5937* is compulsory, as is compliance with any other state law." As a result, the court expressly refused to consider potential harms to the City or water agencies in "determin[ing] the applicability of *Section 5937* as an appropriate use of water."[11] The court held that the Legislature "already considered the competing uses of water when they passed *Section 5937*" and that the court was therefore without "jurisdiction" to reweigh competing interests.

Similarly, the Attorney General and Department of Fish and Wildlife (CDFW), as amici curiae, contend that "no reasonable use analysis is required" to adjudicate a violation of *section 5937*. BBTK similarly urges us to reject the notion that *California Constitution, article X, section 2*'s reasonableness requirement applies to using water to keep fish in good condition under *section 5937*. In its amicus curiae brief, California **[**32]** Trout contends precedent does not support the assertion that water uses are always **[*351]** subject to judicial determinations of reasonableness. WAC insists that *section 5937* requires sufficient waterflows for fish without exception.

In contrast, appellants contend that the court failed to conduct the constitutionally required analysis of reasonableness. They disclaim any suggestion that "flows can never be determined to be required on the Kern River under *Section 5937* due to the constitutional balancing of uses required in *Article X, Section 2*." They also disclaim any facial challenge to the constitutionality of *section 5937*.

On this issue, Bakersfield rejects the other respondents' position that *section 5937* "automatically and necessarily requires a court to impose injunctive relief calling for a certain amount of flows without considering or accounting for other uses, needs and priorities, including domestic supplies and needs."[12]

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[11] Specifically, the court's order stated: "It is important to note that the Court weighed the potential harms to the respective parties in this case *only on the procedural issue* of deciding whether a preliminary injunction should issue. *This discretionary analysis was not done as part of the process to determine the applicability of Section 5937 as an appropriate use of water. As discussed above, the State Legislature already considered the competing uses of water* when they passed *Section 5937* and came down on the side of minimum flow requirements. Therefore, *this Court has no jurisdiction to override the State Legislature and re-weigh the competing interests when it comes to addressing the underlying, substantive issue*. On that point, compliance with *Section 5937* is required as a matter of law." In our view, the court's refusal to consider impacts to all water users in its analysis of the "underlying, substantive issue" was error.

(20) The court did consider other water users for a different issue—i.e., the balance-of-harms analysis for issuing an injunction. For example, the court acknowledged that the water agencies' overall water demands were unknown, but nonetheless concluded that the Kern River's average flow of "726,000 acre-feet is an enormous amount of water that should suffice for the reasonable use of all interested stakeholders." However, whether a water use is "reasonable" under *California Constitution, article X, section 2* is not the same determination as whether the balance-of-harms militates in favor or against issuing an injunction.

[12] Bakersfield nonetheless supports the injunction because Bakersfield supports increased flows in the Kern River (as long as Bakersfield still gets the water it needs).

Analysis

(21) Under California Constitution, article X, section 2, "[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use." (Audubon, supra, 33 Cal.3d at p. 443.) Because section 2 is self-executing, this reasonableness requirement "must be made effectual in all cases." (Gin S. Chow, supra, 217 Cal. at p. 700, italics added.) Consequently, a court must always consider reasonableness whenever it would direct or adjudicate **[**33]** a particular use of water, even when applying statutes that do not expressly incorporate a reasonableness determination. The court's failure to do so here was error.

(22) Of course, this does not mean that statutes concerning the reasonable use of water, such as section 5937, are irrelevant or ineffectual. Applying the plain meaning of the word "reasonable," it is clear that California Constitution, article X, section 2 does not mandate a single, specific, optimal allocation of water among competing uses. Instead, it permits any of a number of water uses and allocations that fall within the rather broad limits of what is "reasonable" (and beneficial). When a statute requires a particular water use or allocation, the terms of the statute dictate the outcome unless section 2 requires otherwise (i.e., application of the statute alone would be a nonbeneficial or unreasonable use of water).[13] Thus, the Legislature has a central role to play in how water is used in the state. One of the only limits to its power is the prohibition on unreasonable or nonbeneficial uses of water. While this limit is modest, it *is* a limit, and is binding. **(23)** Unreasonable or nonbeneficial uses of water are never permitted under the Constitution, even **[*352]** if a statute would otherwise require **[**34]** it. (See Gin S. Chow, supra, 217 Cal. at p. 700 [§ 2 supersedes all state laws inconsistent therewith].)

(24) BBTK observes that the last sentence of California Constitution, article X, section 2 envisions the Legislature enacting laws in furtherance of its policy dictates.[14] It is true that the Legislature is empowered to enact statutes consistent with section 2. But this power does not alter the independent legal effect of section 2, which is a consequence of its self-executing nature. Thus, while the Legislature was certainly free to enact section 5937, it did not (and could not) alter the independent force of law exerted by section 2 on this and all other cases. And that independent force of law requires a consideration of reasonableness.

(26) Where plaintiffs, amici curiae and the trial court err is in concluding that because section 5937 reflects the Legislature's view of reasonableness, it is the *only* relevant manifestation of California Constitution, article X, section 2's reasonableness principle in this case. This approach would perhaps be proper if section 2 were not self-executing. In that circumstance, the "reasonable" use of water would merely be a policy goal to be given specific effect *solely* through implementing legislation like section 5937. (See Bautista v. State of California (2011) 201 Cal.App.4th 716, 726–727 [133 Cal. Rptr. 3d 909] [nonself-executing provisions are public policy statements not directly enforced by judiciary].) Then courts would only apply section 5937 as the implementing **[**35]** statute, and not the text of California Constitution, article X, section 2 itself. However, that is not the situation here because section 2 expressly states that it is self-executing. Consequently, while the Legislature is free to enact statutes that further section 2's goals, those statutes operate *alongside*[15]—rather than as the sole effective manifestation of—section 2's provisions.
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(28) BBTK also observes that section 5937 is a "valid" legislative enactment.[16] We agree. But California

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[13] This is the case unless superseded by another constitutional provision or federal law.

[14] **(25)** Plaintiffs cite Fullerton v. State Water Resources Control Bd. (1979) 90 Cal.App.3d 590 [153 Cal. Rptr. 518], for the proposition that California Constitution, article X, section 2 "consists of a broad policy declaration that the waters of the state should be placed to beneficial use in reasonable and nonwasteful ways, and then in the last sentence clearly and expressly delegates to the Legislature the task of ascertaining how this constitutional goal should be carried out." (Fullerton, at p. 597.) However, we find that description incomplete. Section 2 permits the Legislature to enact laws "in furtherance" of its goals, but also declares that it is self-executing (in the same sentence no less). Since section 2 is self-executing, it has not delegated the subject matter entirely to the Legislature. Rather, section 2 imbues its own provisions with independent legal effect while also enabling the Legislature to enact complementary statutes.

[15] **(27)** It may yield to California Constitution, article X, section 2 if there is a conflict as applied to a particular case.

[16] In a related vein, BBTK claims appellants ask this court to declare section 5937 unconstitutional. However, appellants have not made a challenge to the facial constitutionality of section 5937.

Constitution, article X, section 2's restrictions on all uses of water in the state are also valid. Section 5937 requires dam owners to allow sufficient flows to keep fish in good condition, and section 2 prohibits all unreasonable uses of water. Together, these two legal authorities provide that the in-stream use of water to keep fish in good condition is required to the extent that use is reasonable.

(29) To be clear, using water to keep fish in good condition will often be a reasonable use of water, depending on the circumstances. Indeed, it may well be a reasonable use of water in the present case; we make no determination on that issue here. The point is that no particular use of water is per se reasonable in *all* circumstances, and therefore reasonableness must always be evaluated before a court orders any particular water use. (See Audubon, supra, 33 Cal.3d at pp. 443, 447–448, fn. 30 [no use of water, **[**36]** including public trust uses, has an "absolute priority" over other uses].)

(30) For example, it would be clearly unreasonable for the government to allocate all of the state's water resources to the use of preserving wildlife and natural beauty, and none whatsoever to human sustenance (i.e., drinking water and irrigating crops).[17] Similarly, allocating all of the state's water resources to agricultural irrigation, and none whatsoever to the preservation of the environment would be unreasonable. Moving away from these extremes, one eventually enters the broad spectrum of allocations/water uses that are "reasonable." If the result mandated by a water use statute is reasonable and beneficial, then the statute is applied by its terms—even if the court is of the opinion that other uses/allocations of water would be superior in some way. However, if the use/allocation of water is unreasonable, California Constitution, article X, section 2 prohibits that use even if the statute would otherwise require it.
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Cal-Trout I

Both parties cite to Cal-Trout I. In that case, several petitioners sought the rescission of licenses issued by the Board to the City of Los Angeles and one of its departments. (Cal-Trout I, supra, 207 Cal.App.3d at p. 592.) The licenses **[**37]** validated the diversion of water from four creeks through dams for domestic uses and power generation in Los Angeles.

The petitioners relied on section 5946, which required certain licenses in District 4 ½ to be conditioned "upon full compliance with Section 5937." (Cal-Trout I, supra, 207 Cal.App.3d at p. 592.) Los Angeles mounted what the appellate court called an "implied facial challenge to [section 5946's] constitutional validity." (Id. at p. 593.)

The court rejected Los Angeles's contention. The court observed that, even under California Constitution, article X, section 2, the Legislature had broad authority to legislate in the area of water usage. However, the court acknowledged this authority was "not unlimited," in that the Legislature could not enact "a statute [that] sanctioned a manifestly unreasonable use of water." (Cal-Trout I, supra, 207 Cal.App.3d at p. 625.) The court concluded the "Legislature's policy choice of the values served by a rule forbidding the complete drying up of fishing streams in Inyo and Mono Counties in favor of the values served by permitting such conduct as a convenient, albeit not the only feasible, means of providing more water for L.A. Water and Power, is manifestly not unreasonable." (*Ibid.*) Consequently, the statute was not rendered unconstitutional by section 2.

(31) We find much to commend Cal-Trout I. We agree with its emphasis **[**38]** on the broad discretion granted to the Legislature in this area, and its acknowledgment of the modest limitations California Constitution, article X, section 2 does impose on legislative power.[18]

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[17] The Attorney General and CDFW reject a similar hypothetical offered by appellants where "the entire flow of the river had to be devoted to fish flow in order to preserve one fish, at the expense of all human use of water." They counter by saying that "[t]he trial court's application of the 'manifestly unreasonable' standard on remand, in determining the amount of flows needed to comply with Section 5937, will obviate the potential for any absurd results." But that is no answer to the hypothetical. The hypothetical is a situation where fish could *only* be kept in good condition by devoting the *entire* watercourse to fish flow at the expense of all human use of water. If this resulted in insufficient drinking water for humans, then using the water to comply with section 5937 would be unreasonable. In that situation, California Constitution, article X, section 2 would not just limit the breadth of an injunction, it would prohibit an injunction altogether.

[18] **(32)** We do not deny that applying California Constitution, article X, section 2 has important policy implications for courts, and that concepts like "reasonable" and "unreasonable" can be difficult to define. But nearly all cases acknowledge that judicial determinations of reasonableness come into play *at some point*. (See Cal Trout I, supra, 207 Cal.App.3d at p. 625.) At the end of the day, it remains one of the oldest jobs of the judiciary to determine the meaning and application of the

However, that case largely **[*355]** concerned itself with the constitutionality of section 5946 (and, by extension, 5937). However, as we have noted above, section 2 is not *merely* a limitation on the Legislature's power. Consequently, the conclusion that section 5937 is constitutional does not end the role of section 2 in a water use case. In our view, its provisions must also be given direct legal effect in individual cases like a statute.

BBTK also cites language from a federal district court case indicating that, through section 5937, "'the Legislature has already balanced the competing claims for water … and determined to give priority to the preservation of their fisheries.'" (Natural Resources Defense Council v. Patterson (E.D.Cal. 2004) 333 F.Supp.2d 906, 918; see also California Trout, Inc. v. Superior Court (1990) 218 Cal.App.3d 187, 201 [266 Cal. Rptr. 788] (Cal-Trout II).) But the fact that section 5937 is one expression of the Legislature's policy preferences does not alter the fact that California Constitution, article X, section 2 must nonetheless be applied in this and every case. Often, applying section 2 will ultimately pose no barrier to the full implementation of the Legislature's water policy. But the fact remains that any use of water a California court might order must be reasonable, even if a **[**39]** statute would otherwise require an unreasonable use of water in a particular case.

We also note that immediately after the section cited by BBTK, Patterson states that the "priority" established by section 5937 "must be reconciled with" another law applicable in that case, the Central Valley Project Improvement Act. (Patterson, supra, 333 F.Supp.2d at p. 918, fn. 7.) The court ultimately found the two laws compatible, but the acknowledged need for reconciliation shows that section 5937 does not always and necessarily trump all other legal authorities applicable to a given case.

Moreover, Patterson does not analyze or apply California Constitution, article X, section 2, so it offers little guidance or precedent on the core issue presented in this case. Additionally, as a federal district court case discussing a state statute, Patterson is not binding on this court.

Finally, Patterson was applying section 5937 but was citing language from Cal-Trout II that addressed section 5946. We do acknowledge that *some* of the reasoning from the Cal-Trout cases applies to section 5937. However, this particular language from Cal-Trout II cannot be exported wholesale from section 5946 to section 5937. The opinion stated that the Legislature "already balanced the competing claims for water *from the streams affected by* section 5946 and determined to give priority to the preservation of their fisheries." (Cal-Trout II, supra, 218 Cal.App.3d at p. 201, italics added.) And section ***[*356]*** 5946 applies expressly **[**40]** and exclusively to District 4 ½, which spans portions of Mono and Inyo counties. (§ 11012.) "[T]he bill by which … the predecessor to section 5946, became law carried an urgency clause explaining its necessity. It said: '*Proposals for diversions of water in District 4 ½* are *now being considered* which, if effected will destroy all of the fish in large sections of the streams *in that district* and interfere with the economy *in* [*an*]*area which is dependent to a large extent on recreation*. It is necessary that this act take effect immediately to prevent further destruction of the fish life *in District 4 ½*.' (Sen. Bill No. 78 (1953 Reg.Sess. as introduced Jan. 6, 1953 … .)" (Cal-Trout I, supra, 207 Cal.App.3d at p. 601, italics added & deleted.) Thus, section 5946 does reflect a consideration of the specific tradeoffs applicable to "streams in *that* district" and ultimately a choice to prioritize fisheries in that area. Just because section 5946 reflects the Legislature's balancing of the specific, localized needs pertaining to the streams of District 4 ½ does not mean the Legislature engaged in a similar determination as to all waterways statewide under section 5937.

Conclusion

(33) In sum, because of California Constitution, article X, section 2, no judicial adjudication of competing water

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Constitution—a document which often speaks in generalities. (See, e.g., Clausing v. San Francisco Unified School Dist. (1990) 221 Cal.App.3d 1224, 1238 [271 Cal. Rptr. 72] [unelaborated constitutional right to "privacy" is self-executing].) As a result, "what is a reasonable or unreasonable use of water is a judicial question to be determined in the first instance by the trial court." (Gin S. Chow, supra, 217 Cal. at p. 706.) It is often a difficult job, but no more so than "determining probable cause, reasonable doubt, reasonable diligence, preponderance of evidence, a rate that is just and reasonable, public convenience and necessity, and numerous other problems which in their nature are not subject to precise definition but which tribunals exercising judicial functions must determine." (*Ibid.*)

Moreover, many of these same concerns would apply to *Cal-Trout I*'s principle that California Constitution, article X, section 2 prevents the Legislature from sanctioning "a manifestly unreasonable use of water."

uses is complete until the court assesses whether **[**41]** the use is beneficial and reasonable. Since the reasonable-use requirement applies to all uses of water in the state—including in-stream public trust uses like the one envisioned by section 5937—the trial court's approach of applying only the terms of section 5937 without giving direct effect to the reasonableness provisions of section 2 as to the "underlying, substantive issue" of this case was error.

(34) On remand, the court must determine whether and to what extent using the waters of the Kern River to keep fish in good condition is a reasonable and beneficial use of water under California Constitution, article X, section 2. Such a determination looks to the totality of the circumstances, which include effects on fish and other wildlife (Wat. Code, § 1243, subd. (a)), recreation (*ibid.*), water quality and the transportation of adequate water supplies where needed (United States, supra, 182 Cal.App.3d at p. 130), water supplies for the domestic needs of people such as the residents served by the City of Bakersfield (Wat. Code, § 106), irrigation (Wat. Code, § 106), effects on other users of the watercourse[19] (In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 354 [158 Cal. Rptr. 350, 599 P.2d **[*357]** 656]), and any effects on "appropriations essential to the economic development of this state" (Audubon, supra, 33 Cal.3d at p. 445; see also Gin S. Chow, supra, 217 Cal. at pp. 701–702).

B. *If, After Performing the Analysis Required by This Opinion, the Court Issues Another Preliminary Injunction, the Injunction Should Set the Manner of Compliance* **[**42]**

While we are reversing the order on other grounds, we will briefly address the parties' contentions regarding whether the injunction was sufficiently definite.

(35) A court directive that requires one to "'guess at its meaning and differ as to its application violates the first essential of due process of law.'" (In re Berry (1968) 68 Cal.2d 137, 156 [65 Cal. Rptr. 273, 436 P.2d 273].) Consequently, "'an injunction must not be uncertain or ambiguous and the defendant must be able to determine from the order what he may and may not do.'" (City of Redlands v. County of San Bernardino (2002) 96 Cal.App.4th 398, 415 [117 Cal. Rptr. 2d 582].) For example, courts may not issue broad injunctions simply requiring that the defendant "'obey the law.'" (Id. at p. 416; see Cook v. Craig (1976) 55 Cal.App.3d 773, 786 [127 Cal. Rptr. 712]; see also Long Beach Memorial Medical Center v. Kaiser Foundation Health Plan, Inc. (2021) 71 Cal.App.5th 323, 343 [286 Cal. Rptr. 3d 419].)

