NO. F087487

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BRING BACK THE KERN, et al.,
Plaintiffs and Respondents,

v.

CITY OF BAKERSFIELD,
Defendant and Respondent,

BUENA VISTA WATER STORAGE DISTRICT, et al.,
Real Parties in Interest and Appellants.

On Appeal from the Superior Court of Kern County
The Hon. Gregory Pulskamp (Case No. BCV-21-101310)

COMBINED RESPONDENTS' BRIEF OF BRING BACK THE KERN, ET AL.

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CERTIFICATE OF INTERESTED PARTIES

This certificate is submitted on behalf of the parties indicated below. There are no interested entities or persons that must be listed in this certificate under Rule 8.208.

Party: BRING BACK THE KERN

Party: KERN PARKWAY FOUNDATION

Party: KERN AUDUBON SOCIETY

Party: SIERRA CLUB

Party: CENTER FOR BIOLOGICAL DIVERSITY

DATED: August 21, 2024

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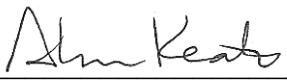
By: 

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INTRODUCTION

This appeal tests the continued validity of Fish and Game Code section 5937, a plainly written law imposing a strict prohibition on the destruction of California's fish-bearing rivers and streams at the hands of owners and operators of dams. It is one of California's oldest laws regarding water and has survived countless efforts to ignore or negate its command. This appeal is yet another such effort; a scattershot of arguments that together challenge the constitutionality of the statute and attack the power of the courts to enforce it. Section 5937 not only does not conflict with the California Constitution but is plainly a product of the Constitution's delegation of authority to the Legislature. The Trial Court correctly interpreted the statute and was correct in enforcing it.[1]

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[1] This Combined Respondents' Brief is filed by Plaintiffs Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity ("Bring Back the Kern") and responds to both Appellants' Joint Opening Brief and J. G. Boswell Company's Opening Brief. Bring Back the Kern hereby joins in the Respondent's Brief concurrently filed by plaintiff Water Audit California.

Appellants[2] seek to overturn the Trial Court's preliminary injunction order that orders the City of Bakersfield to stop diverting excessive amounts of water from the Kern River. Appellants appeal from two orders: the court's initial order granting the preliminary injunction and the court's subsequent stipulated order establishing interim flows for the river. But their arguments do not properly reflect that both orders were subsequently and significantly modified by the Trial Court.

The injunction as amended commands the City of Bakersfield to comply with Fish and Game Code section 5937 by ceasing any diversion of water from the Kern River in excess of that required to keep fish below the diversion dams in good condition. It is a prohibition on violative conduct, not a mandate for the City to take an affirmative action. It offers the parties the opportunity to work

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[2] Real Parties in Interest North Kern Water Storage District, Kern Delta Water District, Buena Vista Water Storage District, Kern County Water Agency, and Rosedale Rio-Bravo Water Storage District (collectively, "Real Parties") filed a single Appellants' Joint Opening Brief, described herein as "Joint Br." Real Party in Interest J.G. Boswell Co. ("Boswell") filed its own Opening Brief, described herein as "Boswell Br." Real Parties and Boswell are collectively referred to herein as "Appellants."

together to define what that number is (the amount of water required to keep fish in good condition) but does not command the parties to make that determination; if and when the parties' good faith consultation fails to answer the question, the Trial Court stands ready to make the determination itself. The injunction is grounded in the law and supported by the best available science.

Appellants' effort to negate section 5937's command and eliminate the Court's authority to enforce the statute should be denied. These appeals should be rejected and the stay of the Trial Court's injunction lifted, restoring to the Trial Court its authority to prevent irreparable harm from being committed during the pendency of the action. This is the minimum owed to the citizens of Bakersfield and the surrounding community, who ask for nothing more than that the City comply with the law.

STANDARD OF REVIEW

"[T]he decision to grant a preliminary injunction rests in the sound discretion of the trial court." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69, citing *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527.) The superior court balances two factors when considering such a request: (1) the likelihood that the plaintiff will

prevail on the complaint/petition, and (2) the interim harm that the plaintiff will face if injunctive relief is denied as compared to the harm that the respondent will face if the injunction is granted. (*IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at p. 69; *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749.) The greater the plaintiff's showing on one factor, the less need be shown on the other (so long as the court finds some possibility that the plaintiff will prevail). (*Butt v. State* (1992) 4 Cal.4th 668, 678; *SB Liberty, LLC v. Isla Verde Ass'n, Inc.* (2013) 217 Cal.App.4th 272, 280.)

An appellate court reviewing a trial court's granting of a preliminary injunction does so on the standard of review of abuse of discretion. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) "Where 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 Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1300.) In reviewing the trial court's factual determinations, the appellate court "interpret[s] the facts in the

light most favorable to the prevailing party and indulge[s] in all reasonable inferences in support of the trial court's order." (*Ibid*.)

PROCEDURAL AND FACTUAL BACKGROUND

The Trial Court provided an extensive discussion of the procedural and factual background leading up and including Plaintiffs' Motion for Preliminary Injunction ("PI Motion") in its Order Granting Plaintiffs' Motion for Preliminary Injunction ("PI Order"). (12 AA 2768.) Following the Court's direction, Plaintiffs and Defendant quickly reached an agreement as to interim flows for the Kern River, submitting a stipulated order that was then signed by the court on November 14, 2023. ("Implementation Order"). (13 AA 2863; 2866.)

Motions for Reconsideration and Stay

On November 21, 2023, Appellants North Kern, Kern Delta, and Buena Vista sought reconsideration and stay of the PI Ruling and PI Order ("Motion for Reconsideration"). (13 AA 2896; 13 AA 2918.) Rosedale subsequently joined. (14 AA 3224.) The motion sought reconsideration of the PI Order on four grounds:

> 1) the consultation procedure set forth in the Injunction is prejudicial to the due process rights of the Real Parties in Interest,
> 2) the Implementation Order was issued without appropriate procedures or due process,

> 3) the 'carve-out' in favor of Bakersfield is unsupported by any record, is contrary to law, and fundamentally alters the status quo of Kern River operations; and
> 4) the Interim Flow Regime is, by Plaintiffs' and Bakersfield's admission, not based on science and is thus contrary to the Injunction and the law.

(13 AA 2905-06.)

The Motion for Reconsideration sought an automatic stay of the PI Order under Code of Civil Procedure section 916 and a discretionary stay under section 918. (13 AA 2923.) Kern County Water Agency ("KCWA") filed its own motion for reconsideration and stay on November 21, 2023. (14 AA 3123.) KCWA sought reconsideration and stay of the PI Order because: (a) it had not yet been served the amended complaint; (b) the PI Order and Implementation Order lacked factual support; and (c) the Implementation Order violated "California Constitution Art. X, Section 2, California Water Rights Law, and Bakersfield's Contractual Obligations Under the Law of the River." (14 AA 3135-41.)

Order on Motions for Reconsideration and Stay

On January 9, 2024, the Trial Court "denied in part and granted in part" the motions for reconsideration and stay ("Reconsidered Injunction"). (16 AA 3735-39.) The Reconsidered Injunction granted

significant portions of the motions for reconsideration, significantly amended the PI Order, and stayed the Implementation Order entirely. (*Id*.)

The court made clear that the City's duty under section 5937 to provide sufficient water below each dam to keep fish in good condition was the top priority, with an exception only if "exempted by dire necessity to sustain human consumption through the domestic water supply." (16 AA 3738.) The priority delivery of water to the City that had been negotiated by Plaintiffs and the City and ordered by the court in the Implementation Order (see 13 AA 2864) **was thus null and void**: the City could claim priority deliveries only in the "dire necessity" described in the Reconsidered Injunction, not in the daily deliveries described in the Implementation Order.

The Trial Court modified its earlier omission of the Real Parties from future consultations regarding flow rates, ordering "Defendant, Plaintiffs, and Real Parties in Interest [to] engage in good faith consultation to establish flow rates necessary for compliance with this order." (16 AA 3738.) But, as the Court had previously stated in its PI Order, it did not mandate that the parties reach agreement. The court made clear that it would retain jurisdiction to modify the terms of the

injunction "if reasonably necessitated by law or in the interests of justice," and instructed:

> 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.
>
> (16 AA 3738.)

The Trial Court did not amend the provision in its PI Order regarding Plaintiff's obligation to post a bond in the amount of $1000, denying that portion of the Motion for Reconsideration.

North Kern filed a Notice of Appeal on January 18, 2024, appealing the PI Order and the Implementation Order, as well as "seeking review of" the Reconsidered Injunction. (16 AA 3766.) Kern Delta filed an essentially identical Notice of Appeal on January 22, 2024. (16 AA 3813.) Rosedale-Rio Bravo followed on January 30, 2024 (17 AA 3864), and Buena Vista and KCWA on January 31, 2024, all essentially identical to North Kern's notice. (17 AA 3912, 3960.) Boswell filed its own Notice of Appeal on March 5, 2024, but used California Court Form APP-002, indicating that "The judgment or order [appealed] was entered on (list the date or dates the judgment

and each order being appealed were entered): November 09, 2023 and November 14, 2023." (Boswell Notice of Appeal, March 5, 2024.) Boswell thus did not name the Reconsidered Injunction in its Notice of Appeal.

ARGUMENT

I. The Trial Court Correctly Determined that Fish and Game Code Section 5937 Was Deliberately Adopted by the State Legislature After Balancing Competing Uses of Water and Is Therefore Enforceable as a Legislative Mandate.

The Trial Court correctly determined that "Section 5937 was deliberately adopted by the State Legislature after balancing the competing uses of water and is enforceable as a legislative mandate." (12 AA 2781; see Fish and G. Code, § 5937 (hereinafter "section 5937").) Appellants argue that the Trial Court abused its discretion by failing to perform a balancing, or comparison, of all uses of water as they claim is required under Article X, section 2, and by improperly elevating the interests described in section 5937 while ignoring other beneficial interests. (Joint Br. at pp. 28-31; Boswell Br. at pp. 15-19.) But there is no conflict between the Trial Court's interpretation of Section 5937 and Article X, section 2. (Fish and G. Code § 5937; Cal. Const., art. X, § 2.)

Real Parties' argument relies on a flawed syllogism: Because "all uses of water, including public trust uses, must now conform to the standard of reasonable use [articulated in Article X, section 2]," (Joint Br. at p. 29), and because "what is a reasonable and beneficial use, 'of course, depends upon the facts and circumstances of each case'," (*id*. at p. 30), therefore, Plaintiffs were required "to make [a] factual showing regarding the Kern River's fisheries, hydrology, or beneficial uses that would suggest the Injunction constituted a reasonable use of water under Article X, section 2." (*Id*. at p. 37.) Boswell makes a similar flawed argument: "[U]sing water to keep fish 'in good condition' must be balanced under the 'rule of reasonableness' provided under Article X, section 2 of the California Constitution." (Boswell Br. at p. 16, citing *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446 ("*Audubon*").)

These arguments ignore the plain language of Article X, section 2, that delegates to the Legislature the power to establish the reasonableness of specific uses of water, a power courts have repeatedly upheld. Section 5937 is an unambiguous exercise of that authority and Appellants provide no reason for this Court to find otherwise, especially when doing so would directly conflict with the

plain language of the California Constitution and Supreme Court and appellate court precedent. While Appellants fruitlessly attempt to distinguish the holdings of *California Trout, Inc. v. State Water Resources Control Board* ((1989) 207 Cal.App.3d 585 ("*Cal Trout I*")) and *California Trout, Inc. v. Superior Court* ((1990) 218 Cal.App.3d 187 ("*Cal Trout II*")), they ignore the law and the reasoning upon which these opinions are based.

The Trial Court was correct that it had "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." (12 AA 2786.) This Court should conclude the same.

A. Article X, Section 2, of the California Constitution Authorizes the Legislature to Enact Laws to Carry Out Its Provisions.

Absent from Appellants' arguments is any mention of a critical provision of Article X, section 2: its delegation to the Legislature the power to enact laws in furtherance of its policy dictates. The last sentence of section 2 states, "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.) The Second District

Court of Appeal recently addressed this clause, confirming that its express language "authorizes the Legislature to 'enact laws in the furtherance of' the prevention of waste and unreasonable use of water." (*L.A. Waterkeeper v. State Water Res. Control Bd.* (2023) 92 Cal.App.5th 230, 268.) "Courts have interpreted this authority to allow the Legislature 'to enact statutes which determine the reasonable uses of water'." (*Ibid.,* citing *Cal Trout I*, *supra*, 207 Cal.App.3d at 625.) Other courts have similarly ruled, including the First District Court of Appeal in 1979:

> [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 v. State Water Resources Control Board* (1979) 90 Cal.App.3d 590, 597, emphasis added.) Appellants do not address this dispositive caselaw.

Article X, section 2, was enacted in 1928 to make clear that all use of the state's water, including riparian and appropriative, is limited to that "reasonably required for the beneficial use to be served" and to make clear that no water right extends to the waste, unreasonable use, or unreasonable method of diversion of water. (*Joslin v. Marin Mun.*

Water Dist. (1967) 67 Cal.2d 132, 138.) Appellants cite to several cases for the proposition that "[t]he determination of what is reasonable and beneficial use, of course, depends on the facts and circumstances of each case." (Joint Br. at pp. 29-30 (quoting *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist*. (1935) 3 Cal.2d 489, 567); see Boswell Br. at p. 17.) This is certainly true when courts are tasked with adjudicating disputes between competing water rights holders. But it does not mean *ad hoc* judicial adjudication is the only mechanism for determining reasonableness, and it does not mean there is no role for the Legislature in making such determinations. The Supreme Court has noted one such determination applicable here:

> Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment.

(*Joslin*, *supra*, 67 Cal.2d at p. 140.)

The court described this "ever increasing need" as having been expressed in "the unanimous policy pronouncements relative to the use and conservation of natural resources." (*Ibid*.) The Legislature has repeatedly made and reinforced these unanimous policy

pronouncements, both before and after the enactment of Article X, section 2, including in the Fish and Game Code, as discussed in section I.B, below.