(36) It is the burden of the party seeking injunctive relief to formulate the nature of the remedy sought. (O'Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1481 [47 Cal. Rptr. 3d 147] (O'Connell).) The moving party must show not only that they are entitled to a preliminary injunction, but also that they are entitled to the particular breadth of injunctive relief sought. (See Anderson v. Souza (1952) 38 Cal.2d 825, 843 [243 P.2d 497] (Anderson).)[20]

Here, the parties dispute whether the court erred in failing to set a flow rate requirement in the injunction. Specifically, the injunction did not say *how much* water Bakersfield must let flow past the weirs in order to keep downstream fish in good condition. Instead, the injunction broadly required that the weirs **[**43]** not be operated in a "manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition."
[*358]

Of course, if the trial court decides not to issue the preliminary injunction on remand, this point is moot. However, we will offer some guidance in case the court does decide to issue some form of preliminary injunction on remand.

First, we think we understand what the court was trying to achieve by its January 9, 2024, order. A flow rate set by agreement of all the parties would have some advantages to one set unilaterally by the court. However, such an agreement may be unlikely.

(37) Moreover, the reasonableness analysis required by California Constitution, article X, section 2 requires at least an estimate of how much water previously used for

[19] This would include the increased flood risks Boswell claims will result from an injunction. Boswell may raise these claims on remand for the court to consider in its reasonable use analysis.

[20] BBTK reverses this burden, arguing it is *not* their burden "to prove how much water is required to keep fish in good condition, but rather the burden of the parties wishing to divert water from a river to prove that their diversions will not be in violation of the law before those actions are taken." Not so. BBTK, as moving parties, bears the burden of proving entitlement to the injunctive relief they seek. (See O'Connell, supra, 141 Cal.App.4th at p. 1481; see also Anderson, supra, 38 Cal.2d at p. 843.)

domestic consumption, irrigation, etc., will now be dedicated to the in-stream public trust use embodied in section 5937. This is because the reasonableness of a particular use of water depends, in part, on how much water is being committed to that use (and thereby being rendered unavailable for other beneficial uses).

Consequently, if the court issues an injunction on remand, it would be advantageous to immediately set an objective standard for compliance upon **[**44]** a proper showing by the moving parties. (Cal-Trout II, 218 Cal.App.3d at p. 209 [appropriate for court to hold hearing to determine "amount of water that must be released to attain compliance with the statute"].) The court could impose a particular volume of flow or a percentage of natural flows, so long as the requirement is reasonable[21] and supported by substantial evidence that it would keep fish in good condition. Such a standard would respect the parties' due process rights by explaining exactly how to comply with the injunction. Additionally, it will properly place the burden on the moving parties to formulate—and prove entitlement to—the specific injunctive relief being requested. (See O'Connell, supra, 141 Cal.App.4th at p. 1481; see also Anderson, supra, 38 Cal.2d at p. 843.) Finally, it will place the trial court in a better position to quickly hold parties accountable and prevent further harm to fish in case of noncompliance.

(38) BBTK points out that the trial court's approach of having the parties meet and confer would avoid protracted litigation and "disobedience of the statute." While encouraging collaboration between the parties is undoubtedly a useful goal, the chronology here is problematic. The trial court granted the injunction and then had the parties confer as to appropriate flow **[**45]** rates. But knowing at least an estimate of what flows are needed to keep fish in good **[*359]** condition is a prerequisite for evaluating whether the injunction can be granted in the first place. This is because determining whether a water use is reasonable under California Constitution, article X, section 2 depends on the facts of the case. A particular use of water when the supply is plentiful may become unreasonable when supply is lower. Without a grasp on how much water the injunction would take from the other uses to which it was previously being put, the court cannot properly perform the "comparison of uses" (Imperial, supra, 225 Cal.App.3d at p. 570) analysis required by section 2. Consequently, in our view a consideration of reasonableness cannot be deferred until the remedy stage, as the Attorney General and CDFW suggest.

C. *The Water Agencies' Appeal of the Bond Was Timely*

The water agencies next challenge the court's decision to require only a nominal bond of $1,000. BBTK first responds that the appeal of that decision was untimely. Not so.[22]

(39) Unless a statute or rule provides otherwise, a notice of appeal must be filed on or before the earliest of: (1) 60 days after the court clerk serves the judgment or notice of entry of judgment, (2) 60 days after a party serves the prospective **[**46]** appellant with the judgment or notice of entry of judgment, (3) 180 days after entry of judgment. (*Cal. Rules of Court, rule 8.104(a)(1)*.)[23]

(40) One rule that "provides otherwise" is *rule 8.108*. (See *rule 8.104(a)(1)* ["Unless … *rule[] 8.108* … provide[s] otherwise, a notice of appeal must be filed."].) Under that rule, if a party serves and files a motion for reconsideration, the time for appeal is extended to the earliest of: (1) 30 days after the court clerk or a party serves an order (or notice of order) denying the motion, (2) 90 days after the first motion to reconsider is filed, (3) 180 days after entry of the appealable order. (*Rule 8.108(e)*.) We will calculate each of these dates to determine the earliest.

The record contains a notice of entry of the order denying (in part) the motion for reconsideration, bearing the date January 17, 2024. Thirty days later would be February 16, 2024.
[*360]

[21] Even if the trial court concludes the injunction should be granted, the reasonableness requirement would also be relevant in determining a flow rate. For example, it would likely be an unreasonable use of water to devote substantially more water to fish flows than necessary to keep fish in good condition.

[22] We also reject WAC's argument that appellants waived their objections to the nominal bond by failing to "brief" the modification order. The water agencies challenge the setting of a nominal bond which was effected by the injunction order, not the modification order. And as to that issue, appellants have thoroughly briefed the matter. That they do not assert this argument against the modification order—which made no changes to the bond whatsoever—does not effect a forfeiture or waiver of their challenge to the injunction order's setting of a nominal bond.

[23] Subsequent rule references are to the California Rules of Court.

The water agencies filed their motion for reconsideration on November 21, 2023. Ninety days later would be February 19, 2024.

Finally, the order granting the injunction and imposing the nominal bond (i.e., the appealable order) was filed on November 9, 2023. One-hundred and eighty days later would be May 7, 2024.

The earliest of these three dates is February 16, 2024. Therefore, February **[**47]** 16, 2024, was the deadline to file a notice of appeal here. (*Rule 8.108(e)*.) The water agencies' notices of appeal were filed on January 18, 22, 30, 31, and February 1, 2024.

D. *The Trial Court Erred in Failing To Impose the Type of Undertaking Required by Code of Civil Procedure Section 529*

(41) "On granting an injunction, the court or judge *must* require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." (*Code Civ. Proc., § 529, subd. (a)*, italics added.) There are four exemptions from this requirement: (1) dissolution of marriage proceedings, (2) injunctions under the *Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.)*, (3) most government officials/entities, and (4) injunctions against distributing sexually explicit images/videos of another. (*Code Civ. Proc., § 529 subd. (b)*.) There is no stated exemption for environmental litigation. (*Ibid.*)

BBTK says state courts have not addressed whether courts are precluded from ordering a nominal bond or waiving the bond requirement entirely. But the statute itself quite clearly addresses whether a court may dispense with **[**48]** the bond requirement when it says courts "must" (*Code Civ. Proc., § 529, subd. (a)*) require an undertaking, except in certain enumerated circumstances that are not present here.

(42) Not only does the statute preclude waiver of the bond requirement altogether, it also precludes nominal bonds. The statute specifically requires that the court require an undertaking "to the effect that the applicant will pay to the party enjoined any damages … the party may sustain by reason of the injunction." (*Code Civ. Proc., § 529, subd. (a)*.) This means "the trial court's function is to estimate the harmful effect which the injunction is likely to have on the restrained party, and to set the undertaking at that sum." (*Abba Rubber Co. v. Seaquist (1991) 235 Cal.App.3d 1, 14 [286 Cal.Rptr. 518] (Abba Rubber)*.) Nominal bonds untethered to potential damages do not satisfy this requirement. **[*361]**

BBTK cites to older federal cases as a "useful guide" suggesting nominal injunction bonds are permissible in environmental litigation. (See *People of State of Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency (9th Cir. 1985) 766 F.2d 1319, 1325*; *Friends of the Earth, Inc. v. Brinegar (9th Cir. 1975) 518 F.2d 322, 323*.) We question how useful these cases are, as they were employing a different standard. (See *Tahoe Regional Planning Agency, supra, 766 F.2d at p. 1325* [Fed. Rules Civ.Proc. required security "'in such sum as the court deems proper.'"].)

(43) In any event, *Code of Civil Procedure section 529* expressly addresses the situations where it does not apply. It lists four exemptions across a variety of contexts, and environmental **[**49]** litigation is not one of them. (See *Code Civ. Proc., § 529, subd. (b)*.) Whether it should be is an argument for the Legislature, not the courts.[24] We cannot insert an exception to *Code of Civil Procedure section 529*, regardless of its merits as a matter of public policy. (See *Code Civ. Proc., § 1858*.)

Consequently, we direct that "[n]o further preliminary injunction shall be issued unless its issuance is conditioned upon the furnishing of an adequate undertaking. We do not purport to determine what an

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[24] **(44)** BBTK observes that damage to the environment is often irreversible. But most preliminary injunctions involve the prospect of irreversible damage. (See *City of Torrance v. Transitional Living Centers for Los Angeles, Inc. (1982) 30 Cal.3d 516, 526 [179 Cal. Rptr. 907, 638 P.2d 1304]*; *7978 Corporation v. Pitchess (1974) 41 Cal.App.3d 42, 46 [115 Cal. Rptr. 746]*.) Yet bonds "must" be imposed all the same. (*Code Civ. Proc., § 529, subd. (a)*.)

Moreover, the moving party will only need to pay the enjoined party "if the court finally decides that the applicant was not entitled to the injunction." (*Code Civ. Proc., § 529, subd. (a)*.) In other words, only when it turns out there was no environmental damage, or that the enjoined party did not cause it, etc.

In any event, whether to add environmental litigation to *subdivision (b) of Code of Civil Procedure section 529* is a question for the Legislature, not the courts.

adequate amount would be. Rather, we leave that determination to the trial court." (*Abba Rubber, supra, 235 Cal.App.3d at p. 22*.)

E. *The Implementation Order Violated the Due Process Rights of Real Parties in Interest*

Law

(45) "[O]nce rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process." (*United States, supra, 182 Cal.App.3d at p. 101*.) **(46)** At a minimum, due process requires notice and an opportunity to be heard. (*Menefee & Son v. Department of Food & Agriculture (1988) 199 Cal.App.3d 774, 781 [245 Cal. Rptr. 166]*.)
[*362]

Stipulations

(47) A stipulation is a voluntary agreement between opposing parties concerning some relevant point. (Black's Law Dictionary (12th ed. 2024), p. 1718 (stipulation).) Like any other agreement or contract, it is essential that the parties or their counsel assent to the terms of a stipulation. (*Palmer v. City of Long Beach (1948) 33 Cal.2d 134, 142 [199 P.2d 952]*.) "A stipulation does not affect parties who do not enter into **[**50]** it." (See 3 Cal.Jur.3d (2024) Agreed Case and Stipulations, § 40.)

Analysis

The court's November 14, 2023, order was a clear violation of the due process rights of the real parties in interest.[25] Despite over a century of contracts, settlements and court decrees governing the rights to the waters of the Kern River, the implementation order established an interim regime whereby Bakersfield would receive the water needed for its "municipal needs *and demands*" before the water agencies received any of their contracted water. In this way, the order affected the water delivery rights of some parties (i.e., the water agencies) on the basis of a stipulation made *solely* by other parties (plaintiffs and Bakersfield). Indeed, it was an agreement whereby a stipulating party apparently stood to benefit at the expense of the nonstipulating parties.

Status of the Water Agencies as Parties

Here, Bakersfield argues that the water agencies are not "actual parties" to the case at all, and are only referred to in the operative complaint as real parties in interest. Bakersfield offers no legal authority for the proposition that a real party in interest named in the complaint and possessing a legitimate interest in the case is not truly a party to an action. (See **[**51]** *Sonoma County Nuclear Free Zone v. Superior Court (1987) 189 Cal.App.3d 167, 173–175 [234 Cal. Rptr. 357]*.) Moreover, it was Bakersfield that argued in its demurrer below that the water agencies were necessary and indispensable parties to this action. Importantly, the court sustained the demurrer on that ground and the complaint was amended to again include the water agencies. They are undoubtedly parties to this action.

Moreover, even if the water agencies should not be considered "parties" to the present action, that would actually *undermine* the trial court's jurisdiction to alter their water delivery rights. Surely the court would be on *less* tenable ground altering the contractual rights of a nonparty rather than a party.
[*363]

Finally, the immediate issue is not whether the water agencies are considered parties *to the action*. Instead, the true issue is whether they needed to be parties *to the stipulation* before it could be used as the basis for detrimentally altering their water delivery rights.

The Implementation Order Plainly Affected the Water Agencies

Bakersfield next asserts the implementation order does not mention or reference the appellants. This is, quite simply, not true. The implementation order stated: "Bakersfield will implement, on an interim basis, an Interim Flow Regime ('Interim **[**52]** Flow Regime') for the Kern River whereby forty percent (40%) of the total measured daily flow of available water will remain in the river channel past the McClung Weir, subject to Bakersfield's municipal needs and demands (currently 130,000 acre-feet per year, with an average daily flow of 180 cubic feet per second ('cfs')). By way of example, using the average annual Kern River flow as stated in

[25] Appellants also suggest the order was improper under ***rule 3.1312*** because there was no longer a pending motion before the court. We do not rely on this ground in reversing the order.

the Ruling on page 14 of 726,000 acre-feet per year, which converts to approximately 1,000 cfs average daily flow, Bakersfield will multiply that amount by 40% to arrive at 400 cfs to be left in the river for interim fish flows. Bakersfield will allocate 180 cfs of the 1000 cfs flow for the City's demands, leaving a balance of 820 cfs. 400 cfs will be left in the river for fish flows, and the remaining 420 cfs of flow (1,000 cfs minus 180 cfs and 400 cfs) would be available for diversion by *the Real Parties in Interest*." (Italics added.)

The implementation order expressly references the water agencies (i.e., the real parties in interest). And in so doing, it expressly subjugates their diversions of Kern River waters to the "municipal needs and demands" of Bakersfield. The suggestion that the **[**53]** implementation order "only … restricted Bakersfield" and did not restrict or limit the water agencies is plainly contradicted by the record.

Bakersfield's Claim of Good Faith Conduct

Bakersfield questions how it could be viewed as having made a self-interested deal since it was merely complying with the trial court's order to consult on flow rates. The answer is that the stipulation Bakersfield submitted to the trial court did more than establish a flow rate. It *also* granted Bakersfield a top-priority interim right to water, with the water agencies receiving water only after Bakersfield's needs and demands were met. It is this aspect of the order that apparently benefited Bakersfield at the expense of the water agencies without their assent.
[*364]

An Opportunity To Participate in Discussions Does Not Obviate Need for a Party To Agree to Stipulation Arising from Those Discussions

In a later order, the court said that the injunction "did not require the Real Parties in Interest to participate in the good faith consultations because they do not operate the weirs subject to the injunction." Perhaps that explanation would suffice if the implementation order had only touched upon operation of the **[**54]** weirs. However, it also granted Bakersfield an interim top-priority right to water deliveries, and provided that the water agencies would only receive water thereafter. This aspect of the order clearly required the water agencies' agreement to the stipulation.[26]

The later order also said there was some evidence the water agencies were invited to participate in the consultation contemplated by the implementation order, but declined. But participation in the consultation is not the same as agreeing to a particular stipulation. Even if the water agencies had an opportunity to attend the consultations, that does not mean they are bound to agreements made solely by other parties at, or as a result of, those consultations.

Requested Relief

We also note the implementation order granted relief that the motion did not request. The motion expressly stated that it was *not* seeking to change the City's management of the "allocations" of Kern River waters. Plaintiffs reiterated their position in response to the motions for reconsideration, observing that the issues of priority between the City and local water agencies "are not part of this litigation." Nonetheless, the implementation order established **[**55]** that the City's use of water for "municipal needs and demands" would be satisfied before the water agencies would receive their contracted water.[27]

Water Agencies' Ability To Participate in Hearing on Motion Does Not Suffice

This fact undermines Bakersfield's next contention. Bakersfield suggests that the water agencies' opportunity to participate at the hearing on the **[*365]** motion for preliminary injunction was sufficient due process. Perhaps that would be true if the motion for preliminary injunction sought alteration of the water agencies' rights relative to Bakersfield. That would put the water agencies on notice that they needed to

[26] Alternatively, there could be a motion/petition/complaint in court seeking such relief with a proper legal and factual basis, and an opportunity to be heard on the issue.

[27] In defending the implementation order, Bakersfield notes that the court did not know what the water agencies' overall annual water demand was. Bakersfield faults the water agencies for this fact. But, again, the motion for preliminary injunction did not seek an alteration in the respective priorities of the water delivery rights of Bakersfield and the water agencies. Consequently, any alleged failure to rebut the factual predicates of such an alteration cannot be used to defend the implementation order.

oppose that request for relief at the hearing. But instead, the motion did the opposite, stating that "[t]he relief sought is narrowly focused. It does not seek to change the City's management of the Kern River allocations." Consequently, the hearing on the motion did not afford the water agencies sufficient opportunity to oppose altering the allocations of Kern River waters because the motion offered no notice such relief was being requested (and instead disclaimed such relief).

The Fact That Section 5937 Might Result in Less Water for Users Does Not Grant Court Authority ***[**56]*** *To Alter the Relative Priority of Claims as Between Users*

(48) WAC argues that the various water delivery contracts are subject to the "legal priority" of statutes like *section 5937*. We agree that courts may, in some circumstances, require water to flow past a dam even though such an order would make full satisfaction of private water delivery contracts impossible. But *section 5937* does not address how that shortfall is to be distributed among the water users. Thus, the implementation order went beyond the authority granted by *section 5937* by altering the priority of rights *between* Bakersfield and the water agencies. *Section 5937* requires that sufficient water flow past a dam—it does not alter who is entitled to the water that so passes. The consequences of any shortfall are governed by other bodies of law, including the various water contracts, water rights licenses and any other applicable statutes. As plaintiffs themselves have quite correctly observed previously, the issues of priority between the City and local water agencies "are not part of this litigation."