"[A]rticle X, section 2, [was] enacted to vest the 'right' in the Legislature… to determine the useful and beneficial purposes of water use." (*Cal Trout I*, *supra*, 207 Cal.App.3rd at p. 625.) "This authorization discloses that the framers of article X, section 2, recognized that the promotion of its salutary policies would require granting the Legislature broad flexibility in determining the appropriate means for protecting scarce water resources." (*In re Waters of Long Valley Creek Steam System* (1979) 25 Cal.3d 339, 351-252.) And "the view enacted by the Legislature is entitled to deference by the judiciary." (*Cal Trout I*, *supra*, 207 Cal.App.3rd at p. 624.)

The Legislature has made clear that it regards the conservation of the state's fish as a useful and beneficial purpose of use. (See section I.B, below.) Requiring the state (or public attorney generals, such as the Plaintiffs here) to repeatedly litigate this directive on an *ad hoc* basis, ignoring the Legislature's pronouncements, "is unsupported by apposite authority and insupportable in reason and legal doctrine."

(*Id.* at p. 624.) Appellants' misguided effort to resurrect this unsupportable argument should not be abetted.

B. Fish and Game Code Section 5937 Is a Valid Legislative Expression of Priorities.

Fish and Game Code section 5937 is plain and clear in its expression of the Legislature's priorities regarding the use of the state's waters: "The owner of any dam shall allow sufficient water at all times to pass 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.)

Section 5937 has its origins in the earliest days of California's statehood, first appearing in early statutes criminalizing obstructing fish passage. (See Bork et al., *The Rebirth of California Fish & Game Code Section 5937: Water for Fish* (April 26, 2018) at pp. 817-824. Available at SSRN: https://ssrn.com/abstract=3169409.) Most of the current language first appeared in the 1915 amendments to Penal Code section 637, when the statute was still connected to the related requirement concerning fishways (currently Fish & G. Code § 5901): "[T]he owners or occupants of any dam or artificial obstruction shall allow sufficient water at all times to pass through such fishway to

keep in good condition any fish that may be planted or exist below said dam or obstruction….” (Stats. 1915, ch. 491, § 1, p. 820 [Act of May 24, 1915].) When the Legislature enacted the Fish and Game Code in 1933, it separated the “sufficient flow” mandate into its own code section, then numbered section 525, but kept the requirement linked to fishways. (Stats. 1933, ch. 73, p. 443.) When it reorganized the Fish and Game Code in 1957, the Legislature clarified that the mandate was not limited to fishways, adding language that remains operative today: “…or in the absence of a fishway…” (Stats. 1957, ch. 456, § 2, p. 1308; 1396.) The statute has remained essentially the same since.

In sum, the Legislature’s directive that dam owners may not divert or obstruct water that is necessary to keep fish in good condition is as old as our state. It existed before the enactment of Article X, section 2, and was therefore known when the Legislature was empowered by that section to enact laws in furtherance of its dictates. It was then amended multiple times after the enactment of Article X, section 2, strengthening its language and broadening its scope.

The Legislature is fully authorized to make a legislative rule concerning reasonableness that applies to the entire state, and it did just that when it enacted section 5937, concerning the use of flowing water in the state's streams and rivers necessary to keep fish in good condition. The Legislature "may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution." (*Shaw v. People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 595.) "'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action.'" (*Ibid*, quoting *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.)[3] Given the *express* delegation of power contained in Article X, section 2, the Trial Court's conclusion that the Legislature already performed the balancing described in Article X, section 2, and that the Court was required to defer to the Legislature's authority, was not in error. (12 AA 2779-2781; 2786.)

[3] One limitation on the Legislature's power—that it may not make a rule that sanctions a manifestly unreasonable use of water—is addressed in Section C.1, below.

C. There Is No Conflict Between Fish and Game Code Sections 5937 and 5946; the Trial Court Correctly Interpreted *Cal Trout I* and *Cal Trout II*.

Appellants attempt to distinguish *Cal Trout I* and *Cal Trout II*, seeking to confine the cases to Fish and Game Code section 5946 and denying their relevance to the facts of this case. (Joint Br. at pp. 31-37; Boswell Br. at pp. 26-30.) Real Parties argue that "*Cal Trout I*'s discussion of Article X, section 2 must be understood in light of" the opinion's focus on Fish and Game Code section 5946. (Joint Br. at p. 33.) Boswell argues that "because section 5946 does not apply to Kern River waters, it does not apply to this dispute. And because section 5946 does not apply to this dispute, the analysis of constitutional balancing in the *Cal Trout* cases cannot apply either." (Boswell Br. at pp. 28-29.)

Appellants miss the point of the *Cal Trout* cases, and therefore misapprehend the Trial Court's citing them. It is true that the statue directly at issue in these cases is Fish and Game Code section 5946, not section 5937, but that does not negate the cases' persuasiveness regarding section 5937. Appellants admit that the *Cal Trout* cases hold that section 5946 is a legislative expression of reasonableness. (Joint Br. at pp. 33-34; Boswell Br. at p. 27.) But the same logic applies to

section 5937, both because of the plain language of Article X, section 2 (discussed above), and because of the close relationship between section 5946 and 5937. That the *Cal Trout* cases focus on section 5946 does negate the Court's sound conclusion that section 5937 is a legislative determination of reasonableness.

1. It Was Not Manifestly Unreasonable or a Transgression of the Constitution for the Legislature to Strike the Balance in Favor of the State's Fish When Enacting Section 5937.

The *Cal Trout I* court noted that the Legislature's power is not unlimited: "If a statute sanctioned a manifestly unreasonable use of water, it would transgress the constitution." (*Cal Trout I*, *supra*, 207 Cal.App.3d at 625.) But the court observed that it found "no case holding a statute unconstitutional as inconsistent with article X, section 2 for promulgating a rule concerning the reasonableness of water use. The contrary view is implicit in *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132." (*Cal Trout I*, *supra*, 207 Cal.App.3rd. at p. 624.) And the court found that section 5946 was not such a case:

> 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.

> Accordingly, we have no warrant to override the Legislature's rule in section 5946 concerning that balance.

Real Parties argue that the *Cal Trout I* court determined that the manifestly unreasonable standard "calls for the development of a standard of reasonableness on the facts of the case," but Real Parties gravely misquote *Cal Trout I* and misapprehend its holding. (Joint Br. at p. 34.) The court in *Cal Trout I* used this language to reflect the common rule "that in the absence of an a priori rule a court may ascertain whether a use of water is unreasonable from the facts and circumstances of particular cases." (*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 624.)[4] But the court then made clear that this common rule "does not impel the view that the Legislature has no power to fashion rules concerning reasonableness, e.g., by enacting statutory safety obligations which become the basis of negligence per se." (*Ibid*.)

The question here is thus not whether *applying section 5937 to the Kern River* would be manifestly unreasonable, but rather whether

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[4] Appellants mistakenly cite page 622, but this quote appears at page 624.

the Legislature's policy choice expressed in section 5937—that forbids the complete drying up of fishing streams throughout the state—is manifestly unreasonable or a transgression of the Constitution.

Real Parties answer this question in the affirmative, but barely support their answer. (Joint Br. at pp. 35-36.) They claim that the statute was enacted "without regard to the facts or circumstances of [the state's stream systems], the hydrology and ecology of those systems, the competing needs of the water systems, or the social and economic effects of such a determination on the communities served by those systems." (*Ibid*.) But they provide no support for this argument, either that this is the proper standard or that these are the facts, instead claiming that this was Plaintiffs' burden when seeking the preliminary injunction. (*Ibid*.)

Given section 5937's provenance as a criminal statute clearly intended to protect fishing streams throughout the state, it should be easy to conclude that it is not manifestly unreasonable or a transgression of the Constitution. But in the context of the rest of the Fish and Game Code, that answer is irrefutable. Section 5937 does not exist in isolation. It is one section of several that describe a rational

and reasonable, and repeatedly upheld, set of laws governing dams and obstructions in California's rivers and streams. Most of these provisions are contained in Chapter 3 of the Fish and Game Code, titled "Dams, Conduits and Screens," specifically Article 1 ("General Provisions") and Article 2, "Dams and Obstructions." These sections provide: Fish must be afforded free passage up- and downstream in most waterways throughout the state (Fish & G. Code § 5901) or be provided fishways to get around dams that do not provide free passage. (Fish & G. Code §§ 5931 and 5932.) Dam owners must always allow sufficient water to flow to pass over, through, or around the dam, or through the fishway (if present) to keep fish below the dam in good condition. (Fish & G. Code § 5937.) And if it is "impracticable, because of the height of any dam, or other conditions, to construct a fishway over or around the dam," the Fish and Game Commission can order the owner of the dam to construct and maintain a fish hatchery instead, or plant young fish. (Fish and G. Code §§ 5938, 5942.)

The Water Code reaffirms the centrality of these code sections in California's regulatory scheme regarding water use: "The provisions for the installation of fishways over or around dams and for

the protection and preservation of fish in streams obstructed by dams are contained in Chapter 3 (commencing with Section 5900), Part 1, Division 6 of the Fish and Game Code." (Wat. Code § 6501.) And section 5937 is supported by the Water Board through its regulations: "…all permits for diversion of water from a stream by means of a dam which do not contain a more specific provision for the protection of fish" shall comply with section 5937. (Cal. Code Regs. tit. 23 § 782; see *Cal Trout I*, *supra*, 207 Cal.App.3d at p. 601, fn. 4.)

Appellants ask this Court to declare this law unconstitutional, as well as the Water Code and the Water Board's own regulations, on the thinnest of reeds. The Court should decline the invitation.

2. Recognizing that Section 5937 Is a Legislative Mandate Regarding the Reasonable Use of Water to Protect the State's Fish Does Not Make Section 5946 Superfluous.

Appellants next advocate for this Court to "harmonize" section 5937 with section 5946, because, they argue, the Trial Court's reading of section 5937 would make section 5946 superfluous. (Joint Br. at pp. 36-37; Boswell Br. at pp. 35-36.) To Appellants, if Section 5937 is a legislative determination of priority for every stream in the state, the Legislature would have no reason to have enacted section 5946. But

this argument rests on a misreading of section 5946. Read correctly, there is no conflict in the two code sections and section 5946 is not superfluous.

Section 5946, subdivision (b), states: "No permit or license to appropriate water in District 4 ½ shall be issued by the State Water Resources Control Board after September 9, 1953, unless conditioned upon full compliance with Section 5937." (Fish & G. Code § 5946, subd. (b).) By its plain terms, Section 5946 governs *the issuance of permits or licenses by the State Water Resources Control Board*. It conditions the issuance of those permits or licenses in District 4 ½ on compliance with Section 5937. (*Ibid*.) Section 5937, in contrast, is directed at the "owner of any dam," and says nothing about permits, licenses, or the State Water Resources Control Board. (Fish & G. Code § 5937.)

Apparently in 1953 (as this year is specifically referenced in section 5946), the State Water Resources Control Board was not conditioning the issuance of permits or licenses for dams on compliance with section 5937, and the Legislature sought to ensure that within District 4 ½, at least, it would proceed to do so. But since 1975, when the Water Board adopted Title 23, section 782 of the

California Code of Regulations, the Water Board conditions such licenses and permits throughout the state on compliance with section 5937. (Cal. Code Regs. tit. 23 § 782; see *Cal Trout I*, *supra*, 207 Cal.App.3d at p. 601, fn. 4.) Whether *this regulation* makes section 5946 superfluous may now be a question, but the answer to that question is irrelevant for determining whether the Trial Court's interpretation of section 5937 makes section 5946 superfluous. The answer is no: section 5937 stands on its own as a directive to the owner of any dam in the state. There is no conflict with one statute requiring dam owners to ensure that minimum flows pass over, through, or under their dams, while another statute requires the State Board to condition issuance of a permit with compliance of that first statute.

3. Other Cases Do Not Support Appellants' Position.

Boswell further strains to find error in the Trial Court's citing of two federal cases, *Patterson I* and *Patterson II*, noting that the stream at issue in these cases was not in District 4 ½, so "the district court's analysis on balancing thus is out of context and misapplies the *Cal Trout* cases." (Boswell Br. at p. 32; *Natural Resources Defense Council v. Patterson* (E.D. Cal. 1992) 791 F. Supp. 1425 ("*Patterson*

I"); *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906 ("*Patterson II*"). But the Trial Court properly noted that the federal court in both cases interpreted section 5937 in a manner consistent with its own interpretation, helping "confirm[] that Section 5937 was deliberately adopted by the State Legislature after balancing the competing uses of water and is enforceable as a legislative mandate." (12 AA 2781.) The Trial Court committed no error in citing cases that directly support its legal conclusion, even if the cases rest on different facts.

Boswell seeks support from another federal opinion that denied a request for a temporary restraining order in *Wishtoyo Foundation v. United Water Conservation Dist.* ((C.D. Cal. Jan. 5, 2023) No. 2:22-cv-08657-DOC-PLA; 2023 U.S. Dist. Lexis 2156; Boswell Br. at pp. 33-34.) But, contrary to Boswell's assertions, the court in *Wishtoyo* did not "balance competing beneficial uses of the water and denied the plaintiffs' request for injunctive relief." (Boswell Br. at p. 33.) Instead, the court noted that Plaintiffs' request was based on findings made in the prior federal action, that the court said involved a balancing of interests that implicitly resulted in sufficient water to keep fish below the dam in good condition. (*Wishtoyo*, *supra*,

C.D.Cal. No. 2:22-cv-08657-DOC-PLA at pp. 15-16.) Ultimately, *Wishtoyo* is hardly solid enough ground to find a statute unconstitutional.

Finally, Boswell points to several decisions by the State Water Board to demonstrate that balancing of uses is required under Section 5937. (Boswell Br. at pp. 38-42, discussing SWRCB Order 95-4 [see Boswell RJN, Ex. 2 at pdf pp. 44-107] and SWRCB Order 95-17 [see Boswell RJN, Ex. 3 at pdf pp. 109-161].) These are both water rights orders by the State Board, not court decisions in actions to enforce the plain language of section 5937 against a dam operator. Whether and to what extend section 5937 plays a role in the State Board's decisions is a completely different question than presented here.