(49) Bakersfield also contends, "[t]he trial court's protection and prioritization of Bakersfield's domestic water supplies and needs, over the lower priority diversions of Appellants **[**57]** for agricultural uses, was consistent with, supported by, and, in fact *required*, by well-established California statutes establishing a priority for domestic uses of water over agricultural uses." (Italics added.) This argument is profound in scope, but erroneous. It posits that statutory water use preferences *require* courts to alter the respective water delivery rights established by existing contracts and prior court decrees, in order to ensure a statutory "higher use" is satisfied before a lower one. This is incorrect. For one, the statutory policy in favor of domestic purposes (*Wat. Code, § 106*) is followed shortly thereafter by an explanation that "[t]he declaration of the policy of the State in this chapter is not exclusive, and all other or further declarations of policy in th[e Water] code shall be given their full force and effect." (*Wat. Code, § 107*.)
[*366]

Second, while domestic use is prioritized over all other uses, irrigation is similarly prioritized over all other uses except domestic ones. (*Wat. Code, § 106*.) Applying Bakersfield's reasoning, Bakersfield should get all of the water needed for domestic purposes *and the water agencies should get all of the water needed for irrigation* before *any* water is devoted to keeping **[**58]** fish in good condition. But that is not how the law of water use works. No single use of water—not even using water for domestic purposes—has an "absolute priority."[28] (*Audubon, supra, 33 Cal.3d at p. 447, fn. 30*.)

(51) Finally, even if water use preference statutes operated in the manner suggested by Bakersfield (they do not), judicial relief would still be subject to procedural prerequisites. Judicial relief could only be granted after either an agreement of *all* affected parties, or after a prayer for relief in a proper petition or complaint and an opportunity for all parties to be heard. Here, there is no stipulation signed by all parties altering the relative priority of water rights between Bakersfield and the water agencies, nor has there been a prayer for such relief followed by an opportunity for all parties to be heard on the issue.[29]

F. *The Appeal Is Not Moot*

Finally, plaintiffs suggest that the appeals of the implementation order are moot because the trial court stayed it in the modification order.

(52) "A case becomes moot when events '"render[] it impossible for [a] court, if it should decide the case in favor of plaintiff, to grant him any effect[ive] relief."'" (*In re D.P. (2023) 14 Cal.5th 266, 276 [303 Cal. Rptr. 3d 388, 522 P.3d 645] (D.P.).)*

We acknowledge that the modification order remedied

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[28] **(50)** To be clear, the Legislature's preference for domestic uses of water, followed by irrigation, must be taken into account by courts determining the reasonable use of water. What we reject is the categorical approach that the highest hierarchical use of water must be satisfied in full before the next highest use can be accommodated to any extent.

[29] Bakersfield notes that the court set water pumping rates in *County of Inyo v. City of Los Angeles (1976) 61 Cal.App.3d 91 [132 Cal. Rptr. 167]*. But that was done after an evidentiary hearing on that exact issue. (*Id. at p. 94*.)

at least **[**59]** some of the due process issues present in the implementation order. But that does not render a challenge to the implementation order moot. The modification order stayed, rather than vacated, the implementation order. Stays, of course, can be lifted. Indeed, Bakersfield requests in this very appeal that the implementation order be reinstated. Thus, the implementation order still exists. And since appellants are requesting on appeal the order be vacated, rather than merely stayed, it is clear they have not yet received the relief they currently seek. We **[*367]** can grant effective relief by reversing the implementation order and thereby prevent it from being "un-stayed." Consequently, the appeal of the implementation order is not moot.

(53) In any event, "[e]ven when a case is moot, courts may exercise their 'inherent discretion' to reach the merits of the dispute." (*D.P., supra, 14 Cal.5th at p. 282*.) We will exercise that inherent discretion here. If the implementation order is truly of no effect in light of the modification order, as plaintiffs suggest, then they must concede our reversal of the implementation order causes no harm. Conversely, if our reversal of the implementation order accomplishes something beyond the trial **[**60]** court's stay, then plaintiffs must concede the appeal is not moot.[30]

Conclusion

It was error for the court to grant relief that was not requested by the moving parties pursuant to a stipulation that did not include the parties to be apparently disadvantaged thereby. Accordingly, we reverse the implementation order.

G. *The Modification Order Did Not Render the Injunction or Implementation Order Nonappealable*

WAC argues that because the modification order was appealable, it rendered the injunction and the implementation order *non*appealable.

(54) First, WAC emphasizes that an order denying a motion for reconsideration is not separately appealable. However, the rule that denials of reconsideration are not *separately* appealable is only material when a party attempts to appeal only the denial of reconsideration and not the underlying order. Here, appellants did appeal the underlying orders. When a party appeals the underlying order, denial of reconsideration *is* reviewable. (*Code Civ. Proc., § 1008, subd. (g)*.)

WAC next observes that orders granting reconsideration are separately appealable. As a result, WAC argues the injunction and implementation order **[*368]** are not appealable. There are several problems with this contention. First, appellants' **[**61]** arguments on the merits are largely directed to issues on which reconsideration was *not* granted—e.g., the granting of an injunction requiring Bakersfield to operate the weirs in a manner that keep downstream fish in good condition, and the setting of a nominal bond.

(55) Second, the fact that an order granting reconsideration (in part) happens to quote text from a prior order, does not render the prior order nonappealable. To the contrary, an attack on an injunction is properly brought as an appeal to the injunction, not an appeal of the modifications to the injunction. The modification order was not an injunction itself. It was a modification of an existing injunction. The modification order makes this clear, stating the injunction "is hereby *modified* as follows (changes are in italics)" (Italics added.) Its verbatim quotations of the injunction were offered not to establish another injunction of independent force and effect, but instead to provide context for the italicized provisions the court *was* adding to/deleting from the injunction. In other words, the substance and effect of the modification order is embodied in its italicized text, not the unchanged quotations from the injunction. **[**62]** [31]

Even if the modification order's verbatim quotations of the original injunction were meant to have some substantive effect beyond providing context for what the order was actually accomplishing through its italicized text,[32] that effect would obviously be to *deny* reconsideration as to the unaltered text.[33] Such denials

[30] In contrast, WAC's argument in its respondent's brief that the injunction should not be stayed on appeal is moot, because we are reversing the injunction. Moreover, this issue was previously addressed in writ of supersedeas proceedings in this court.

[31] Moreover, even if the modification order were nonreviewable in this appeal, the reversal of the underlying reviewable order would render its modifications meaningless and ineffectual.

[32] This is a premise we do not accept.

[33] In their motion for reconsideration, the water agencies argued "The California Constitution's mandate for reasonable use requires consideration of all relevant facts and circumstances and the balancing of all the relevant interests. [Citations.] The Court must require that evidence be brought

are cognizable on appeal from the underlying orders.[34] (See *Code Civ. Proc., § 1008, subd. (g)*.)

DISPOSITION

The order dated November 9, 2023, granting a preliminary injunction and setting a nominal bond is reversed. The order dated November 14, 2023, **[*369]** implementing the preliminary injunction is reversed. The matter is remanded for proceedings consistent with the views expressed in this opinion. Appellants are awarded costs.

Detjen, Acting P. J., and Peña, J., concurred.

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before it on a properly noticed motion, with opportunity for all parties to be heard and to present evidence regarding these critical questions."

[34] As a result of our conclusions in the previous sections of this opinion, we do not address the remaining contentions.

Bring Back the Kern, et al. v. City of Bakersfield
Kern County Superior Court Case No. BCV-22-103220-GAP

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; my electronic service address is jestabrook@somachlaw.com; I am over the age of 18 years and am not a party to the foregoing action.

On May 30, 2025, I served the following document(s):

DECLARATION OF NICHOLAS A. JACOBS IN SUPPORT OF MOTION FOR PEREMPTORY CHALLENGE

on the following persons or parties:

XX: (By Mail): I enclosed the document(s) in a sealed envelope or package addressed to the person at the address set forth below and placed the envelope in the area designated for collection and mailing. Following our ordinary business practices, on the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

Hon. Gregory A. Pulskamp *Courtesy Copy*
Kern County Superior Court, Dept. J
Metro Justice Building
1415 Truxtun Avenue
Bakersfield, CA 93301

XX: (Via Electronic Service): I transmitted the document(s) listed above to the email address(es) of the person(s) set forth on the attached service list. My electronic service address is: jestabrook@somachlaw.com. Service is deemed complete at the time of transmission of the document or at the time the electronic notification of service of the document is sent.

SEE SERVICE LIST ATTACHED

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 30, 2025, at Sacramento, California.

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Exempt From Filing Fees Pursuant to Government Code Section 6103

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

BRING BACK THE KERN; WATER AUDIT CALIFORNIA; KERN RIVER PARKWAY FOUNDATION; KERN AUDUBON SOCIETY; SIERRA CLUB; and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs and Petitioners,

v.

CITY OF BAKERSFIELD, and DOES 1-500,

Defendants and Respondents,

BUENA VISTA WATER STORAGE DISTRICT; KERN DELTA WATER DISTRICT; NORTH KERN WATER STORAGE DISTRCT; ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT; KERN COUNTY WATER AGENCY; and DOES 501-999,

Real Parties in Interest.

Case No. BCV-22-103220-GAP

[PROPOSED] ORDER OF TRANSFER RE MOTION FOR PEREMPTORY CHALLENGE PURSUANT TO C.C.P. § 170.6

JUDGE: Hon. John W. Lua, Presiding Judge
DEPT: 1

Action Filed: November 30, 2022

SOMACH SIMMONS & DUNN
A Professional Corporation

The written motion of Kern County Water Agency, Real Party in Interest in the above-entitled matter, for the peremptory disqualification of the Honorable Gregory A. Pulskamp of the above-captioned Court, and the supporting declaration under penalty of perjury of Nicholas A. Jacobs, have been duly presented and filed. It is established, as provided in section 170.6 of the Code of Civil Procedure, that the Honorable Gregory A. Pulskamp is prejudiced against Real Party in Interest Kern County Water Agency or the interest of that party in the above-entitled matter.

THEREFORE, IT IS HEREBY ORDERED that the Honorable Gregory A. Pulskamp is relieved from his assignment as judge in the above-entitled matter, and from any and all other assignments in this case, and that the matter shall proceed before the Honorable _____, in Department _____ of this court.

DATE: _____

By: _____
Presiding Judge John W. Lua

SOMACH SIMMONS & DUNN
A Professional Corporation

Bring Back the Kern, et al. v. City of Bakersfield
Kern County Superior Court Case No. BCV-22-103220-GAP

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; my electronic service address is jestabrook@somachlaw.com; I am over the age of 18 years and am not a party to the foregoing action.

On May 30, 2025, I served the following document(s):

[PROPOSED] ORDER OF TRANSFER RE MOTION FOR PEREMPTORY CHALLENGE PURSUANT TO C.C.P. § 170.6

on the following persons or parties:

XX: **(By Mail):** I enclosed the document(s) in a sealed envelope or package addressed to the person at the address set forth below and placed the envelope in the area designated for collection and mailing. Following our ordinary business practices, on the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

Hon. Gregory A. Pulskamp *Courtesy Copy*
Kern County Superior Court, Dept. J
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Bakersfield, CA 93301

XX: **(Via Electronic Service):** I transmitted the document(s) listed above to the email address(es) of the person(s) set forth on the attached service list. My electronic service address is: jestabrook@somachlaw.com. Service is deemed complete at the time of transmission of the document or at the time the electronic notification of service of the document is sent.

SEE SERVICE LIST ATTACHED

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 30, 2025, at Sacramento, California.

Jennifer Estabrook

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF KERN

BRING BACK THE KERN, WATER AUDIT CALIFORNIA, KERN RIVER PARKWAY FOUNDATION, KERN AUDUBON SOCIETY, SIERRA CLUB, AND CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs and Petitioners,

v.

CITY OF BAKERSFIELD, AND DOES 1-500,

Defendants and Respondents,

BUENA VISTA WATER STORAGE DISTRICT, KERN DELTA WATER DISTRICT, NORTH KERN WATER STORAGE DISTRICT, ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, KERN COUNTY WATER AGENCY; J.G. BOSWELL COMPANY, and DOES 501 – 999, inclusive,

Real Parties in Interest.

Case No. BCV-22-103220

PLAINTIFF BRING BACK THE KERN'S OPPOSITION TO KERN COUNTY WATER AGENCY'S MOTION FOR PEREMPTORY CHALLENGE

Judge: Hon. John W. Lua
Hon. Gregory A. Pulskamp

Action Filed: November 30, 2022
Trial Date: December 8, 2025

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BRING BACK THE KERN

Plaintiff Bring Back the Kern ("BBTK") objects to, and opposes, Real Party in Interest Kern County Water Agency's ("KCWA's") Motion for Peremptory Challenge [C.C.P. § 170.6] ("Motion") on the grounds that it is untimely and improper.

I. INTRODUCTION

KCWA's Motion is ill-conceived and untimely. Section 170.6 motions must be made within a narrow, clearly-defined time frame. KCWA attempts to avoid the obvious time bar by invoking language in the Civil Procedure Code that allows a party to make a Section 170.6 challenge after a new trial has been ordered. But there has been no trial in this case, much less an order for a new trial. What happened here was the Kern County Superior Court ("Trial Court") entered a preliminary injunction order. The Fifth District Court of Appeal ("Appellate Court") overruled the order, holding that the Trial Court expressly refused to consider factors the Appellate Court found it should have considered. The Appellate Court remanded for further proceedings in accordance with its opinion. It directed the Trial Court to determine, for the first time, the reasonableness of water use in any further preliminary injunction proceedings. The Appellate Court did not, and could not, order a new trial or for that matter any trial. The date for the first trial in this case, which was set by the Trial Court months ago, is December 8, 2025.

The cases on which KCWA relies do not support its motion. Instead, they explain why KCWA cannot invoke Section 170.6. KCWA's Motion is entirely meritless and must be denied.

II. STATEMENT OF FACTS

Defendant City of Bakersfield ("City") operates multiple weirs on the Kern River used to divert water for its own use and the use of several other entities, including the Real Parties in Interest ("RPIs"). KCWA is one of the RPIs. (*See* Verified Third Amended Complaint for Injunctive Relief and Petition for Writ of Mandate, December 1, 2023 ¶¶ 2, 18-23.) Judge Gregory A. Pulskamp ("Judge Pulskamp") was assigned to the case for all purposes on December 13, 2022. (*See* Notice of Assignment to Judge for All Purposes.) On May 3, 2023 KCWA along with the other RPIs filed a motion for leave to file an answer in intervention. (*See* Motion for Leave to File Answer in Intervention.) On September 18, 2023, the Court ordered Plaintiffs to file, within 10 days, an amended complaint that included the RPIs. (*See* Ruling on Defendant's Demurrer, September 18,

2023; Ruling on RPI's Motion to Intervene, September 18, 2023.) Plaintiffs filed a Second Amended Complaint on October 4, 2023, naming KCWA and the other RPIs. (*See* Second Amended Complaint.) On November 17, 2023, KCWA filed a notice of appearance of its attorneys of record. (*See* Notice of Appearance.)

On November 9, 2023, Plaintiffs BBTK and other environmental groups obtained a preliminary injunction in the Trial Court. (*See* Ruling on Plaintiffs' Motion for Preliminary Injunction, October 30, 2023; Order Granting Plaintiffs' Motion for Preliminary Injunction, November 9, 2023 ("PI").)

The PI prohibited the City from operating the weirs in question "in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition." (*Id.* at p. 2; *see* Fish & G. Code, § 5937 ("The owner of any dam shall . . . allow sufficient water to pass over, around or through the dam, to keep in 'good condition' any fish that may be planted or exist below the dam.").) On November 14, 2023, the Trial Court established an interim flow regime pursuant to a stipulation offered by BBTK and the City. (*See* Notice of Entry of Order for Implementation of Preliminary Injunction ("Implementation Order").) On December 27, 2023, after the RPIs filed motions for reconsideration, the Trial Court stayed the Implementation Order and modified the PI. (*See* Ruling on Motions and Objections.) In this ruling, "in an effort to reach a global resolution satisfactory to all the parties," the Trial Court modified the PI to require, *inter alia*, that the RPIs participate in the discussions concerning interim flow rates. (*See id.* at p. 2.)

The RPIs appealed the modified PI and the Implementation Order to the Appellate Court, which issued an opinion on April 2, 2025. (*See Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322.) The Appellate Court reversed the modified PI and the Implementation Order and "remanded for proceedings consistent with the views expressed in [its] opinion." (*Id.* at p. 368-69.) The Appellate Court explained that:

> In its ruling, the trial court expressly refused to weigh the potential harm to the City of Bakersfield or the water agencies in determining whether applying section 5937 to the Kern River would result in "an appropriate use of water."
>
> . . .

> The court's failure to directly consider the reasonableness of the water use it was ordering in the injunction was constitutional error.
>
> Consequently, we reverse the injunction and the order setting a flow rate, and remand for further proceedings.

(*Id.* at pp. 334-335.) Thus, the Appellate Court reversed the preliminary injunction because it found the Trial Court had not conducted an examination of a necessary issue in connection with its consideration of a preliminary injunction motion. There was no mention anywhere of a trial or a judgment. The first and only trial in this case is scheduled for December 8, 2025. (*See* Notice of Mandatory Settlement Conference/Final Case Management Conference/Trial, November 21, 2024.)

Despite this, KCWA filed its Motion on May 30, 2025, contending that it was entitled to disqualify Trial Court Judge Pulskamp under the portion of Section 170.6 relating to new trials. (*See* Motion at p. 2:3-11.)

III. ARGUMENT

A. KCWA's Motion Is Untimely.

Section 170.6 allows peremptory challenges but imposes strict deadlines. It provides that "[i]f directed to the trial of a civil cause that has been assigned to a judge for all purposes, the motion shall be made . . . within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance." (Cal. Civ. Proc. Code § 170.6(a)(2).) Judge Pulskamp was assigned for all purposes on December 13, 2022. (*See* Notice of Assignment to Judge for All Purposes at 1.) KCWA had appeared in this action by at least November 17, 2023 when its attorneys filed a notice of appearance. (*See* Notice of Appearance.) Thus, the window for KCWA to move to disqualify Judge Pulskamp closed no later than a year and a half ago.