But more importantly, in neither order did the State Board conclude that it was required to balance flows required under section 5937 with other uses, as Boswell argues. Instead, in Order 94-5 the State Board made clear that:

> *California Trout, Inc*., can be read as indicating that section 5937 legislatively establishes that it is reasonable to release enough water below any dam to keep fish that exist below the dam in good condition. A release of water that is much in excess of the amount needed to keep the fish in good condition, however, could be unreasonable within the meaning of California Constitution Article X,

> section 2 if there would be adverse effects on other beneficial uses of the water.

(SWRCB Order 95-4 [Boswell RJN, Ex. 2 at pdf p. 52].)

The balancing, if any, involved the water *in excess of* that required to keep fish in good condition. It would not include flows required under section 5937. The board was clear that "Maintaining the fish in good condition is critical to protecting the public trust uses downstream of the dam and it is a legal obligation of the District under Fish and Game Code section 5937." (*Id*. at pdf p. 58.)

SWRCB Order 95-17 is no different, as the State Board stated unequivocally that it had three tasks: to "maximize[] the competing beneficial uses of water, maintain[] fish in good condition, and protect[] public trust resources when feasible." (SWRCB Order 95-17 [Boswell RJN, Ex. 3 at pdf p. 137].) "Maintaining fish in good condition" was one of the Board's three obligations, not one of several beneficial uses to be balanced with other beneficial uses. The Board fully recognized the primacy of that legislative directive, making clear that it "believes that the flows established in this order, in combination with the other required measures, will be sufficient to keep fish in good condition and to protect public trust resources in Lagunitas Creek." (*Id*. at pdf p. 152.) Boswell's argument that not including

flows required by section 5937 in a balancing would be reversible error (Boswell Br. at p. 42) is wrong and finds no support in these State Board orders.

D. The Trial Court Correctly Determined that Plaintiffs Were Likely to Succeed on the Merits.

Appellants argue that the trial court incorrectly failed to require "Plaintiffs to make any factual showing regarding the Kern River's fisheries, hydrology, or beneficial uses that would suggest the Injunction constituted a reasonable use of water under Article X, Section 2." (Joint Br. at pp. 37-39.) This is mostly a repeat of Appellants' flawed argument regarding the relationship between section 5932 and Article X, section, 2, which is addressed above. The Trial Court correctly concluded that:

> 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.
>
> (12 AA 2810.)

Appellants seek to force the Trial Court to conduct an evidentiary hearing to obtain evidence that Appellants believe essential to a balancing that had already been done by the Legislature

when it enacted section 5937. Appellants have a difficult time believing that the Legislature meant what it said when it enacted the unambiguous language of section 5937, but the courts must presume that is the case. (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 484-485.)

Appellants propose a hypothetical of a river whose entire flow was required to keep fish in good condition, suggesting that this scenario demonstrates that the language of section 5937 cannot possibly mean what it says. (Joint Br. at p. 38.) But not only is this hypothetical misplaced in this part of the injunction analysis, as it does not speak to the likelihood of success on the merits (whether it could apply to the balancing of harms part of the inquiry is discussed in Section II, below), but it ignores the other provisions of the Fish and Game Code that work in conjunction with section 5937. As described above, there are several mechanisms for dam owners and the State to provide water for communities while also protecting the river's fish, including by building fish hatcheries or planting young fish below diversion dams. (See Section I.C.1, above; Fish and G. Code §§ 5938, 5942.)

The Trial Court correctly determined that Plaintiffs had a "very high likelihood of succeeding on the merits" based on its detailed analysis of the plain language of the statute as well as controlling and persuasive case law. There is no basis to find that the Trial Court abused its discretion. (*IT Corp. v. County of Imperial*, *supra*, 35 Cal.3d at p. 69.)

II. The Trial Court Fully Considered and Correctly Weighed the Respective Harms to the Parties.

The Trial Court extensively considered the likely harms to the respective parties, and even engaged in a balancing of those harms, as part of its discretionary analysis in deciding whether a preliminary injunction should issue, despite its acknowledgement that it had "no jurisdiction to override the State Legislature and re-weigh the competing interests when it comes to addressing the underlying, substantive issue" regarding section 5937. (12 AA 2815.) The Court also correctly acknowledged that due to the strong likelihood that Plaintiffs would prevail on the merits of their section 5937 claim, "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." (12 AA 2815.) And the Court correctly issued a prohibitory injunction, not a mandatory one.

A. The Injunction Is Prohibitory, Not Mandatory.

Appellants complain that the Trial Court "should have applied a stricter standard to Plaintiffs' motion" because, according to Appellants, the injunction sought was mandatory, not prohibitory. (Joint Br. at p. 40.) Appellants are wrong on both counts: the court made clear that it "would engage in essentially the exact same analysis and reach the same conclusion regardless of whether the injunction is classified as prohibitory or mandatory." (12 AA 2806.) But the injunction is clearly prohibitory in nature, not mandatory, as both logic and the law dictate.

The Trial Court observed that "[s]ince the conduct to be restrained would prevent Defendant from engaging in a particular behavior, the injunction sought is prohibitory, not mandatory." (12 AA 2815.) This ought to be the start and the stop of the analysis: Plaintiffs sought, and the court granted, an injunction preventing Bakersfield from diverting excessive amounts of water from the Kern River. Bakersfield was not ordered to take an affirmative act; it was *prohibited* from taking an unlawful one. The plain fact is that without Bakersfield's daily action of placing, manipulating, and controlling adjustable barriers in the Kern River to divert water, the Kern River

would and does naturally flow through the city, from the mouth of the canyon to the flat of the valley floor. (12 AA 2801-03.) In operating its six weirs in the Kern River, Bakersfield does not put water into the river channel, it removes it. (*Id*. at p. 2803 ["…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. … All of the weirs require manual operation and require in-field personnel for any change in flow rates."].)

But repeated actions, like Bakersfield's daily "mechanical manipulation of constructed weirs" (*Ibid*.), if engaged in long enough, can become so routine as to appear to be acts that themselves are the status quo, as opposed to the *natural* status quo those daily *acts* disturb. Is the long-standing and ongoing operation of the weirs the status quo, or is the natural flowing river the status quo? Under the law, Appellants argument that the ongoing operation of the weirs is the status quo is the "untenable" position, not the Trial Court's conclusion that the status quo is the flowing river. (Joint Br. at p. 40.)

Appellants reach to the 1941 decision in *Food and Grocery Bureau of Southern Cal. v. Garfield* (1941) 18 Cal.2d 174 ("*Food and Grocery Bureau*"), glossing over the much more extensive discussion

by the Supreme Court in the 2021 decision of *Daly v. San Bernardino Cnty. Bd. of Supervisors* (2021) 11 Cal.5th 1030 ("*Daly*"). *Food and Grocery Bureau* regarded "an injunction against a long-established practice," (see Joint Br. at p. 41) but that is where the similarity to this case ends. There, a trade association brought an unfair business practices claim against a grocery store for its decade-old trading stamp promotion. (*Food and Grocery Bureau*, 18 Cal.2d at p. 176.) Contrary to Appellants' assertion (Joint Br. at p. 41), the court did not conclude that the injunction was mandatory but rather **assumed the injunction to be prohibitory**. (*Food and Grocery Bureau*, 18 Cal.2d at p. 177.) The court stayed the injunction only after "consideration of the respective rights of the litigants, which contemplates the possibility of an affirmance of the decree as well as of a reversal." (*Id*. at pp. 177-178.) The fact that the trading stamp promotion had been "countenanced for many years without objection, coupled with other circumstances here shown," including that the plaintiff had admitted "that of itself it [was] not injured by petitioner's activities," (*id*. at p. 178) governed its decision; not any holding that injunctions against long-standing acts are necessarily or even possibly mandatory in effect.

Far more persuasive and on point is the holding of *Daly*. There, the Supreme Court discussed the difference between mandatory and prohibitory injunctions and the role of identifying the status quo in determining the difference. It identified two prevailing methods of measuring the status quo employed by California courts. One is measured "from the time the order is entered," and the other is measured "from the last actual peaceable, uncontested status which preceded the pending controversy"; i.e., "before the contested conduct began." (*Daly*, 11 Cal.5th. at pp. 1045-46, internal quotations omitted.) The Court did not take sides, but rather noted the first method's use when the order "offers a remedy for a past violation," and the second method's use when the order seeks "to prevent injury from future conduct." (*Id*. at p. 1046.) Here, either method could be justified—with both resulting in the same conclusion that the injunction is prohibitory—but the trial court chose the second method, explicitly ordering Bakersfield to cease its violative actions to prevent future injury to the Kern River's fish. (12 AA 2789.)

The *Daly* court paid considerable attention to a much earlier Supreme Court case, *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80 ("*United Railroads*"), which Appellants also

discuss. (*Daly*, 11 Cal.5th at pp. 1044-1046; 1048-1050; Joint Br. at pp. 40-41.) The plaintiff in *United Railroads* obtained an injunction preventing San Francisco from operating excessive municipal railway cars on United Railroads' tracks. (*United Railroads*, 172 Cal. at pp. 81-82.) San Francisco argued that such an injunction was "mandatory in effect" because it was actually "an order directing the city to relinquish its possession of the incorporeal hereditament [the city's right to use the rails] and, therefore, mandatory in character." (*Id*. at p. 86.) As the *Daly* court described it, San Francisco had argued that "maintaining the status quo during the pendency of the litigation required allowing the city to continue its disputed usage of the tracks." (*Daly*, 11 Cal.5th at p. 1044.) The Supreme Court rejected this argument, finding such an injunction to be prohibitory. (*United Railroads*, 172 Cal. at pp. 86-87.)

The *Daly* court explained that its decision in *United Railroads* "recognizes that in some instances, an injunction that is essentially prohibitory in nature may involve some adjustment of the parties' respective rights to ensure the defendant desists from a pattern of unlawful conduct." (*Daly*, 11 Cal.5th at p. 1046.) The court continued:

> The *United Railroads* 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.

(*Daly*, 11 Cal.5th at p. 1046.) The court then approvingly quoted a Court of Appeal decision that cited *United Railroads* "for the proposition that '[a]n injunction that restrains the continuance of an act or series of acts may be just as much a preventive or prohibitory injunction as one that restrains the commission of an act.'" (*Daly*, 11 Cal.5th at p. 1048, quoting *Jaynes v. Weickman* (1921) 51 Cal.App. 696, 699 (emphasis added).)

Appellants seek to distinguish *United Railroads* on the basis that "the practice enjoined was never uncontested," contrasting the food stamp practice in *Food and Grocery Bureau*. (Joint Br. at p. 41.) But this is not a defining fact of the *United Railroads* holding, as *Daly* makes clear, and *Food and Grocery Bureau* does not even regard a mandatory injunction.

That "the Kern River has been operated in accordance with the 'Law of the River' for over a century" is simply not the definition of the status quo under the law. (See Joint Br. at p. 41.) The City's

repeated diversion of water from the Kern River is the continuance of a series of acts just like the continuance of a series of acts by San Francisco in *United Railroads*: in both instances, the activity is ongoing, it preceded the litigation, is alleged by the plaintiffs to be in violation of the law (and so found by the Court). (*Daly*, 11 Cal.5th at p. 1044.) Like the injunction in *United Railroads*, the Injunction here was properly issued as it "restrain[s] the defendant from repeating its unlawful conduct," even if it also "require[es] some adjustment of the parties' respective rights." (*Id*. at p. 1048.)

The Trial Court's thoughtful and reasoned injunction "may not be recharacterized as mandatory merely because it requires the defendant to abandon" its repeated conduct of excessive diversions from the Kern River, as to which the Real Parties "assert[] a right of some sort." (*Daly*, 11 Cal.5th at p. 1046.)

B. The Trial Court Fully Considered Evidence of Potential Harm Presented by Real Parties.

Real Parties seek for this Court to substitute its own balancing of the respective harms for that conducted by the Trial Court, claiming that the Trial Court ignored evidence of their respective harm. (Joint Br. at pp. 42-43.) The Trial Court did not ignore any evidence, including all evidence submitted by Real Parties, but it noted correctly

in its assessment of the relative harms that the legislature had imposed a compulsory balance between flows required to keep fish in good condition and agricultural flows, in the form of Section 5937. (12 AA 2785.)

Nonetheless, the Trial Court reviewed the extensive evidence and concluded that the average annual flows of the Kern River provide "an enormous amount of water that should suffice for the reasonable use of all interested stakeholders." (12 AA 2785.) Some of this evidence was included in the City's 2016 "Recirculated Draft Environmental Impact Report" for the "Kern River Flow and Municipal Water Program," of which the Trial Court took judicial notice. (12 AA 2775-76; see 12 AA 2543-2691.) There, the City demonstrated its diversions to be approximately 24,000 acre-feet per year and calculated that a year-round flowing river could be accomplished with as little as approximately 160,000 acre-feet per year. (12 AA 2589; 12 AA 2584-85; 12 AA 2561-62; see 11 AA 2471-73.) Given the Kern River's average annual flows of 726,000 acre-feet, the Trial Court did not abuse its discretion in determining that the river's flows "should suffice for the reasonable use of all interested stakeholders," which includes consideration of North Kern's "total

agricultural water requirement" of 160,000 acre-feet per year, especially as Kern River diversions represent only a portion of that total, with as little as 10,000 acre-feet diverted for North Kern in some years. (11 AA 2331.)

Real Parties argue that the Trial Court committed error in not considering KCWA's demand for municipal water, citing a declaration submitted by KCWA in support of its opposition to Plaintiffs' Motion for Preliminary Injunction. (Joint Br. at p. 44, citing 11 AA 2321-24.) But this declaration provides no details regarding KCWA's municipal needs; it contains a single conclusory sentence on the issue: "KCWA's operations provide broad benefits to municipal, industrial, and agricultural water users throughout Kern County." (11 AA 2321.) The declaration is otherwise focused not on KCWA's use of water, but rather its water rights and its operation of the Cross Valley Canal. (11AA 2321-24.) KCWA cannot claim on that evidence that the Trial Court's Injunction Order would deprive it of any of its municipal needs from the Kern River. The Trial Court thus did not "wrongly assume" (Joint Br. at p. 44) that Bakersfield was the only provider of domestic water supplies in its analysis; it made a considered analysis

based on all the evidence presented by the parties, including KCWA. It did not abuse its discretion.