To circumvent this time bar, KCWA argues that it is entitled to disqualify Judge Pulskamp under the portion of Section 170.6 which applies "following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, *if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter*." (*See* Motion at p. 2:6-9 (citing

Cal. Civ. Proc. Code § 170.6(a)(2)) (emphasis added).) But this code provision means what it says: "a peremptory challenge is permitted under section 170.6(a)(2) where (1) a trial court's decision or final judgment is made in conjunction with a 'trial' and (2) a subsequent reversal of that decision results in a 'new trial.'" (*State Farm Mut. Auto. Ins. Co. v. Super. Ct.* (2004) 121 Cal.App.4th 490, 499.) *State Farm* also explained, as part of a thorough review of Section 170.6:

> That is not to say that section 170.6(a)(2) should be liberally construed. As the Supreme Court recently stated: "[W]ith respect to the assertion that section 170.6 must be given a liberal construction, our own cases have observed that because of the dangers presented by judge-shopping—by either party—the limits on the number and timing of challenges pursuant to this statute are vigorously enforced . . . . We do not believe that the 1985 amendment of section 170.6, subdivision (2) was intended to eliminate all restrictions on the challenge or to counter every possible situation in which it might be speculated that a court could react negatively to a reversal on appeal." (*Peracchi v. Superior Court, supra,* 30 Cal.4th at p. 1263, 135 Cal.Rptr.2d 639, 70 P.3d 1054, citation omitted.)

(*Id.* at p. 498.)

In *State Farm*, a party filed a Section 170.6 motion after an appellate court issued a writ reversing the trial court's ruling on a choice of law issue. (*Id.* at p. 494.) There was no final ruling in the case, and no reopening of the case upon its return to the trial court. Instead, the court noted that "the case will resume its course in the trial court and move toward *trial* (the first trial) or some other disposition." (*Id.* at p. 503 (emphasis in original).)

Likewise, here the Appellate Court reversed the Trial Court's preliminary injunction and remanded for further proceedings. (*See Bring Back the Kern, supra*, 110 Cal.App.5th at p. 334-35.) Upon its return to the Trial Court the case will resume its course and move toward trial. KCWA's Motion must be denied, therefore, just as the Section 170.6 motion was denied in *State Farm*.

B. KCWA's Own Cited Cases Require that the Motion Be Denied.

KCWA does not acknowledge *State Farm* and does not cite any contrary authority. Instead, KCWA relies on out of context quotes from cases that rejected Section 170.6 motions. KCWA does not cite any case that allows a Section 170.6 motion to be made after a preliminary injunction order is overruled.

Instead of identifying a first trial, KCWA appears to argue that, for purposes of a Section

170.6 motion, the term "new trial" should include any proceedings "in the context of a subsequent motion for preliminary injunction and a trial on the merits" regardless of whether there has already been a first trial or judgment. (Motion at p. 3:1-13.) It simply asserts, without support, that "[w]hether arising in a subsequent motion for preliminary injunction or at trial, these proceedings constitute a 'new trial' on the same issues." (*Id.* at p. 3:25-26.) Neither of these are correct. The Civil Procedure Code and the cases cited by KCWA make clear that "new trial" requires "a *re-*examination of an issue of fact in the same court *after a trial and decision by a jury, court, or referee*." (Cal. Civ. Proc. Code § 656 (emphasis added); *see also Geddes v. Superior Court* (2005) 126 Cal.App.4th 417, 424 ("In the context of this statute, a retrial is a 'reexamination' of a factual or legal issue that was in controversy in the prior proceeding") (citing *Paterno v. Superior Court* (2004), 123 Cal.App.4th 548).) No such "new trial" has been ordered here.

The cases relied upon by KCWA do not support its position. In fact, they prove that KCWA's argument is wrong. In *Geddes*, the court did not uphold a Section 170.6 motion. Instead, the court rejected a Section 170.6 motion even after summary judgment had been granted and then reversed. (*See* 126 Cal.App.4th 417.) The appellate court held that the trial court had failed to state the facts and law upon which its decision was based, and remanded the case for a further explanation. (*Id.* at pp. 423-424 ("Section 170.6 applies only where the matter is to be retried, not where it is remanded with instructions that require the court to complete a judicial task not performed in the prior proceeding.").) Similarly, in this case the Appellate Court remanded with instructions to consider a factor (reasonableness of water use) that the Trial Court did not consider previously. (*See Bring Back the Kern, supra*, 110 Cal.App.5th at pp. 334-335.) Also like the *Geddes* Court, the Appellate Court's ruling will not result in "reconsideration of the merits[.]" (*See Geddes, supra,* 126 Cal.App.4th at p. 424.) Nothing about *Geddes* supports KCWA's motion.

In *Paterno*, the trial court conducted a bench trial and found for the defendants. (*See* 123 Cal.App.4th 548.) The appellate court reversed. It ordered the trial court to enter judgment in favor of the plaintiffs and to conduct further proceedings to determine the amount of damages. (*Id.* at p. 552.) Plaintiffs then filed a Section 170.6 motion. (*Ibid.*) The trial court struck the motion, and this decision was upheld by the appellate court. (*Id.* at pp. 553, 562.)

Here, citing *Paterno*, KCWA claims that any trial on the merits of Plaintiffs' claims would constitute a "new trial" simply because the Appellate Court directed the Trial Court to "'determine whether and to what extent using the waters of the Kern River to keep fish in good condition is a reasonable and beneficial use of water.'" (Motion at p. 3:8-13, 3:25-26.) But the Trial Court expressly *has not conducted* such an inquiry to date, and thus, there can be no re-examination. Similar to the plaintiffs in *Paterno,* KCWA's Motion attempts to frame "*any* remand for resolution of *any* contested factual or legal issue [as] a 'new trial' within the meaning of section 170.6(a)(2)." (123 Cal.App.4th at p. 558.) As the *Paterno* Court rightfully pointed out, such an interpretation "would unhinge the term 'new trial' from its definitional moorings" (*ibid.*) and "jettison the reexamination requirement, thereby rendering a central element of the term 'new trial' meaningless." (*Id.* at p. 561.) *Paterno*, like *Geddes*, defeats KCWA's motion.[1]

IV. CONCLUSION

There is no support for KCWA's Motion, even in the cases on which the Motion relied. The Motion must be denied.

Dated: June 4, 2025

MORRISON & FOERSTER LLP

By: */s/ Bryan Wilson*
Bryan Wilson
Chelsea Caylin Kehrer

Attorneys for Plaintiffs
BRING BACK THE KERN

[1] KCWA also suggests without saying explicitly that *C.C. v. Superior Court* (2008) somehow supports its position (Motion at p. 2:14-17, 19-21), but in reality *C.C.* is yet another case that rejects a Section 170.6 motion. (*See C.C.,*166 Cal.App.4th 1019, 1023.)

PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 755 Page Mill Road, Palo Alto, California 94304-1018. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on June 4, 2025, I served a copy of:

- **PLAINTIFF BRING BACK THE KERN'S OPPOSITION TO KERN COUNTY WATER AGENCY'S MOTION FOR PEREMPTORY CHALLENGE**

☒ **BY ELECTRONIC SERVICE [Code Civ. Proc sec. 1010.6; CRC 2.251]** by electronically mailing a true and correct copy through Morrison & Foerster LLP's electronic mail system from hsmith@mofo.com to the email address(es) set forth below, or as stated on the attached service list per agreement in accordance with Code of Civil Procedure section 1010.6 and CRC Rule 2.251.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Palo Alto, California, this 4th day of June, 2025.

Heather Smith	*/s/ heathersmith*
(typed)	(signature)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

BRING BACK THE KERN, WATER AUDIT CALIFORNIA, KERN RIVER PARKWAY FOUNDATION, KERN AUDUBON SOCIETY, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs and Petitioners, vs. CITY OF BAKERSFIELD and DOES 1 through 500, Defendants and Respondents, BUENA VISTA WATER STORAGE DISTRICT, KERN DELTA WATER DISTRICT, NORTH KERN WATER STORAGE DISTRICT, ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, KERN COUNTY WATER AGENCY, J.G. BOSWELL COMPANY, and DOES 501-999, Real Parties in Interest.	Case No.: BCV-22-103220 **WATER AUDIT CALIFORNIA'S OPPOSITION TO REAL PARTY KERN COUNTY WATER AGENCY'S MOTION FOR PEREMPTORY CHALLENGE [Code Civ. Proc., § 170.6]** Complaint Filed: November 30, 2022 First Amended Complaint Filed: March 6, 2023 Second Amended Complaint Filed: October 4, 2023 Third Amended Complaint Filed: December 1, 2023 Judge: Hon. John W. Lua, presiding Judge Hon. Gregory Pulskamp Trial Date December 8, 2025

I. INTRODUCTION

Water Audit California ("Water Audit") submits its Opposition to Real Party in Interest Kern County Water Agency's ("KCWA") Motion for Peremptory Challenge [C.C.P. § 170.6] filed Friday, May 30, 2025 ("Motion") on the basis that the Motion is untimely and without merit. Water Audit concurs and joins with the City of Bakersfield's ("City") Objection and Opposition filed on June 2, 2025, and the Opposition of Bring Back the Kern ("BBTK") filed on June 6, 2025.

II. ARGUMENT

Under Code of Civil Procedure, section 170.6 ("Section 170.6"), a peremptory challenge to disqualify a judge is permitted following the reversal of a trial court's decision or final judgment on appeal, but only if the case is remanded for a "new trial." (see *Geddes v. Superior Court* ("*Geddes*") 2005, 126 Cal. App. 4th 417; *C.C. v. Superior Court* (2008) 166 Cal. App. 4th 1019; *First Federal Bank of California v. Superior Court* (2006) 143 Cal. App. 4th 310.)

The trial court retains jurisdiction to conduct further proceedings following remand from the appellate court. Section 170.6 permits disqualification only when the trial judge is reassigned to conduct a new trial following reversal on appeal. Herein, the appellate court did not direct a new trial" but rather a continuation of the original proceedings.

> The order dated November 9, 2023, granting a preliminary injunction and setting a nominal bond is reversed. The order dated November 14, 2023, implementing the preliminary injunction is reversed. The matter is remanded for proceedings consistent with the views expressed in this opinion.
>
> (*Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322, 368-369.)

1. There is no need to assign new a judge for a new proceeding or trial.

A motion under Section 170.6 may be filed after the appeal of an interlocutory order only if the remand requires the trial court to conduct a "new trial" on the matter and the same judge from the prior proceeding **is assigned** to conduct that new trial. Section 170.6, subdivision (a)(2), explicitly provides that such a motion is permitted following the reversal of a trial court's decision or final judgment. (Code Civ. Proc., § 170.6; *Karlsen v. Superior Court* (2006) 139 Cal. App. 4th 1526; *Jane Doe 8015 v. Superior Court* ("*Jane Doe*") (2007) 148 Cal. App. 4th 489.) In this matter, there has been only one proceeding.

The appellate court's remand order does not divest the trial court of its jurisdiction to proceed with the case, nor does it automatically trigger the right to disqualify the judge under Section 170.6. Mere judicial error does not constitute sufficient grounds for disqualification. Herein there is no evidence of bias or "whimsical disregard" of a statutory scheme. (*Hernandez v. Superior Court* (2003) 112 Cal. App. 4th 285, 303). The appellate court has found that errors in the trial court's rulings due to inadvertence rather than intent did not justify assigning a new judge on remand. In *Tower Acton Holdings v. Los Angeles County Waterworks Dist. No. 37* ((Jan. 21, 2003, B147571) ___Cal.App.4th___ [2003 Cal. App. LEXIS 115]), the appellate court granted reassignment to a new judge, but only after finding a factual showing that it was in the interest of justice.

Judge Pulskamp has presided over this complex proceeding, with hundreds of pleadings and briefings and thousands of pages of documents filed since the case was commenced in 2022.[1] The case has remained active, under his authority and supervision. Judge Pulskamp has continued to conduct proceedings and to issue rulings during the pendency of the appeal, including setting a trial date for the matter. There is no evidence of prejudice. The result of reassignment will be appreciable delay of determination of a matter of substantial public interest.

2. Reconsideration of an injunction does not constitute a new trial.

Reconsideration of an injunction does not constitute a "new trial" for purposes of filing a peremptory challenge under Section 170.6 because the remanded decision was not determinative of the action.

Karlsen v. Superior Court (("*Karlsen*") (2006) 139 Cal. App. 4th 1526) is significant in clarifying the application of Section 170.6 regarding peremptory challenges on remand. The Court of Appeal held that a peremptory challenge under Section 170.6 is not permitted when the appellate court remands a case with directions that do not involve conducting a new trial. In *Karlsen*, the appellate court had remanded the case with instructions for the trial court to prepare a statement of decision. The *Karlsen* trial court erred in accepting a peremptory challenge and transferring the case to a different judge.

[1] The complexity of the case is reflected in the superior court record with ≈ 15 hearings and ≈ 415 docket entries.

Karlsen emphasized that Section 170.6 allows a peremptory challenge on remand only when the remittitur directs a new trial. This decision underscores the principle that appellate court directions on remand are binding and must be followed precisely. A peremptory challenge under Section 170.6 is not available unless the remand explicitly involves a new trial, as opposed to other proceedings.

Additionally, the legislative history of section 170.6 demonstrates that the term "new trial" is intended to cover situations where the case is to be retried, not where the court is required to reconsider prior rulings. (see *Stegs Invs. v. Superior Court* (1991) 233 Cal. App. 3d 572, *Jane Doe*, supra, 148 Cal. App. 4th 489.) Therefore, reconsideration of an injunction would not meet the statutory definition of a "new trial" for purposes of filing a peremptory challenge under Section 170.6.

III. CONCLUSION

For the foregoing reasons, Water Audit respectfully requests that the Court deny Real Party KCWA's Motion for Motion for Peremptory Challenge pursuant to Code of Civil Procedure, section 170.6.

DATED: June 11, 2025

_____
William McKinnon
Attorney for Water Audit California

PROOF OF SERVICE

I, Valerie Stephan, declare:

I am a resident of Lincoln County, Oregon. I am over the age of eighteen and not a party to the within action. My business address is 952 School Street, #316, Napa, California 94559.

On June 11, 2025, I served a copy of the within document(s):

WATER AUDIT CALIFORNIA'S OPPOSITION TO REAL PARTY KERN COUNTY WATER AGENCY'S MOTION FOR PEREMPTORY CHALLENGE [Code Civ. Proc., § 170.6]

X by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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MORRISON & FOERSTER LLP

I declare the foregoing to be true, subject to the penalty of perjury. Executed on June 11, 2025 at Lincoln County, Oregon.

Valerie Stephan

EXHIBIT B
to Petition for Writ of Mandate

Superior Court of California
County of Kern

Date: 06/10/2025 **Time:** 8:00 AM - 5:00 PM

BCV-22-103220

BRING BACK THE KERN ET AL VS CITY OF BAKERSFIELD

Courtroom Staff

Honorable: J. Eric Bradshaw **Clerk:** Gricelda Evans

NATURE OF PROCEEDINGS: RULING

The "Motion for Peremptory Challenge" filed by Real Party in Interest Kern County Water Agency was transferred by Presiding Judge John W. Lua to Assistant Presiding Judge J. Eric Bradshaw for consideration and ruling.

Having review and considered the moving and opposition papers, the peremptory challenge against Honorable Gregory A. Pulskamp under CCP section 170.6 is DENIED.

Copy of minute order sent to all parites as stated on the attached Certificate of Service.

CERTIFICATE OF SERVICE

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, that I am not a party to the within action and that my business address is , that I served the **Minutes dated June 10, 2025** attached hereto on all interested parties and any respective counsel of record in the within action, following standard Court practices, by: (a) enclosing true copies thereof in a sealed envelope(s) with postage fully prepaid and depositing/placing for collection and delivery in the United States mail at Bakersfield, California; and/or (b) enclosing true copies thereof in a Kern County interoffice envelope(s) and placing for collection and delivery; and/or (c) by posting true copies thereof, to the Superior Court of California, County of Kern, Non-Criminal Case Information Portal (www.kern.courts.ca.gov); and/or (d) electronically transmitting true copies thereof by electronic service or e-mail. Service address(es) are indicated on the attached service list.

Date of Service: June 10, 2025

Place of Service: Bakersfield, CA

Sent from electronic service address: donotreply@kern.courts.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Tara Leal
CLERK OF THE SUPERIOR COURT

Date: June 10, 2025

By: *Gricelda Evans*
Gricelda Evans, Deputy Clerk

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Exempt from Filing Fees
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

BRING BACK THE KERN, WATER AUDIT CALIFORNIA, KERN RIVER PARKWAY FOUNDATION, KERN AUDUBON SOCIETY, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs and Petitioners,

v.

CITY OF BAKERSFIELD, and DOES 1 through 500,

Defendants and Respondents,

BUENA VISTA WATER STORAGE DISTRICT, KERN DELTA WATER DISTRICT, NORTH KERN WATER STORAGE DISTRICT, ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, KERN COUNTY WATER AGENCY, and DOES 501-999,

Real Parties in Interest.

Case No. BCV-22-103220
Assigned to Hon. Gregory Pulskamp

~~(PROPOSED)~~ ORDER ON DECEMBER 21, 2023 MOTIONS AND OBJECTIONS FILED BY VARIOUS PARTIES

On December 21, 2023 at 9:00 a.m., in Department 8 of this Court before the Honorable Judge Gregory A. Pulskamp, the following motions and objections were heard:

1. The "FIRST AND SECOND POINT PARTIES' MOTION FOR RECONSIDERATION OF PRELIMINARY INJUNCTION AND IMPLEMENTATION ORDER."
2. The "FIRST AND SECOND POINT PARTIES' MOTION FOR STAY OF PRELIMINARY INJUNCTION AND IMPLEMENTATION ORDER."
3. The "KERN COUNTY WATER AGENCY'S MOTION FOR RECONSIDERATION AND STAY, AND REQUEST FOR EVIDENTIARY HEARING."
4. The "FIRST AND SECOND POINT PARTIES' OBJECTIONS TO EVIDENCE SUBMITTED IN OPPOSITION TO MOTION FOR RECONSIDERATION."
5. The "KERN COUNTY WATER AGENCY'S EVIDENTIARY OBJECTIONS TO DECLARATION OF COLIN L. PEARCE IN SUPPORT OF CITY OF BAKERSFIELD'S RESPONSE TO MOTIONS FOR RECONSIDERATION."
6. The "WATER AUDIT CALIFORNIA'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION."
7. The "REAL PARTIES' OBJECTION TO WATER AUDIT CALIFORNIA'S EX PARTE APPLICATION."
8. The "REAL PARTIES' OBJECTIONS TO EVIDENCE SUBMITTED IN SUPPORT OF WATER AUDIT CALIFORNIA'S EX PARTE APPLICATION."