The Trial Court did not "implicitly assume[] that Bakersfield could take the entire flow of the Kern River for its claimed demands." (Joint Br. at 44.) The Reconsidered Injunction prioritizes that water "exempted by dire necessity to sustain human consumption through the domestic water supply." (16 AA 3738.) This limited directive plainly does not implicitly assume that Bakersfield could or would take the entire flow of the Kern River. Regardless, consideration of the City's domestic needs is part of the Trial Court's reasoned analysis of the potential harms to all parties, especially given Water Code section 106's clear prioritizing of domestic water supplies over that used for agriculture. (Wat. Code § 106; see 12 AA 2782.)

Real Parties are wrong that Plaintiffs "did not provide any indication of even an approximate quantity of water that would be required for their proposed minimum flow." (Joint Br. at p. 44.) This is not a basis to find that the Trial Court abused its discretion; the Trial Court correctly acknowledged that it was permitted to "impose the 'best approximate compliance' and then thereafter 'proceed with more elaborate study looking to refinement of those rates in subsequent

proceedings'." (12 AA 2787, quoting *Cal Trout II*, *supra*, 218 Cal.App.3d at 209.) But even then, Plaintiffs did in fact provide the court with approximate quantities of water: first, in the form of the Draft EIR prepared by the City that concluded how 160,000 acre-feet per year could keep the river flowing year-round (11 AA 2471, citing 12 AA 2561; see also 12 AA 2589; 12 AA 2584-85; 12 AA 2562); and second, through the Declaration of Ted Grantham, who proposed a flow regime based on the best-available science, determined as a percentage of natural flows as a starting point, to be adjusted as data is collected. (11 AA 2471, citing 11 AA 2514-2520.)

Finally, Boswell argues that the Trial Court "overlooked the risk of flooding from increased flows" and thereby committed reversable error. (Boswell Br. at p. 46.) But as Boswell admits, this evidence was not introduced in any of the proceedings regarding the preliminary injunction. (*Id*. at p. 47.) "The granting, denial, dissolving or refusing to dissolve a permanent or preliminary injunction rests in the sound discretion of the trial court upon a consideration of all the particular circumstances of each individual case and will not be modified or dissolved on appeal except for an abuse of discretion." (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 850 (internal quotations omitted).)

Boswell's only complaint is that it cannot move for reconsideration of the injunction due to this Court's stay of the injunction. (Boswell Br. at p. 47.) But that is not grounds for finding reversible error in the Trial Court's PI Order; it is not an allegation that the Trial Court abused its discretion by failing to properly consider some change in circumstances that occurred since it issued its order. (See *Union Interchange, Inc. v. Savage* (1959) 52 Cal.2d 601, 606.) Boswell is free to seek reconsideration and modification of the PI Order after this Court removes the currently-imposed stay, but Boswell's current protest is untimely and meritless.

C. Plaintiffs Amply Demonstrated Likelihood of Irreparable Harm, But This Is Not the Correct Standard for Reviewing the Trial Court's Prohibitory Injunction.

Appellants argue that Plaintiffs failed to provide any evidence that irreparable harm would occur during the pendency of the litigation. (Joint Br. at p. 45.) Irreparable harm is a required element in *mandatory* injunctions, not *prohibitory* injunctions. (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286 , 295, quoting (*Hagen v. Beth* (1897) 118 Cal. 330, 331 ["[t]he granting of a mandatory injunction pending the trial ... is not permitted except in

extreme cases where the right thereto is clearly established and it appears that irreparable injury will flow from its refusal."].)

Nonetheless, Plaintiffs clearly demonstrated that irreparable harm would follow if the injunction were not issued. Appellants suggest that a fish's ability to return to a wet river in a single extremely unusual year somehow negates the irreparability of killing hundreds or thousands of fish and destroying, for an unknown number of years, aquatic and riparian habitat essential for the life of fish and birds. (Joint Br. at p. 45.) That a fish species may possibly repopulate a rewatered river does not negate the fact that the drying up of that river is irreparable for the fish alive in that river, at that time.

Appellants are correct that the Kern River has experienced "periodic dryback." (*Ibid*.) As the Trial Court found, "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…." (12 AA 2803.) But, as the Trial Court found, this drying up of the river has been and continues to be caused not by natural forces, but by "major improvements, such as canal enlargements and

concrete linings, [that] 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." (12 AA 2803.)

The dewatering of the Kern River by City in furtherance of Appellants' agricultural water use has absolutely caused irreparable harm to the fish that sometimes do inhabit the often-dry stretches of the river. These fish are prevented from swimming upstream, following the wet river as it dries up, due to the presence of the City's six dams that prevent fish passage. Thus, all of the River's "intermittent dryback" episodes have been and continue to be truly deadly, permanent, and irreparable for those fish.

The Trial Court correctly observed that this harm, caused by "a completely dry, dead river channel," is significant, and noted that the harm extended beyond fish, to "other forms of life such as birds" and to "the quality of life for Bakersfield's residents and visitors…." (12 AA 2814-15.) That some fish species may be able to repopulate a river once flows are restored is a testament to the almost unimaginable resiliency of nature. But this resiliency does not negate the

irreparability of the harm the Trial Court concluded was being caused by the City's excessive diversions.

III. The Injunction Was Specific and Definite Enough to Provide a Standard of Conduct.

Appellants incorrectly state that Plaintiffs requested as relief "a simple reiteration of the statutory [i.e. Section 5937] directive without quantification of the amount of water required to satisfy the direction." (Joint Br. at p. 46, citing 2 AA 316.) While this accurately quotes one sentence in Plaintiffs' motion, it incorrectly adds "i.e. Section 5937" to the sentence, changing its meaning. And Appellants' quoting of only this single sentence misleads this Court as to the actual relief requested by Plaintiffs. This quote, contained with the brief's Standard of Review section, merely sets forth an interpretation of part of the holding of *Cal Trout II*, and makes no request for relief at all. (2 AA 316.) And Plaintiffs take pains to describe how it is the City's burden—and discretion—to determine how to comply with the law, but that:

> Any consideration to determine the amount of water necessary to comply with the Fish and Game Code can be addressed by 'means of interim judicial relief.'" (*Cal. Trout II*, *supra*, 218 Cal.App.3d at p. 200.) A good faith initial interim estimate of sufficient bypass flow will need to be properly monitored and measured. (Cal. Code

> Regs. tit. 23 § 931-937.) The interim estimate of sufficient flow must be adjusted over time guided by: credible science (Fish & G. Code, § 33); ecosystem-based management (Fish & G. Code, § 43); and adaptive management. (Fish & G. Code, § 13.5.)
>
> (2 AA 316.)

Appellants would have the Trial Court first determine the exact flow requirements for the river before issuing any injunction, claiming that not doing so is in error. (Joint Br. at p. 47.) But Appellants make their argument with hardly any analysis of the Trial Court's actual injunction. They cite Plaintiffs' motion and the transcript of the hearing, and quote a few lines from the order, but they mostly ignore the substance of the nearly three pages of discussion by the Trial Court in its order. (Joint Br. at pp. 46-53; 12 AA 2815-18.)