Brett Stroud and Scott Kuney appeared on behalf of Real Parties in Interest North Kern Water Storage District. Isaac St. Lawrence appeared on behalf of Real Party in Interest Buena Vista Water Storage District. Richard Iger and Craig Carnes appeared on behalf of Real Party in Interest Kern Delta Water District. Nicholas Jacobs appeared on behalf of Real Party in Interest Kern County Water Agency. Jennifer Spaletta appeared on behalf of Real Party in Interest Rosedale-Rio Bravo Water Storage District. Adam Keats appeared on behalf of Plaintiffs Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center

for Biological Diversity. William McKinnon appeared on behalf of Plaintiff Water Audit California. Colin Pearce and Matt Collom appeared on behalf of Defendant City of Bakersfield.

The Court, after considering the briefs of the parties and other documents on file in this matter, including the declarations and exhibits filed in support of the briefs and documents and matters to which the Court has taken judicial notice, and the arguments of counsel, and for good cause appearing, issues the ruling attached hereto as Exhibit A ("Ruling"). Pursuant to this Ruling,

IT IS HEREBY ORDERED THAT:

1. The "FIRST AND SECOND POINT PARTIES' MOTION FOR RECONSIDERATION OF PRELIMINARY INJUNCTION AND IMPLEMENTATION ORDER" is denied in part and granted in part.
2. The "FIRST AND SECOND POINT PARTIES' MOTION FOR STAY OF PRELIMINARY INJUNCTION AND IMPLEMENTATION ORDER" is denied in part and granted in part.
3. The "KERN COUNTY WATER AGENCY'S MOTION FOR RECONSIDERATION AND STAY, AND REQUEST FOR EVIDENTIARY HEARING" is denied in part and granted in part.
4. The "FIRST AND SECOND POINT PARTIES' OBJECTIONS TO EVIDENCE SUBMITTED IN OPPOSITION TO MOTION FOR RECONSIDERATION" is denied.
5. The "KERN COUNTY WATER AGENCY'S EVIDENTIARY OBJECTIONS TO DECLARATION OF COLIN L. PEARCE IN SUPPORT OF CITY OF BAKERSFIELD'S RESPONSE TO MOTIONS FOR RECONSIDERATION" is denied.
6. The "WATER AUDIT CALIFORNIA'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION" is denied.
7. The "REAL PARTIES' OBJECTION TO WATER AUDIT CALIFORNIA'S EX PARTE APPLICATION" is denied.
8. The "REAL PARTIES' OBJECTIONS TO EVIDENCE SUBMITTED IN SUPPORT OF

WATER AUDIT CALIFORNIA'S EX PARTE APPLICATION" is denied.

9. The Court's "ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION" filed on November 9, 2023 is hereby modified as follows (changes are in *italics*):

"IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion for Preliminary Injunction is granted;
2. Defendant City of Bakersfield and its officers, directors, employees, agents, and all persons acting on its behalf are prohibited from operating the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition, *unless exempted by dire necessity to sustain human consumption through the domestic water supply*.
3. Defendant, Plaintiffs, *and Real Parties in Interest* shall engage in good faith consultation to establish flow rates necessary for compliance with this order;
4. The Court shall retain jurisdiction to ensure compliance with this order and to modify the terms and conditions thereof if reasonably necessitated by law or in the interests of justice. If after good faith consultation, Defendant, Plaintiffs, *and Real Parties in Interest* are not successful in agreeing to flow rates necessary for compliance, *any party* may file a request for this Court to make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after reasonable notice to *all the parties*;
5. This order shall become effective immediately upon the posting of a bond in the amount of $1,000.00, or of cash or a check made out to

the Clerk of the Kern County Superior Court in lieu thereof. The date and time of the posting of the bond, or of cash or a check in lieu thereof, shall be reflected in a Notice of Posting of Undertaking to be filed by Plaintiff and served on all parties.

6. This order shall remain in place until the conclusion of trial, further order of this Court, or further order by a court of higher jurisdiction."

10. The Court's "Order for Implementation of Preliminary Injunction" filed on November 14, 2023 is stayed.

DATED: January 9, 2024

Signed: 1/9/2024 07:06 PM

Gregory A. Pulskamp

Honorable Gregory A. Pulskamp
Judge of the Kern County Superior Court

EXHIBIT A

Superior Court of California
County of Kern
Bakersfield Department 8

Date: **12/27/2023** **Time:** **8:00 AM - 5:00 PM**

BCV-22-103220

BRING BACK THE KERN ET AL VS CITY OF BAKERSFIELD

Courtroom Staff

Honorable: Gregory A. Pulskamp **Clerk:** Inez Trimble

NATURE OF PROCEEDING:

Ruling on Motions and Objections heretofore submitted on December 21, 2023.

RULING:

1. The "FIRST AND SECOND POINT PARTIES' MOTION FOR RECONSIDERATION OF PRELIMINARY INJUNCTION AND IMPLEMENTATION ORDER" is denied in part and granted in part.
2. The "FIRST AND SECOND POINT PARTIES' MOTION FOR STAY OF PRELIMINARY INJUNCTION AND IMPLEMENTATION ORDER" is denied in part and granted in part.
3. The "KERN COUNTY WATER AGENCY'S MOTION FOR RECONSIDERATION AND STAY, AND REQUEST FOR EVIDENTIARY HEARING" is denied in part and granted in part.
4. The "FIRST AND SECOND POINT PARTIES' OBJECTIONS TO EVIDENCE SUBMITTED IN OPPOSITION TO MOTION FOR RECONSIDERATION" is denied.
5. The "KERN COUNTY WATER AGENCY'S EVIDENTIARY OBJECTIONS TO DECLARATION OF COLIN L. PEARCE IN SUPPORT OF CITY OF BAKERSFIELD'S RESPONSE TO MOTIONS FOR RECONSIDERATION" is denied.
6. The "WATER AUDIT CALIFORNIA'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION" is denied.
7. The "REAL PARTIES' OBJECTION TO WATER AUDIT CALIFORNIA'S EX PARTE

APPLICATION" is denied.

8. The "REAL PARTIES' OBJECTIONS TO EVIDENCE SUBMITTED IN SUPPORT OF WATER AUDIT CALIFORNIA'S EX PARTE APPLICATION" is denied.

DISCUSSION:

The Court's "ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION" filed on November 9, 2023 did not require the Real Parties in Interest to participate in the good faith consultations because they do not operate the weirs subject to the injunction. However, the Order did not preclude the Real Parties in Interest from engaging in the consultations. Evidence submitted in advance of the hearing on December 21, 2023 indicates that the Real Parties in Interest were invited to participate in the consultations, but declined. Nevertheless, out of an abundance of caution and in an effort to reach a global resolution satisfactory to all the parties, the Court is willing to modify the Order as set forth below. In addition, recent circumstances demonstrate the potential for exceptionally low periodic flow rates from Lake Isabella, requiring this Court to make at least a partial determination regarding priority of flows.

Based on the foregoing, the Court's "ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION" filed on November 9, 2023 is hereby modified as follows (changes are in *italics*).

"**IT IS HEREBY ORDERED THAT:**

1. Plaintiff's Motion for Preliminary Injunction is granted;

2. Defendant City of Bakersfield and its officers, directors, employees, agents, and all persons acting on its behalf are prohibited from operating the Beardsley Weir, the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition, *unless exempted by dire necessity to sustain human consumption through the domestic water supply.*

3. Defendant, Plaintiffs, *and Real Parties in Interest* shall engage in good faith consultation to establish flow rates necessary for compliance with this order;

4. The Court shall retain jurisdiction to ensure compliance with this order and to modify the terms and conditions thereof if reasonably necessitated by law or in the interests of justice. If after good faith consultation, Defendant, Plaintiffs, *and Real Parties in Interest* are not successful in agreeing to flow rates necessary for compliance, *any party* may file a request for this Court to make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after

reasonable notice to *all the parties*;

5. This order shall become effective immediately upon the posting of a bond in the amount of $1,000.00, or of cash or a check made out to the Clerk of the Kern County Superior Court in lieu thereof. The date and time of the posting of the bond, or of cash or a check in lieu thereof, shall be reflected in a Notice of Posting of Undertaking to be filed by Plaintiff and served on all parties.

6. This order shall remain in place until the conclusion of trial, further order of this Court, or further order by a court of higher jurisdiction."

The Court's "Order for Implementation of Preliminary Injunction" filed on November 14, 2023 is stayed.

DISPOSITION:

Real Parties in Interest shall prepare a formal order consistent with this ruling for the Court's signature pursuant to California Rule of Court 3.1312.

Copy of minutes mailed to all parties as stated on the attached certificate of mailing.

FUTURE HEARINGS:

No future hearings are currently set.

CERTIFICATE OF MAILING

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, and not a party to the within action, that I served the ***Ruling dated December 27, 2023*** attached hereto on all interested parties and any respective counsel of record in the within action by depositing true copies thereof, enclosed in a sealed envelope(s) with postage fully prepaid and placed for collection and mailing on this date, following standard Court practices, in the United States mail at Bakersfield California addressed as indicated on the attached mailing list.

Date of Mailing: December 27, 2023

Place of Mailing: Bakersfield, CA

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Tara Leal
CLERK OF THE SUPERIOR COURT

Date: December 27, 2023

By: *Inez Trimble*
Inez Trimble, Deputy Clerk

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PROOF OF SERVICE

The undersigned hereby declares that I am and was at the times of the service hereunder mentioned, over the age of eighteen (18) years, and not a party to the within cause. My business address is 1800 30th Street, Fourth Floor, Bakersfield, CA 93301.

I served by email the document entitled **(PROPOSED) ORDER ON DECEMBER 21, 2023 MOTIONS AND OBJECTIONS FILED BY VARIOUS PARTIES** on the interested parties in this action as listed on the following service list:

Adam F. Keats adam@keatslaw.org	*Attorneys for Plaintiff: Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, Center for Biological Diversity*
William McKinnon legal@waterauditca.org Linda Ghiringhelli Linda.asc@sbcglobal.net Valerie Stephan vstephan@waterauditca.org	*Attorneys for Plaintiff: Water Audit California*
Colin L. Pearce clpearce@duanemorris.com Jolie-Anne S. Ansley jsansley@duanemorris.com Ashley L. Barton abarton@duanemorris.com Matthew S. Collom mcollom@bakersfieldcity.us Blanca A. Herrera bahherrera@duanemorris.com	*Attorneys for Defendant: City of Bakersfield*
Robert E. Donlan red@eslawfirm.com Craig A. Carnes cac@eslawfirm.com Kevin W. Bursey kbursey@eslawfirm.com Richard Iger richard@kerndelta.org	*Attorneys for Intervenors: Kern Delta Water District*
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Daniel N. Raytis dan@bbr.law Daniel M. Root droot@bbr.law	*Attorneys for Intervenors: Rosedale-Rio Bravo Water Storage District*
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On the date set forth below, I caused the document to be sent to the persons at the e-mail addresses listed on the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 3, 2024, at Bakersfield, California.

Kristen L. Moen

EXHIBIT D
to Petition for Writ of Mandate

Adam Keats (SBN 191157)
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

BRING BACK THE KERN, WATER AUDIT CALIFORNIA, KERN RIVER PARKWAY FOUNDATION, KERN AUDUBON SOCIETY, SIERRA CLUB, and CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs and Petitioners, vs. CITY OF BAKERSFIELD and DOES 1 through 500, Defendants and Respondents, BUENA VISTA WATER STORAGE DISTRICT, KERN DELTA WATER DISTRICT, NORTH KERN WATER STORAGE DISTRICT, ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT, KERN COUNTY WATER AGENCY, and DOES 501-999, Real Parties in Interest.	Case No.: BCV-22-103220 **VERIFIED THIRD AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDATE** Cal. Const. Art. X, sec. 2; Public Trust Doctrine Fish & G. Code, §§ 5901, 5937; Civ. Code, §§ 3479, 3480; Pub. Resources Code, § 6009.1; and Code Civ. Proc, §§ 526, 527, 1085, 1103. Dept.: 8 Judge: Hon. Gregory Pulskamp Complaint Filed: November 30, 2022 Second Amended Complaint Filed: Oct. 4, 2023

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INTRODUCTION

1. Plaintiffs and Petitioners Bring Back the Kern, Water Audit California, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity bring this action on their own behalf, on behalf of the general public, and in the public interest.

2. Defendant and Respondent City of Bakersfield ("City") regularly diverts water from the Kern River through its operation of several diversion structures within the river's channel. The City diverts this water on its own behalf and on behalf of other parties, including the Real Parties in Interest named herein, pursuant to water rights held by those parties and/or pursuant to contractual agreements with those parties.

3. The City's diversion of Kern River water for the city's use and on behalf of other water rights and contract holders regularly results in the complete dewatering of portions of the Kern River described in detail below, herein the "Subject Reach."

4. The City diverts water from the Kern River without having satisfied its duties under the California Constitution, the Public Resources Code, the Fish and Game Code, the California Civil Code, and the Public Trust Doctrine, to protect various resources on behalf of the people of California.

5. The City has created a public nuisance by diverting water from the Kern River and its tributary streams without any analysis of the impacts on public trust uses and resources in violation of statutory and common law obligations as set forth below.

6. The City's conduct is a substantial factor in causing Plaintiffs' harm. Plaintiffs did not consent to the City's conduct.

7. Plaintiffs seek to, with judicial assistance, improve the City's conduct to comport with the law.

PARTIES

8. Plaintiff and Petitioner Bring Back the Kern is a non-profit organization formed by local residents with the mission of restoring flowing water in the Kern River through the City of Bakersfield. Bring Back the Kern works to achieve this through building awareness among the public and encouraging decision makers to change the status quo and put more water in the river. Bring Back the Kern brings this action in its own behalf, and as a private attorney general advocating for the

interests of the people of California.

9. Plaintiff and Petitioner Water Audit California is a California public benefit corporation with a mission of advocacy for the public trust. Water Audit California is organized and existing under the laws of the State of California. Water Audit California is a "person" under California Corporations Code Sections 18 ("'Person' includes a corporation as well as a natural person"); 15901.02(y) ("'Person' means an individual . . . corporation . . ."); and 25013 ("'Person' means an individual, a corporation..."). Water Audit California brings this action in its own behalf, and as a private attorney general advocating for the interests of the people of California.

10. Plaintiff and Petitioner Kern River Parkway Foundation is a local non-profit organization working to protect, preserve, and restore the natural riparian and wildlife habitat of the Kern River. The Foundation works with county, city, and community stakeholders to develop and maintain public open space, structures, monuments, and parks that preserve and beautify the Kern River and supports projects that advance educational and scientific knowledge of the Kern River. Kern River Parkway Foundation brings this action in its own behalf, and as a private attorney general advocating for the interests of the people of California.

11. Plaintiff and Petitioner Kern Audubon Society is a local, independent chapter of the Audubon Society, founded in Bakersfield in 1973 and incorporated in 1979, that works to educate the public about the importance of birds and to protect important bird habitat areas as well as sensitive bird species across Kern County. The Kern River through Bakersfield is a major factor in attracting birds traveling in the Pacific Flyway. Kern Audubon Society has published a popular birding map of the Kern River from the mouth of the Kern Canyon to Enos Lane, including local groundwater recharge basins. Kern Audubon Society has hundreds of members, primarily based in the Bakersfield area who are personally affected by the lack of a flowing river. Kern Audubon Society brings this action in its own behalf, and as a private attorney general advocating for the interests of the people of California.

12. Plaintiff and Petitioner Sierra Club is a non-profit organization that advocates for environmental and social justice issues. Its local chapter, the Kern-Kaweah Chapter, advocates for these interests in the southern San Joaquin Valley. The Sierra Club works to hold county and city

government accountable for actions causing harm to habitat, sensitive species, and disadvantaged communities. The Kern-Kaweah Chapter of the club has several thousand members, a significant portion of whom live in the Bakersfield area in close proximity to the dried-up Kern River. Sierra Club brings this action in its own behalf, and as a private attorney general advocating for the interests of the people of California.

13. Plaintiff and Petitioner Center for Biological Diversity is a non-profit organization dedicated to saving life on earth through science, law, and creative media, with a focus on protecting the lands, waters and climate that wild animal and plant species need to survive. The Center has offices in California and other states and has more than 1.7 million members and online activists, including members in and around Bakersfield and the Kern River. The Center has a particular interest in protecting, restoring, and enhancing the public trust resources of the Kern River, and returning flows in the lower Kern River to a more natural regime for the benefit of people, wildlife, and native ecosystems. Center for Biological Diversity brings this action in its own behalf, and as a private attorney general advocating for the interests of the people of California.

14. Defendant and respondent City is a city authorized by the California Constitution and as set forth in Government Code section 3400, et seq.

15. The City is a legal subdivision of the state; references to the "state" includes cities. (Gov. Code, §§ 53208.5, 53217.5 & 53060.1 [setting various limits on benefits for "members of the legislative bodies of all political subdivisions of the state, including charter cities and charter counties"], 8557, 8698, 12650 & 12424 ["political subdivision" includes "any city, city and county [or] county"], 37364, subd. (e) ["[t]he provisions of this section shall apply to all cities, including charter cities"]; *City of Redondo Beach v. Padilla* (2020) 46 Cal.App.5th 902, 912.)

16. Plaintiffs do not know the true names of defendants and respondents DOES 1 to 500, inclusive, and therefore sues them with these fictitious names. Plaintiffs are informed and believe, and based on such information and belief, allege that each of these parties is in some manner legally responsible for the events and happenings alleged herein. Plaintiffs are further informed and believe, and based on such information and belief allege, that at all times mentioned the respondents were the partners, agents, coventurers, and/or employees of their co-respondents and defendants, and in doing

the things herein alleged were acting within the course and scope of such agency and employment. Alternatively, the DOES have acted in reliance on permission granted by the City, and their future action must be equitably amended to avoid injury to the public trust. Alternatively, the DOES have acted without permission, and their future action must be equitably amended to avoid injury to the public trust. Plaintiffs will seek leave to amend to insert the true names of the DOES when such parties have been identified.

17. The City and DOE defendants/respondents will collectively be referred to as "Defendants."

18. Real Party in Interest BUENA VISTA WATER STORAGE DISTRICT is a Water Storage District formed under the California Water Storage District Law, Water Code section 39000, *et seq*. Plaintiffs are informed and believe that Buena Vista Water Storage District holds a water right or contractual interest, or both, in some water that is diverted from the Kern River by the City, and therefore may have an interest in this litigation.

19. Real Party in Interest KERN DELTA WATER DISTRICT is a Water District formed under Water Code section 34000, *et seq*. Plaintiffs are informed and believe that Kern Delta Water District holds a water right or contractual interest, or both, in some water that is diverted from the Kern River by the City, and may hold an ownership interest in the Rocky Point Weir and therefore may have an interest in this litigation.

20. Real Party in Interest NORTH KERN WATER STORAGE DISTRICT is a Water Storage District formed under the California Water Storage District Law, Water Code section 39000, *et seq*. Plaintiffs are informed and believe that North Kern Water Storage District holds a water right or contractual interest, or both, in some water that is diverted from the Kern River by the City, and may hold an ownership interest in the Beardsley Weir and/or the Calloway Weir, and therefore may have an interest in this litigation.

21. Real Party in Interest ROSEDALE-RIO BRAVO WATER STORAGE DISTRICT is a Water Storage District formed under the California Water Storage District Law, Water Code section 39000, *et seq*. Plaintiffs are informed and believe that Rosedale-Rio Bravo Water District holds a water right or contractual interest, or both, in some water that is diverted from the Kern River by the

City, and therefore may have an interest in this litigation.

22. Real Party in Interest KERN COUNTY WATER AGENCY is a political subdivision of the State of California, organized and existing under the Kern County Water Agency Act. Plaintiffs are informed and believe that Kern County Water Agency holds a water right in some water that may possibly flow in the Kern River through the City of Bakersfield, and therefore may have an interest in this litigation.

23. The Buena Vista Water Storage District, Kern Delta Water District, North Kern Water Storage District, Rosedale-Rio Bravo Water Storage District and the Kern County Water Agency shall be collectively referred to herein as "Real Parties."

24. DOES 501 to 999, inclusive, are persons or entities presently unknown to the Plaintiffs who may claim some interest as a real party in interest in the acts that are a subject of this action. Plaintiffs will seek leave to amend this petition to show the true names and capacities of DOES 501 to 999 when such names and capacities become known.

VENUE & JURISDICTION

25. The venue is proper in this court under the California Code of Civil Procedure, section 395, subdivision (a) because the subject reach of the Kern River, the associated diversion works, the waters discussed herein, and the offices of the City and Real Parties, are all within the County of Kern, California.

26. Plaintiffs seek an injunction, (Code Civ. Proc., §§ 526, 527), a writ of mandate (Code Civ. Proc. § 1085), and/or a writ of prohibition (Code Civ. Proc. § 1103). Each of these is within the jurisdiction of this court. (California Constitution art. VI, §§ 1 & 4.)

27. This Court has subject matter jurisdiction because the causes of action arise, inter alia, under the California Fish and Game Code, the California Water Code, the Code of Civil Procedure, the California Civil Code, the California Constitution, and the California Public Trust Doctrine.

28. Plaintiffs have performed all conditions precedent to filing suit or is excused from such conditions. (Wat. Code, § 1851.)

29. Plaintiffs have given notice to the City of its intended litigation.

LEGAL BACKGROUND

Public Trust Doctrine

30. The courts have recognized the State's responsibility to protect public trust uses whenever feasible. (See, e.g., *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 435; *California Trout, Inc. v. State Water Resources Control Bd.* (*Cal. Trout I*) (1989) 207 Cal.App.3d 585, 631; *California Trout, Inc. v. Superior Court* (*Cal. Trout II*) (1990) 218 Cal.App.3d 187, 289.)

31. Both the City and the Water Districts are subdivisions of the state. They "... share[] responsibility for protecting our natural resources and may not approve of destructive activities without giving due regard to the preservation of those resources. " (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (*FPL Group*) (2008) 166 Cal.App.4th 1349, 1371 fn. 19.)

32. "The core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters." (*Audubon, supra* 33 Cal.3d 419, 425.) Over a century ago the U.S. Supreme Court defined the public trust as property that "is a subject of concern to the whole people of the state." (*Illinois Central R.R. Co. v. Illinois* (1892) 146 U.S. 387, 454, 455.) The public trust provides that certain natural resources, including water resources, are held by the state "as trustee of a public trust for the benefit of the people." (*Audubon, supra,* 33 Cal.3d 419, 434.)

33. The state as sovereign is primarily responsible for administration of the public trust. The City is a trustee for the public trust in all actions and decisions that include or implicate public trust interests.

34. Citizens may enforce a state agency's affirmative duty to comply with the public trust doctrine in court. (*Audubon*, *supra,* 33 Cal.3d 419, 431 n.11, citing *Marks v. Whitney*, 6 Cal.3d at pp. 261–62; *see also FPL Group,* supra, 166 Cal.App.4th 1349, 1366 ["the public retains the right to bring actions to enforce the trust when public agencies fail to discharge their duty"].)

35. There are two distinct public trust doctrines. First is the common law doctrine, which involves the government's affirmative duty to take the public trust into account in the planning and allocation of water resources. The second is a public trust duty derived from statute, for example: Fish and Game Code, including section 5901; section 5937; section 711.7, subd. (a) ["The fish and wildlife

resources are held in trust for the people of the state by and through the department [of Fish and Game]."]; section 1600 ["The Legislature finds and declares that the protection and conservation of the fish and wildlife resources of this state are of utmost public interest. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state, as well as providing a significant part of the people's food supply; therefore their conservation is a proper responsibility of the state."]; section 1801 ["It is hereby declared to be the policy of the state to encourage the preservation, conservation, and maintenance of wildlife resources under the jurisdiction and influence of the state. This policy shall include the following objectives: [¶] . . . [¶] (b) To provide for the beneficial use and enjoyment of wildlife by all citizens of the state, [¶] (c) To perpetuate all species of wildlife for their intrinsic and ecological values, as well as for their direct benefits to all persons. . . ."]; section 1802; section 2000; section 2052; section 3503.5; section 3511; section 3513; section 3800; and section 12000. (See *FPL Group,* supra, 166 Cal.App.4th 1349, 1363-64.)

36. The public trust doctrine serves the function in an integrated system of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and it imposes a continuing duty on the state to take such uses into account in allocating water resources. (*Audubon*, supra, 33 Cal.3d 419, 452.)

37. No party can acquire a vested right to appropriate water in a manner harmful to public trust interests and the state has "an affirmative duty" to take the public trust into account in regulating water use by protecting public trust uses whenever feasible. (*Audubon*, supra, 33 Cal.3d 419, 446–447.)

38. A trustee for the public trust has, *inter alia,* a duty to administer the trust solely in the interest of the beneficiaries; the duty to act impartially in managing the trust property; the duty to not use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, and to not take part in a transaction in which the trustee has an interest adverse to the beneficiaries. (Public Resources Code, section 6009.1)

39. To the extent that the City or Real Parties own or control the weirs (dams) and are therefore deemed "owners" under the law, each of those parties are trustees who have a duty to perform the conduct enumerated in Public Resources Code, section 6009.1.

40. The public trust doctrine applies to all water rights, including riparian and pre–1914 appropriator rights. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106 [in *Audubon* "the court determined that no one has a vested right to use water in a manner harmful to the state's waters"]; *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 966, ["when the public trust doctrine clashes with the rule of priority, the rule of priority must yield"].)

41. Any water right priorities must yield to the unreasonable use or violation of public trust values. The subversion of a water right priority is justified if enforcing that priority will lead to the unreasonable use of water or result in harms to values protected by the public trust. (*El Dorado*, supra, 142 Cal.App.4th 937, 967, as cited in *Light v. State Water Resources Control Bd.* (2014 226 Cal.App.4th 1463, 1489.)

California Constitution, Article X, Section 2

42. Article X, section 2 of the California Constitution states *in part*: "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water."

43. The Supreme Court has held that Article X, section 2 "dictates the basic principles defining water rights: that no one can have a protectible interest in the unreasonable use of water, and that holders of water rights must use water reasonably and beneficially." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242.)

44. "'Beneficial use' and 'reasonable use' are two separate requirements, both of which must be met." (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1185.)

45. "What constitutes reasonable use is case-specific. California courts have never defined ... what constitutes an unreasonable use of water, perhaps because the reasonableness of any particular use depends largely on the circumstances. … The inquiry is fact-specific, and the answer may change over time. What may be a reasonable beneficial use, where water is present in excess of all needs,

would not be a reasonable beneficial use in an area of great scarcity and great need." (*Ibid*, internal quotation omitted.)

46. Water Code, section 1243 provides that the "use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use."

47. Concurrent jurisdiction allows for environmental groups or others adversely affected by a violation of the public trust to pursue actions in court directly against the violator. Because the limited budgets of the trustee agencies do not allow these agencies to pursue every violation brought to their attention, such assistance is acknowledged to be invaluable in protecting trust resources statewide.

California Fish and Game Code, § 5901

48. Section 5901 of the Fish and Game Code states "it is unlawful to construct or maintain in any stream [in certain districts, including District 3 1/2] any device or contrivance that prevents, impedes, or tends to prevent or impede, the passing of fish up and down stream."

49. The Kern River is located within District 3 1/2. (Fish & G. Code, § 11009.)

50. Section 12025.1, subdivision (a) of the Fish and Game Code states:

> In addition to any penalties imposed by any other law, a person found to have violated Section 5901 shall be liable for a civil penalty of not more than eight thousand dollars ($8,000) for each violation. Each day that a violation of Section 5901 occurs or continues without a good faith effort by the person to cure the violation after receiving notice from the department shall constitute a separate violation.

California Fish and Game Code, § 5937

51. Section 5937 of the Fish and Game Code states: "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam." (Fish & G. Code § 5937; See *Cal. Trout I,* supra, 207 Cal.App.3d 585, 626.)

52. The "good condition" requirement for maintaining fish includes the health of individual fish, the health and diversity of the various populations and their ability to maintain self-sustaining populations, and the health of the entire biotic community.

53. Any flow regimen is to maintain in "good condition" populations of fish and other components of the aquatic ecosystem that may reside, are in transit or may be planted below a dam.

54. The criteria for fish in "good condition" has been established in case law. It includes 1) the health of individuals, fish are healthy, free of disease, parasites, etc., and have reasonable growth rates with adequate habitat; 2) diversity and abundance of aquatic populations, diversity of age class, sufficient habitat to support all life stages and support self-sustaining populations; 3) the community, its overall health including co-evolved species and the health of the aquatic ecosystem at several trophic levels. (see Bear Creek- SWRCB Order 95-4 at 18 to 22, 1995; *Putah Creek v. Solano Irrigation 7 CSPA-294 District*, Sacramento Superior Court No. CV515766, April 8, 1996; *Cal. Trout I*, supra, 207 Cal.App.3d 585, *Cal. Trout II*, supra, 218 Cal.App.3d 187; and State Board Order WR 95-17, Lagunitas Creek, October 1995. Also see Moyle, et al. 1998.)

55. "Compulsory compliance with a rule requiring the release of sufficient water to keep fish alive necessarily limits the water available for appropriation for other uses. Where that affects a reduction in the amount that otherwise might be appropriated, [section 5937] operates as a legislative choice among competing uses of water." (*Cal. Trout I,* supra, 207 Cal.App.3d 585, 601.)

56. "Owner" is defined as the entity "owning, controlling, or operating a dam or pipe". (Fish & G. Code, § 5900, subd. (c).) "'Dam' includes all artificial obstructions." (Fish & G. Code, § 5900, subd. (a).)

57. Thus, section 5937 imposes a responsibility on a dam "owner", not a regulatory agency.

Public Resources Code, § 6009.1

58. Public Resources Code, section 6009.l states in part:

> (a) Granted public trust lands remain subject to the supervision of the state and the state retains its duty to protect the public interest in granted public trust lands.
> (b) The state acts both as the trustor and the representative of the beneficiaries, who are all of the people of this state, with regard to public trust lands, and a grantee of public trust lands, including tidelands and submerged lands, acts as a trustee, with the granted tidelands and submerged lands as the corpus of the trust.
> (c) A grantee may fulfill its fiduciary duties as trustee by determining the application of each of the following duties, all of which are applicable under common trust principles:
> (1) The duty of loyalty.
> (2) The duty of care.
> (3) The duty of full disclosure.
> (4) The duty to keep clear and adequate records and accounts.
> (5) The duty to administer the trust solely in the interest of the beneficiaries.
> (6) The duty to act impartially in managing the trust property.
> (7) The duty to not use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, and to not take part in a transaction in which the trustee has an interest adverse to the beneficiaries.

(8) The duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.
(9) The duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust.
(10) The duty to keep the trust property separate from other property not subject to the trust and to see that the trust property is designated as property of the trust.
(11) The duty to take reasonable steps to enforce claims that are part of the trust property.
(12) The duty to take reasonable steps to defend actions that may result in a loss to the trust.
(13) The duty to not delegate to others the performance of acts that the trustee can reasonably be required to perform and to not transfer the administration of the trust to a cotrustee. If a trustee has properly delegated a matter to an agent, the trustee has a duty to exercise direct supervision over the performance of the delegated matter.

59. Public Resources Code, section 6009.1, subdivision (d) is a statutory manifestation of the common law duties of a trustee of the public trust. It is a Legislative enumeration of the duties of a public trust trustee.

60. "Granted public trust land" as described in subdivision (a) of section 6009.1 includes all lands granted to the State of California by the United States. "The United States obtained title to all public land in California by the Treaty of Guadalupe Hidalgo in 1848; the treaty did not disturb title to private land. Upon admission to the Union, California obtained legislative jurisdiction over all land except land the federal government expressly reserved therefrom. … In 1981, the United States owned 47 million acres or 47 percent of California. Twenty million acres were administered by the Forest Service, 16 million acres by the Bureau of Land Management, 4.7 million acres by the Defense Department and 4.5 million acres by the National Park Service." (*United States v. McCrickard* (E.D. Cal. 1996) 957 F. Supp. 1149, 1152, fn. 47 [citations omitted].)

61. As enumerated under Public Resources Code, section 6009.1, a public trust trustee has an affirmative duty to administer the natural resources held by public trust solely in the interest of the people of California. Whether Public Resources Code, section 6009.1 is seen as directly controlling, or as an enumeration of common law duties, the City thus has an independent duty to (a) do no harm; and to (b) follow the instructions of the trustee agency unless excused by judicial process. This duty includes but is not limited to compliance with California law that requires the free passage of fish.

Civil Code, §§ 3479, 3480, and 3490

62. Civil Code, section 3479 states:

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

63. Civil Code, section 3480 states:

> A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

64. Civil Code, section 3490 states:

> No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right.

(See also *People v. Gold Run etc. Co*. (1884) 66 Cal. 138, 152, *Bowen v. Wendt* (1894) 103 Cal. 236, 238.)

65. In addition, common law liability for a public nuisance can arise both from the affirmative act of the City impeding the free passage of fish, and from the failure to remedy the problem once it is recognized.

FACTUAL BACKGROUND

66. The Kern River watershed exemplifies the uniqueness of California's biodiversity, as its climatic conditions result in a Mediterranean climate with warm dry summers and cool moist winters.

67. Beginning at its headwaters, northwest of Mount Whitney and tributaries that flow in from around Mount Whitney at 14,505 feet, its outflow is near Bakersfield and historically Buena Vista Lake in the San Joaquin Valley.

68. The Kern River's watershed includes about 3,612 square miles.

69. The Kern River currently runs approximately 165 miles to Bakersfield and beyond depending on water availability for surface flows.

70. Historically, the Kern River took many paths across an alluvial delta on the San Joaquin Valley floor. At the time of white settlement in the 1850s, the Kern River flowed south at what is now Bakersfield, into Kern Lake.

71. A flood in 1867 rerouted the river in what is titled "New River."

72. Historically, the Kern River filled two very large but shallow lakes, Kern Lake and Buena Vista Lake, and during very wet years, the river could overflow Buena Vista Lake northward to

Tulare Lake, which at times, flowed northward to the San Joaquin River. These lakes and the wetlands that interconnected them were known to be full of abundant fish and they supported large herds of antelope, elk, and thousands of grizzlies. They were also a critical overwintering stopover of the Pacific Flyway, hosting millions of waterfowl each winter before the birds returned to Canada and Alaska for summer breeding.

73. Starting in the 1850s and 60s, settlers began to divert flows from the Kern River and to dry up the vast wetlands of the San Joaquin Valley. Under state law, those who reclaimed wetlands or irrigated desert land for agricultural use could take title to the land. This system was abused by the land barons of the time, who found ways around acreage limits to allow them to amass property holdings of hundreds of thousands of acres.

74. Expansion in the amount of irrigated acreage and diversion canals in the Kern River alluvial fan coupled with a dry period led to a drying up of the lower Kern River in 1877, initiating a dispute that was eventually resolved by the California Supreme Court in 1886, which held that both prior appropriations and downstream riparian landholders rights to the Kern River were valid. (*Lux v. Haggin* (1886) 69 Cal. 255.) This created California's dual system of appropriative and riparian water rights.

75. Rather than wait for the state to reassess all water rights on the Kern River and determine how water would be split between upstream appropriators and downstream riparian rights holders, land barons Henry Miller and James Haggin created the Miller-Haggin Agreement in 1888, a settlement that divided up shares to the Kern River. This agreement forms the basis of what is referred to as the "law of the river."

76. The Miller-Haggin agreement has been expanded and modified several times in the 150 years since its signing, including with the 1900 Shaw decree, and amendments to the original agreement in 1930, 1955, and 1964. Neither the original agreement nor any of the subsequent revisions considered impacts to public trust resources of the Kern River.

77. In 1976, the City took ownership to some of the rights of Kern River water from the corporate descendent of James Haggin's land empire, Tenneco West. With this purchase, the City took over ownership and control of the Kern River and the multiple diversion weirs along the river. The

City also took over the administration of Kern River water diversions under the historical "law of the river" system, which divided up most, and often all, of the river's flows between various diverters. Since then, the City has staffed personnel to manage each weir and headgate to deliver water to irrigation districts based on their claimed rights and water orders, as well as ancillary contractual agreements. The City keeps detailed records of these diversions and publishes an annual report of the diversions, summarizing its operation of the Kern River diversion weirs.

78. The higher elevation reaches of the river remain ecologically and hydrologically intact due to conservation protections (e.g., Sequoia National Park, Golden Trout Wilderness), Wild and Scenic River designations and remoteness including various wilderness areas, at least until these parts of the river system reach the Lake Isabella reservoir.

79. From Lake Isabella, the Kern River flows through the steep and rugged Kern River Canyon. After exiting the canyon, Kern River water starts to be diverted in large quantities, first at the Beardsley Weir, then the Rocky Point Weir, the Calloway Weir, the River Canal Weir, the Bellevue Weir, and the McClung Weir, ["Diversion Structures"], all of which are managed and operated by the City.

80. The Diversion Structures are not permitted by law.

81. The City diverts Kern River water on behalf of area water districts and on its own behalf. Most of the water diverted by the City is delivered to area water districts and water storage districts for agricultural purposes. These districts either hold water rights to this water or have a contract with the City for delivery of water to which the City holds the rights. A smaller portion of the diversions are for the City's own use, for municipal purposes.

82. The Kern River has sufficiently reliable flows to satisfy the City's current diversions for municipal purposes, while still providing sufficient water to flow downriver through the City year-round. However, the Kern River does not have sufficiently reliable flows to satisfy the City's current diversions for agricultural purposes while still providing sufficient water via the current points of diversion to flow downriver through the City.

83. The Diversion Structures, coupled with the natural infiltration into groundwater, reduce the surface flows in the Kern River to the point where the river flows through the City only on very

rare occasions.

84. The dewatering of reaches of the Kern River, along with increased groundwater pumping in the vicinity of the river by various water districts, has depleted water levels in the groundwater basin.

85. The loss of the river has severely diminished and threatened the City's surface and groundwater supply, and resulted in damage and threats to the quality of the river ecosystem and the local environment, including vegetation and fish and wildlife in and around the river, aesthetic and recreational opportunities in and around the river, and air quality in the surrounding area.

86. The reduction in riparian and associated wetland and upland habitats has consequently reduced habitat for native wildlife and decreasing their populations.

87. Fish (as defined by Fish and Game Code, section 45) are currently found in the areas of the Kern River impacted by the City's actions.

88. Historically at least seven native species of finfish occupied the lower Kern: Coastal rainbow trout (*Oncorhynchus mykiss irideus*), Hardhead (*Mylopharodon conocephalus*), Riffle sculpin (*Cottus gulosus*), Sacramento pike minnow (*Ptychocheilus grandis*), Sacramento hitch (*Lavinia exilicauda exilicauda*), Sacramento sucker (*Catostomus occidentalis occidentalis*), and Sacramento perch (*Archoplites interruptus*).

89. Although the City's diversions have largely extirpated native finfish from the Kern River below the Diversion Structures, finfish can be found in this portion of the river when flows are sufficient.

90. If adequate surface flows were maintained within the Kern River through the City, populations of finfish species could be restored.

91. The Kern River alluvial fan is one of the best recharge areas in California, as water managers assume 90-94% of water recharged into the aquifer from the Kern River channel can be recovered.

92. The Kern River has had an annual average outflow of around 720,000-acre feet since records have been kept starting in the late 19th century. As the southernmost major river of the Sierra Nevada range, it is subject to wide fluctuations in annual precipitation, with some instances of up to 2-

million-acre feet and drought years with a tenth of that. The river's median outflow is over 500,000-acre feet.

93. A feasible alternative exists to the City's current diversion regime: The City could divert some water further downstream of its existing Diversion Structures, closer to the Kern River's historical terminus.

94. Facilities exist downstream of the Diversion Structures that would allow all current recipients of Kern River water diverted by the City to obtain all or most of the water they would otherwise obtain from the City's diversions.

95. The end users serviced by the City's existing diversions of the Kern River at the Diversion Structures can be serviced from diversion facilities located downstream.

96. The key to servicing the current end users from different diversion points downstream is the Cross Valley Canal (CVC), a bidirectional canal that is capable of taking water upriver, utilizing seven pumping plants along a 22 mile canal from the California Aqueduct on the western side of Kern County and conveying it to the Calloway Canal and Weir near central Bakersfield.

97. The CVC has 4 turnouts to the river channel along the route from Tupman to Bakersfield. The River Canal Weir, the Bellevue Weir, and the McClung Weir all have ways of accessing the CVC through these turnouts, making the water transferrable back to virtually anywhere in the valley floor of Kern County.

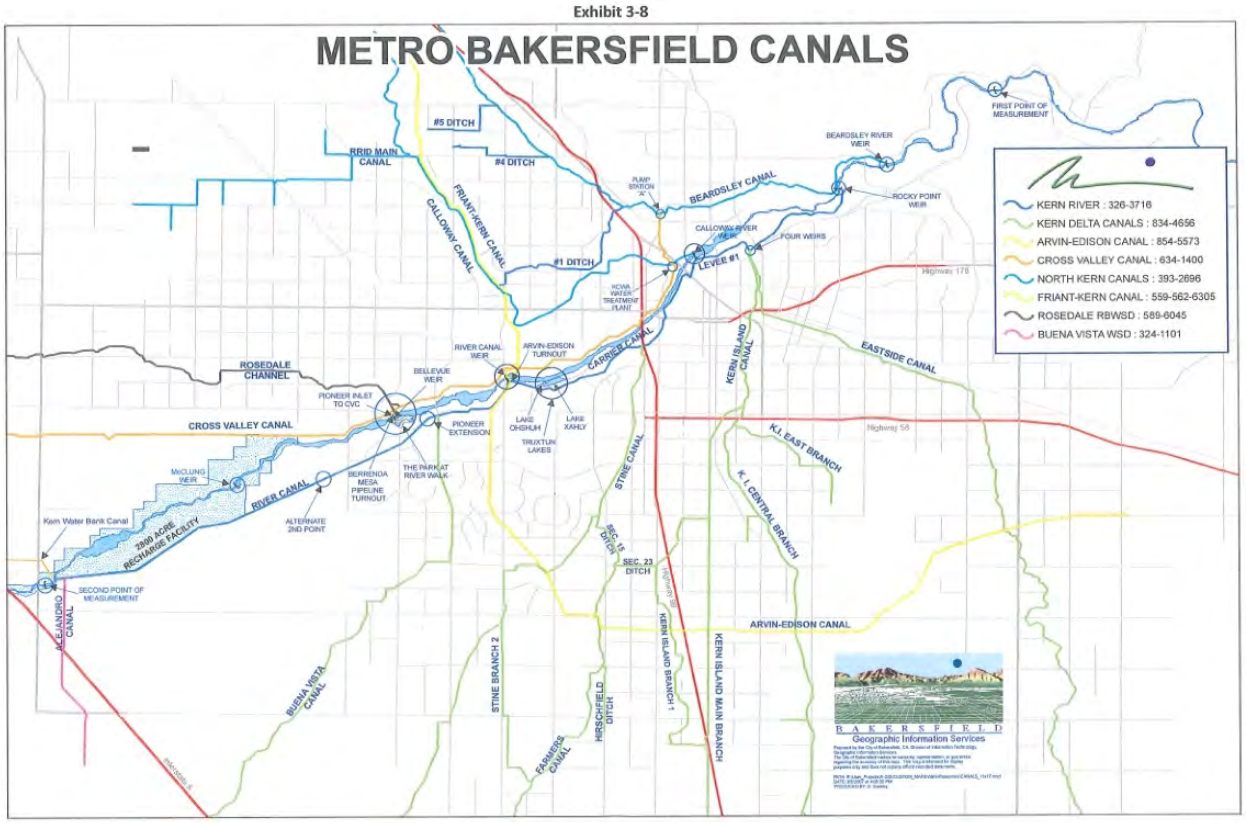
98. The CVC can take water east back to the Calloway Canal, which then can take water north to the same destinations serviced by the Beardsley and Calloway Canals that currently divert water northeast of Bakersfield. There also is a connection between the CVC and the Arvin-Edison Canal, allowing water to be transferred south to the same locations serviced by the Kern Island Canal.

99. If water was to consistently flow down the Kern River to the River Canal Weir, there would be approximately eight additional miles of flowing river through the City. If water flowed to the Bellevue Weir on the western edge of the City, there would be approximately two more miles (ten additional miles total). If water flowed to the McClung Wier, there would be an additional 8 miles of restored river, for a total of 18 miles of the Kern River that are typically dewatered due to the City's diversions.

100. Adjacent to the Kern River's terminus at Buena Vista Lake, the river channel also connects to the California Aqueduct with an intertie which could also be used to convey water north where it can be put directly into the CVC. See Exhibit below, "Metro Bakersfield Canals."

101. Transfers and conveyances of water such as those suggested here have been performed before, for instance by North Kern Water Storage District in a deal with the City of Bakersfield, with the water flowing west to the River Canal Weir before being diverted into the CVC and then taken back east again, facilitated by the City to improve the aesthetics of the river through Bakersfield by allowing additional water through river before diversion.

102. Because the river bottom is sandy, porous, and been largely dried up by decades of



diversions, there will be losses of water to the groundwater table, especially in the short term. However, per local water manager assumptions, over 90% of this water is recoverable as groundwater, serving an important need for groundwater recharge operations and SGMA compliance.

103. Although the extra distance and logistical considerations of changing the point of the diversion may seem challenging to some end users (if not to the City, or to the public trust resources

that depend on a flowing river), water storage districts and the City have decades of experience making water transfers to move water and cut down on transportation costs. For example, Buena Vista Water Storage District may at times allow Kern Delta Water Storage District to divert its share of Kern River water in exchange for money and an equal amount of State Water Project water from the California Aqueduct, reducing Kern Delta's cost for pumping water uphill via the CVC.

104. As a public trust trustee, the City has a duty to determine the nature and extent of it injuries to the public trust, and to greatest extent possible mitigate the injuries that it causes. The City has not reviewed nor formally considered the impacts to public trust resources caused by its operation of the Diversion Structures.

105. In February 2023, the City approved an agreement with a contractor for the preparation of a Water Master Plan ("Master Plan") for the Kern River. The Master Plan will include the following subjects:

a. Narrative introduction to the Kern River;

b. Definition of the City's current water supplies and projected future supply, including a summary of contractual obligations;

c. Definition of the City's current and projected future water demands, including a summary of contractual obligations;

d. Development of sustainable water management priorities;

e. Development of capital improvement projects;

f. Summary of Kern River GSA, GSP, and introduction to SGMA requirements.

106. The Master Plan will be used for the following purposes:

a. Defining City goals and priorities for sustainable water management;

b. Providing knowledge transfer for City staff;

c. Capital improvement budget funding and phasing.

107. The Master Plan will not directly assess the harms to public trust resources caused by the City's water diversions, nor will it analyze the status or needs of the public trust resources impacted by the City's actions.

FIRST CAUSE OF ACTION

Writ of Mandate and/or Prohibition – Code Civ. Proc. §§ 1085 and/or 1103

108. Plaintiffs incorporate and restate each and every paragraph contained herein as though fully set forth herein.

109. If an agency refuses to perform a ministerial duty, an affected party may seek a writ of mandate. A writ of mandate may be issued by any court to any corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station. (Code Civ. Proc., § 1085, subd. (a).)

110. A writ of prohibition may be issued by any court to any corporation, board, or person, commanding the party to desist or refrain from further proceedings and to show cause why the party should not be absolutely restrained from any further proceedings in such action or matter. (Code Civ. Proc. §§ 1103, 1104.)

111. Code of Civil Procedure, sections 1085 and 1103 are proper vehicles for compelling or challenging a ministerial act of an agency. (*Morton v. Board of Registered Nursing* (1991) 235 Cal.App.3d 1560, 1566, fn. 5.)

112. The general rule is that a petitioner must show a special interest to be served or some particular right to be preserved or protected through the issuance of the writ. (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232.) However, "where an issue is one of public right, and the object of the action is to procure the enforcement of a public duty, it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the duty in question enforced. [Citations omitted]." (*Id.* at p. 1233.) The exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right. (*Green v. Obledo* (1981) 29 Cal.3d 126, at page 144.)

113. A writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. (Code Civ. Proc., § 1086; *Brown v. Superior Court* (1971) 5 Cal.3d 509, 514.)

114. The issuance of a writ is required when an adequate legal remedy is not available and the other requirements for a writ have been met. (*May v. Board of Directors* (1949) 34 Cal.2d 125,

133–134.)

115. "Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [numerous citations omitted] and (2) a clear, present and beneficial right in the petitioner to the performance of that duty [numerous citations omitted]." (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1558.)

116. A writ of mandate will lie to compel a public official to perform an official act required by law. (Code Civ. Proc., § 1085.) Alternatively, a writ of prohibition may issue to prevent improper conduct. (Code Civ. Proc. § 1103.) A writ of mandate or prohibition will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. Mandamus may issue to compel an official both to exercise their discretion (if they are required by law to do so) and to exercise it under a proper interpretation of the applicable law. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.) To illustrate, depending on the facts of the moment, a writ of mandate and/or prohibition may issue to prevent Defendant from conduct that will result in the drying of the river, a writ of mandate may issue commanding Defendant to re-water the river, but in neither event may a writ be issued to control the manner in which Defendant exercises its discretion as to how it ensures that the river does not dry.

Violations of California's Public Trust Doctrine

117. A real and present controversy exists between Plaintiffs and the City concerning the obligations of the City to comply with the public trust doctrine.

118. The dewatering of the Kern River described herein is harming a navigable waterway. As such, it is a continuing injury to the public trust. (*People v. Sweetser* (1977) 72 Cal.App.3d 278; *Envtl. Law Found. V. State Water Res. Control Bd.* (Cal. Ct. App. 2018) 26 Cal.App.5th 844, 860.)

119. The City has a clear ministerial duty to assess the impacts on public trust resources that may be caused by its actions, including any actions that may adversely impact the public trust, before taking those actions. (*FPL Group,* supra.166 Cal.App.4th 1349, 1370.)

120. The City has violated and continues to violate its duties under the public trust doctrine by diverting water from the Kern River through its operation of the Diversion Structures without having considered the impacts of these diversions on public trust resources and considered feasible

mitigation and/or avoidance measures.

121. The City has violated and continues to violate its duties under the public trust doctrine by diverting water from the Kern River through its operation of the Diversion Structures without first considering feasible alternatives or mitigation measures to its injuries of public trust resources caused by its operation of the Diversion Structures.

122. The City has violated and continues to violate its duties under the public trust doctrine by diverting water from the Kern River through its operation of the Diversion Structures when feasible alternatives or mitigation measures to its injuries of public trust resources caused by its operation of the Diversion Structures are available.

123. The City has admitted no fault and will continue its conduct unless ordered by the Court to do otherwise.

124. A writ of mandate compelling the City to assess the impacts on public trust resources caused by the City's diversions, and to adopt feasible mitigation and/or avoidance measures, is appropriate and necessary to avoid irreparable harm to Plaintiffs and the public.

125. A writ of mandate and/or prohibition commanding the City to desist or refrain from diverting water from the Kern River in amounts that would result in injuries to trust resources pending the completion of its assessment of the impacts on trust resources caused by the City's diversions is appropriate and necessary to avoid irreparable harm to Plaintiffs and the public.

126. No other plain, speedy, or adequate remedy exists. The injury to the public trust cannot be remedied or mitigated by an award of damages. There is no regulatory process for relief.

Violations of the Fish and Game Code

127. A real and present controversy exists between Plaintiffs and the City concerning the obligations of the City to comply with Fish and Game Code, sections 5901 and 5937.

128. The City has a clear and mandatory duty under Fish and Game Code, sections 5901 and 5937 as alleged herein.

129. Fish exist in the Kern River above and below the Diversion Structures.

130. The City's operation of the Diversion Structures acts to prevent, impede, and tend to prevent or impede the passing of fish up and down stream.

131. The City has violated, and continues to violate, its duty under Fish and Game Code, section 5901 to not construct or maintain in any stream in District 3 1/2 any unpermitted device or contrivance that prevents, impedes, or tends to prevent or impede, the passing of fish up and down stream.

132. The City has failed, and continues to fail, its duty under Fish and Game Code, section 5937 to at all times allow sufficient water to pass through, over, or around the Diversion Structures to keep in good condition any fish that may be planted or exist below the Diversion Structures.

133. The City's violations of its duties under the Fish and Game Code cannot be remedied or mitigated by an award of damages. There is no regulatory process for relief.

134. A writ of mandate compelling the City to release water of sufficient flow and with appropriate timing to keep fish downstream of the Diversion Structures in good condition is appropriate and necessary to avoid irreparable harm to Plaintiffs and the public.

135. A preemptory or alternative writ of mandate and/or prohibition commanding the City to desist or refrain from diverting water from the Kern River in any manner that reduces river flows below a volume that is sufficient to keep fish downstream of said weirs in good condition is appropriate and necessary to avoid irreparable harm to Plaintiffs and the public.

136. No other plain, speedy, or adequate remedy exists. The injuries caused by the City's violations of the Fish and Game Code cannot be remedied or mitigated by an award of damages. There is no regulatory process for relief.

SECOND CAUSE OF ACTION

Injunctive Relief – Code Civ. Proc. §§ 526 and 527

Violations of Article X of the California Constitution

137. Plaintiffs incorporate and restate each and every paragraph contained herein as though fully set forth herein.

138. An injunction may be granted when "it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually." (Code. Civ. Proc., § 526, subd. (a)(1).)

139. To the extent traditional mandate constitutes a proper remedy, the remedy of injunctive relief is also proper. (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1563. fn. 9.)

140. A controversy exists between Plaintiffs and the City concerning the obligations of the City to comply with its duties under Article X of the California Constitution.

141. Because the provisions of Article X, Section 2 of the California Constitution are self-executing, courts are empowered to enforce them even in the absence of implementing legislation. (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist*. (1980) 26 Cal.3d 183, 198, [citing *Joslin v. Marin Mun. Water Dist*. (1967) 67 Cal.2d 132, 141, and *Tulare Dist. v. Lindsay-Strathmore Dist*. (1935) 3 Cal.2d 489, 568].)

142. The City has a clear and mandatory duty to not waste or unreasonably use waters of the Kern River and to not utilize an unreasonable method of use or method of diversion of the waters of the Kern River.

143. The City is required to comply with the mandatory duties set out in the California State Constitution, including those duties imposed under Article X, Section 2.

144. The City has violated, and continues to violate, Article X, Section 2 of the California Constitution through its unreasonable method of use and/or its unreasonable method of diversion of the waters of the Kern River in a manner that is causing significant harm to the Kern River environment.

145. The City's diversion of Kern River water at the Diversion Structures is an unreasonable method of diversion because there readily exist feasible alternative points of diversion downstream that would result in far less harm to the Kern River, its ecosystem, and public trust resources while still providing all or substantially all the water currently diverted at the Diversion Structures for agricultural users.

146. The City's diversion of Kern River water is an unreasonable method of use of the waters of the Kern River because the City diverts more water from the Kern River than is reasonably required for any beneficial use served by the City's or any other party's use in light of the harm to the Kern River environment by the City's water diversions.

147. Plaintiffs seek an injunction prohibiting the City from diverting from the Diversion Structures amounts of water required to: (a) provide for regular and consistent flows of the Kern River; (b) to prevent unreasonable harm to trust resources; and (c) to provide for sufficient water for fish habitat downstream of the Diversion Structures.

148. Plaintiffs have no plain, speedy, or adequate remedy in the ordinary course of law because the City will continue to violate Article X, Section 2 of the California Constitution unless compelled to comply by this Court.

THIRD CAUSE OF ACTION

Writ of Mandate and/or Prohibition – Code Civ. Proc. §§ 1085 and 1103

Breach of Trustee Duties

149. Plaintiffs incorporate and restate each and every paragraph contained herein as though fully set forth herein.

150. A trust imposes a fiduciary duty on a trustee. The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432-433.) Whether a fiduciary duty exists, and the extent of that duty, is generally a question of law. Whether the defendant breached that duty towards the plaintiff is a question of fact. (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 915.)

151. The beneficiaries of the public trust are the people of California, and it is to them that the trustee owes fiduciary duties. The trustee deals with the trust property for the beneficiary's benefit. No trustee can properly act for only some of the beneficiaries – the trustee must represent them all, taking into account any differing interests of the beneficiaries, or the trustee cannot properly represent any of them. (*Bowles v. Superior Court* (1955) 44 Cal.2d 574.) This principle is in accord with the equal protection provisions of the Fourteenth Amendment to the US Constitution.

152. A fiduciary relationship creates the highest duty of loyalty known to the law. (Restatement (Third) of Torts § 16 (2020).)

153. The City has a fiduciary duty pursuant to Public Resources Code, section 6009.1 as it is a city of the state and thus a grantee of lands by the federal government pursuant to California's

entrance into the Union as a state.

154. Alternatively, the City has a common law fiduciary duty as enumerated by Public Resources Code, section 6009.1 as it is a division of the state and thus a grantee of lands by the federal government pursuant to California's entrance into the Union as a state.

155. The City has breached its fiduciary duties by failing to act as a reasonably careful trustee would have acted under the same or similar circumstances.

156. The fiduciary duty of loyalty encompasses cases where the fiduciary fails to act in good faith.

157. The City has not made a good faith inquiry or effort to determine if the injury that it has caused can be mitigated.

158. A trustee has a duty to keep clear and adequate records and accounts and make full disclosure to the beneficiaries. Facts are especially important when public trust assessments must include a balancing of needs between the beneficial use of environmental flows and the beneficial claims of commerce.

159. The City has agreed to make diversions and to take beneficial use of Kern River flows without considering the cumulative impact of these decisions on the public trust.

160. A trustee's duty requires erring on the side of caution where uncertainty exists. As the level of uncertainty grows, the level of caution must also increase. Trustees can fulfill their duty of caution by halting demands upon public trust resources until the uncertainty can be resolved.

161. The trustee's duty of furnishing timely information to beneficiaries, also expressed as a duty to provide an accounting, has implicit within it the requirement that the information be complete, accurate and understandable to the beneficiaries. This procedural duty is critical to the performance of the preeminent substantive duty to protect public trust resources. It is axiomatic that we manage what we measure.

162. The City has failed to perform its undertaking of disclosure.

163. As a beneficiary of the public trust, Plaintiffs were harmed by the City's negligence of its trustee's duties. The City's conduct was a substantial factor in causing Plaintiffs' harm.

164. A writ of mandate compelling the City to release water of sufficient size and with

appropriate timing to provide reliable flows in the Kern River through the City, and to provide sufficient fish passage and habitat in the Kern River through the City, and to remediate the public nuisance caused by unlawful dewatering of the Kern River, is appropriate and necessary to avoid irreparable harm to Plaintiffs and the public, harms which necessarily outweigh any comparable harm to the City.

165. A writ of mandate and/or prohibition commanding the City to desist or refrain from diverting water from the Kern River in any manner that reduces reliable flows in the Kern River through the City, and to provide sufficient fish passage and habitat in the Kern River through the City, is appropriate and necessary to avoid irreparable harm to Plaintiffs and the public, harms which necessarily outweigh any comparable harm to the City.

166. Plaintiffs have no plain, speedy, or adequate remedy in the ordinary course of law because the City will continue to breech its trustee duties unless compelled to comply by this Court.

FOURTH CAUSE OF ACTION

Injunctive Relief – Code Civ. Proc. §§ 526, 527

Public Nuisance – Civil Code §§ 3479 and 3480

167. Plaintiffs incorporate and restate the preceding paragraphs as if set forth in full here.

168. The public nuisance doctrine aims at the protection and redress of community interests. (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 358.)

169. "Unlike the private nuisance — tied to and designed to vindicate individual ownership interests in *land* — the "common" or *public* nuisance emerged from distinctly different historical origins. "The public nuisance doctrine is aimed at the protection and redress of *community* interests ... which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex Rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103.) "It is this *community* aspect of the public nuisance, reflected in the civil and criminal counterparts of the California code, that distinguishes it from its private cousin, and makes possible its use, by means of the equitable injunction, to protect the quality of organized social life." (*Id*. at p. 110. [Emphasis in original].)

170. "No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right." (Civ. Code, § 3490.)

171. "Anything which … unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." (Civ. Code, § 3479.)

172. As set forth above, by its water diversions, the City unlawfully dewaters the Subject Reach of the Kern River, obstructing the free passage and/or use in the customary manner of the Kern River.

173. "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.)

174. Although the City knew that it was causing dewatering of the Kern River, no mitigation for injury to the public trust by the City was undertaken and no action was taken to force amendment of the rights and contractual agreements which govern the current diversion of Kern River water.

175. Liability for a public nuisance can arise both from the affirmative act of dewatering the river by its extractions, and also from the failure to remedy the problem once it was recognized.

176. The City's dewatering of the proximate reach of the Kern River was and is intentional and unreasonable, or alternatively unintentional but negligent.

177. The City is subject to liability for the nuisance it has caused in violation of Civil Code, sections 3479 and 3580.

178. The City knows or should know of the condition and the nuisance or unreasonable risk of nuisance involved.

179. After a reasonable opportunity to take remedial actions, the City has failed to abate the condition or to protect the public against it. (*Lelie Salt Co. v. San Francisco Bay Conservation* (1984) 153 Cal.App.3d 605, 619-620; Rest.2d Torts, § 839.)

180. An injunction may issue to enjoin the nuisance. (*People v. Truckee Lumber Co.* (1897) 116 Cal. 397.)

181. Plaintiffs are acting as a private attorney general seeking to enforce the public trust. A private attorney general is not employed by the state but is a non-government actor who represents the public's rights or interests in court. "A party acting as a 'private attorney general' can raise issues that

are not personal to it." (*Scenic Hudson Preservation v. Fed. Power* (2d Cir. 1965) 354 F.2d 608, 619-620.)

182. The term private attorney general is meant to convey the concept that a private citizen may stand in the shoes of the Attorney General, not in the sense of an attorney representing a party in court, but in the sense of a government official advancing the public interest in a lawsuit. (*Associated Industries v. Ickes* (2d Cir. 1943) 134 F.2d 694, 704, vacated by mootness, *Ickes v. Associated Industries of New York State* (1973) 320 U.S. 707.) "[T]he private attorney general doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions ..." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565.)

183. Plaintiffs have standing to bring a claim for public nuisance as the conduct of the City has prevented California citizens from the use, in a customary manner, of the Kern River. These citizens, the community, have a special interest in the fish and wildlife within the Kern River. They have suffered an injury in fact to their public trust interests in the fish and other wildlife of the Kern River when the City unlawfully destroys these resources. These interests in fish and other wildlife include not only the public trust property interest in the fish and other wildlife, but other recreational and ecological values provided by the fish and other wildlife and protected by the public trust.

184. Further, one who is adversely affected by governmental action should have standing to challenge that action. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165. "These liberal standing requirements have been applied to individuals acting in the public interest to protect against effects of environmental abuse." (*Laidlaw Environmental Services, Inc., Local Assessment Com. v. County of Kern* (1996) 44 Cal.App.4th 346, 354. See also *Animal Legal Defense Fund v. Olympic Game Farm, Inc*. (W.D. Wash. 2019) 387 F. Supp. 3d 1202, 1206-07.)

185. "A private party can maintain an action based on a public nuisance 'if it is specially injurious to himself, but not otherwise.' … The damage suffered must be different in kind and not merely in degree from that suffered by other members of the public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040.) "In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a different kind from that

suffered by other members of the public exercising the right common to the general public that was the subject of interference." (*Rincon Band of Luiseño Mission Indians of the Rincon Reservation Cal. v. Flynt* (2021) 70 Cal.App.5th 1059, 1103.)

186. Plaintiffs have suffered damages of a different kind from that suffered by other members of the public.

187. Plaintiffs have expended significant time and money: (a) educating the community, elected officials, and public employees and officials about the value and possibility of a flowing Kern River and the City's obligations regarding the river; (b) researching the City's operation of the Diversion Structures; (c) researching the ecology, biology and social history of the river, including its reach through the City; (d) participating at a high and expert level in public hearings and administrative processes in opposition to the City's dewatering of the river; and, (e) working to restore, protect, and improve habitat and recreational resources along the Kern River that continue to be harmed by the lack of water in the Kern River channel.

188. The City's actions have caused and continue to cause Plaintiffs to divert significant resources from their ordinary activities to engage in the activities described above; activities they would not have to engage in but for the City's actions.

WHEREFORE Plaintiffs pray for relief as hereinafter set forth:

PRAYER FOR RELIEF

1. A writ of mandate and/or prohibition:
    a. Enjoining any and all activity that is in violation of the City's duties under the Public Trust Doctrine;
    b. Enjoining any and all activity that is in violation of Fish and Game Code, sections 5901 and 5937;
    c. Enjoining any and all activity that is in violation of the City's duties under Public Resources Code, section 6009.1 and/or the public trust duties enumerated therein;
    d. Enjoining the City from operating the Diversion Structures in any manner that reduces river flows below a volume that is sufficient to keep fish downstream of the Diversion Structures in good condition.

e. Compelling the City to assess the impacts on public trust resources that may be caused by its operation of the Diversion Structures;

f. Compelling the City to avoid and/or mitigate, if feasible, any impacts to trust resources caused by its operation of the Diversion Structures;

g. Compelling the City to take such actions as required to bring its operation and maintenance of the Diversion Structures into compliance with Fish and Game Code, sections 5901 and 5937;

h. Compelling the City to release water of sufficient volume and with appropriate timing to provide reliable flows in the Kern River through the City, and to provide sufficient fish passage and habitat in the Kern River through the City;

2. An order for preliminary and/or permanent injunctive relief:

a. Enjoining the City from operating the Diversion Structures in such a manner that water is diverted from the Kern River in excess of amounts required for: (a) regular and consistent flows of the Kern River; (b) preventing unreasonable harm to trust resources; and (c) providing sufficient water for fish habitat downstream of the Diversion Structures;

b. Enjoining the City from operating the Diversion Structures in such a manner that dewaters the Subject Reach of the Kern River, obstructing the free passage and/or use in the customary manner of the Kern River.

3. For costs of suit;

4. For attorneys' fees pursuant to law, including Code of Civil Procedure, section 1021.5 or as otherwise provided;

and

5. For such other and further relief as the Court deems just and proper.

DATED: November 17, 2023

LAW OFFICE OF ADAM KEATS, PC

Adam Keats
Attorney for Bring Back the Kern, Kern River Parkway Foundation, Kern Valley Audubon, Sierra Club, Center for Biological Diversity

DATED: November 17, 2023

WATER AUDIT CALIFORNIA, INC

William McKinnon
Attorney for Water Audit California

VERIFICATION

I, Adam Keats, declare that:

1. I am an attorney duly admitted and licensed to practice before all courts of this State. I am the attorney of record for the Plaintiffs in this action.

2. Plaintiffs have their places of business in Kern, Alameda, and Napa counties, and therefore are absent from the county in which I have my office. I therefore make this verification on behalf of Plaintiffs.

3. I have read the foregoing Third Amended Complaint and Petition for Writ of Mandate and know the contents thereof; the factual allegations therein are stated upon my information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 17th day of November, 2023, in San Francisco, California.

LAW OFFICE OF ADAM KEATS, PC

By: _____
Adam Keats
Attorney for Bring Back the Kern, Kern River Parkway Foundation, Kern Valley Audubon, Sierra Club, Center for Biological Diversity

PROOF OF SERVICE

I, Adam Keats, am over eighteen years of age and not a party to this action. I am employed in the county where the mailing took place. My business address is 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111.

On December 1, 2023, I served the following document(s):

Third Amended Complaint

on the following parties, via electronic mail to the addresses listed below:

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For Kern County Water Agency:
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Nicholas A. Jacobs njacobs@somachlaw.com
Michelle E. Chester mchester@somachlaw.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 1st day of December 2023, in San Francisco, California.

Adam Keats

EXHIBIT E
to Petition for Writ of Mandate

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STATE BAR NUMBER: 210091
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ATTORNEY FOR (name): RPI Kern County Water Agency

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN
STREET ADDRESS: 1415 Truxtun Avenue
MAILING ADDRESS: 1415 Truxtun Avenue
CITY AND ZIP CODE: Bakersfield, CA 93301
BRANCH NAME: Metropolitan Division

PLAINTIFF/PETITIONER: BRING BACK THE KERN, et al.
DEFENDANT/RESPONDENT: CITY OF BAKERSFIELD

NOTICE OF ENTRY OF JUDGMENT OR ORDER

CASE NUMBER: BCV-22-103220-GAP

(Check one): [X] **UNLIMITED CASE** (Amount demanded exceeded $35,000) [ ] **LIMITED CASE** (Amount demanded was $35,000 or less)

TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on *(date)*: June 10, 2025

2. A copy of the judgment, decree, or order is attached to this notice.

Date: June 18, 2025

NICHOLAS A. JACOBS
(TYPE OR PRINT NAME OF [X] ATTORNEY [ ] PARTY WITHOUT ATTORNEY)

▶ _____
(SIGNATURE)

Form Approved for Optional Use
Judicial Council of California
CIV-130 [Rev. January 1, 2024]

Superior Court of California
County of Kern

Date: 06/10/2025 **Time:** 8:00 AM - 5:00 PM

BCV-22-103220

BRING BACK THE KERN ET AL VS CITY OF BAKERSFIELD

Courtroom Staff

Honorable: J. Eric Bradshaw **Clerk:** Gricelda Evans

NATURE OF PROCEEDINGS: RULING

The "Motion for Peremptory Challenge" filed by Real Party in Interest Kern County Water Agency was transferred by Presiding Judge John W. Lua to Assistant Presiding Judge J. Eric Bradshaw for consideration and ruling.

Having review and considered the moving and opposition papers, the peremptory challenge against Honorable Gregory A. Pulskamp under CCP section 170.6 is DENIED.

Copy of minute order sent to all parites as stated on the attached Certificate of Service.

CERTIFICATE OF SERVICE

The undersigned, of said Kern County, certify: That I am a Deputy Clerk of the Superior Court of the State of California, in and for the County of Kern, that I am a citizen of the United States, over 18 years of age, I reside in or am employed in the County of Kern, that I am not a party to the within action and that my business address is , that I served the **Minutes dated June 10, 2025** attached hereto on all interested parties and any respective counsel of record in the within action, following standard Court practices, by: (a) enclosing true copies thereof in a sealed envelope(s) with postage fully prepaid and depositing/placing for collection and delivery in the United States mail at Bakersfield, California; and/or (b) enclosing true copies thereof in a Kern County interoffice envelope(s) and placing for collection and delivery; and/or (c) by posting true copies thereof, to the Superior Court of California, County of Kern, Non-Criminal Case Information Portal (www.kern.courts.ca.gov); and/or (d) electronically transmitting true copies thereof by electronic service or e-mail. Service address(es) are indicated on the attached service list.

Date of Service: June 10, 2025

Place of Service: Bakersfield, CA

Sent from electronic service address: donotreply@kern.courts.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Tara Leal
CLERK OF THE SUPERIOR COURT

Date: June 10, 2025

By: *Gricelda Evans*
Gricelda Evans, Deputy Clerk

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Bring Back the Kern, et al. v. City of Bakersfield
Kern County Superior Court Case No. BCV-22-103220-GAP

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; my electronic service address is jestabrook@somachlaw.com. I am over the age of 18 years and am not a party to the foregoing action.

On June 18, 2025, I served the following document(s):

NOTICE OF ENTRY OF JUDGMENT OR ORDER

on the following parties:

SEE SERVICE LIST ATTACHED

XX: (Via Electronic Service): I transmitted the document(s) listed above, to the email address(es) of the person(s) set forth on the service list. My electronic service address is: gloomis@somachlaw.com. Service is deemed complete at the time of transmission of the document or at the time the electronic notification of service of the document is sent.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 18, 2025, at Sacramento, California.

Jennifer Estabrook

Jennifer Estabrook

SOMACH SIMMONS & DUNN
A Professional Corporation

SOMACH SIMMONS & DUNN
A Professional Corporation

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