In fact, the Trial Court explains at length its reasoning regarding possible injunctive relief, describing two possible options: (1) requiring the parties to confer and establish, with the input from subject matter experts, the specifics of the necessary flows, or (2) have the Court specify the flows necessary for compliance. (12 AA 2815-16.) The Court stated that it had "no intention of countenancing 'protracted disobedience of the statute' and [was] 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." (12 AA 2816, quoting *Cal Trout II*, *supra*, 218 Cal.App.3d at 194.) But the Court also acknowledged that the Defendant City "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." (12 AA 2817.) The Court elected to give the parties a chance to meet and confer, to see if collaboration and cooperation might be possible, avoiding both protracted litigation and protracted disobedience of the statute.

But the Court did not leave this noble effort hanging on its own; it explicitly retained jurisdiction and instructed the parties that their obligation was limited to good faith consultation. If the parties proved "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." (16 AA 3738.)

This is not an injunction lacking a definite standard of conduct, one that improperly avoids establishing required flows, a mere

"follow the law" injunction like that complained of in *Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* ((2022) 76 Cal.App.5th 1, 22) ("*Monterey Coastkeeper*"), or an impermissible delegation of authority. (See Joint Br. at pp. 47-52.) It was a reasoned effort by the Trial Court to enjoin the City's violative behavior while encouraging the parties to collaborate on a remedy that would have support by all stakeholders. Appellants' cynical rejection of this effort should not be rewarded.

Appellants' reliance on *Monterey Coastkeeper* is particularly inapt. *Monterey Coastkeeper* does not regard an injunction, an action under Section 5937, or even an effort to establish any sort of minimum flows. Instead, it was a mandamus and declaratory relief action against the State Water Resources Control Board and several regional water boards, seeking to force the boards to comply with a specific pollution control policy and the Public Trust Doctrine. (*Monterey Coastkeeper*, *supra*, 76 Cal.App.5th at p. 7.) It was an appeal of a trial court's sustaining of a demurrer due to the petitioners' failure to identify "a mandatory, ministerial duty but instead brought a broad, generalized challenge to an agency's discretionary decisions." (*Id*. at p. 12.) This is nothing like the injunction sought and issued

here, which is specific to the City's operation of six weirs and prohibits the City from diverting water from the river in excessive amounts that violate the law. (16 AA 3738.)

Appellants point to Bring Back the Kern's Motion to Compel Compliance as an example of "extensive additional proceedings" like those of concern to the court in *Monterey Coastkeeper*. (Joint Br. at p. 51.) In fact, the Motion to Compel merely acknowledged that the initial good faith consultation ordered by the Trial Court had been conducted and was not successful, necessitating action by the Trial Court to "make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order." (See Pet. for Writ of Supersedeas, 4/19/2024, at pp. 26-41; 16 AA 3738.)

Finally, the Trial Court's provision for good faith consultation among the parties was not an impermissible delegation of authority, for the simple reason that the court never delegated any authority to any party, unlike the court in *Stadish v. Superior Court* ((1999) 71 Cal.App.4th 1130, 1144). (Joint Br. at p. 52.) The Trial Court gave an opportunity to the parties to confer but it maintained full jurisdiction and stood ready to establish the minimal flow rates itself, if and when

necessary. (16 AA 3738.) That the parties have already engaged in that good faith consultation, and that Bring Back the Kern has already requested the Trial Court exercise its jurisdiction to establish the minimal flows now sought by Appellants, demonstrates the lack of merit to Appellants' argument.

IV. Appellants' Appeal of the Injunction's Bond is Untimely.

Appellants challenge the Trial Court's requirement of a $1000 bond, but this challenge is untimely as it was not brought within 60 days of the PI Order. (Cal. Rules of Court 8.104, subd. (a)(1).) Real Parties requested first in oral argument on the motion for injunction, and then in their Motion for Reconsideration, that an evidentiary hearing be held to determine the amount of the bond. (13 AA 2911-12.) The Trial Court refused this request, clearly denying it. (16 AA 3738.) A court's denial of a motion for reconsideration is not separately appealable, and each of the Notices of Appeal were filed well beyond the statute of limitations for appealing the PI Order. (Code Civ. Proc. § 1008, subd. (g); Cal. Rules of Court 8.104, subd. (a)(1).)

Appellants concede that "[a] single order or judgment can be in part appealable and in part nonappealable," citing *Six4Three, LLC v.*

Facebook, Inc. ((2020) 49 Cal.App.5th 109, 111), and that a "denial 'is not separately appealable' but is instead 'reviewable as part of an appeal from' the underlying order," citing Code Civ. Proc., § 1008, subd. (g). (Appellants' Opposition to Motion to Dismiss Appeal, August 14, 2024, at pp. 10-11.) But Appellants do not explain how their appeal of the PI Order, where the Trial Court set the amount of the bond that they now appeal, is timely. Notice of Entry of the PI Order was filed and served on November 9, 2024 (12 AA 2795), yet the first Notice of Appeal was not filed until January 18, 2024, 70 days after entry of the order. (16 AA 3766.) Because the Trial Court denied Appellants' motion for reconsideration of its bond amount, that portion of the PI Order is not appealable as Appellants filed their notices of appeal more than 60 days after notice of entry of the PI Order. (Cal. Rules of Court 8.104, subd. (a)(1).)

Nonetheless, there is no basis for reversal of the Trial Court's order setting the bond. California state courts have not addressed whether courts are *precluded* from ordering a nominal bond or waiving the bonding requirement entirely. (*Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219-20.) Federal decisions, which provide a useful guide, have repeatedly held that only a

nominal injunction bond should be imposed in environmental litigation, even where an enjoined defendant may suffer substantial economic loss as a result of the injunction. (See, e.g., *People ex rel. Van de Kamp v. Tahoe Regional Plan* (9th Cir.1985) 766 F.2d 1319; *Friends of the Earth, Inc. v. Brinegar* (9th Cir.1975) 518 F.2d 322; see also Henson & Gray, Injunction Bonding in Environmental Litigation (1979) 19 Santa Clara L.Rev. 541.) The federal authority is based on a perception that where a court is inclined to grant an injunction against environmental damage, the public interest in preservation of the environment pending hearing on the merits is more important than the defendant's economic interest. Stated another way, the damage to the environment, often irreversible, is greater than the damage to the pocketbook. (Henson & Gray, *supra,* at p. 569.) The federal rule of nominal injunction bonding in environmental litigation is a sound one, nothing in the pertinent California statutes forbids application of the rule, and the Trial Court's application of it here should be upheld.

V. The Implementation Order Is Not Appealable.

Appellants complain about violations of their due process rights caused by the Trial Court's issuance of the Implementation Order and argue that the Implementation Order was not based on substantial

evidence. (Joint Br. at pp. 55-63; see also Boswell Br. at pp. 45-47.) But the due process concerns raised by Appellants, including lack of notice and the lack of a hearing, were mooted by the Reconsidered Injunction, which ordered good faith consultation with all parties, including Appellants. (16 AA 3738.) The same is true for the priority given to the City of the first 180 cfs (see Joint Br. at p. 57) and the "40% fish flow standard" (see *id*. at 59-62; see Boswell Br. at p. 46); these terms were amended and voided by the Reconsidered Injunction and are not properly the subject of appeal. (16 AA 3738 ["Defendant City of Bakersfield … [is] 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*."].)

Nonetheless, this Court should not mistake the Trial Court's reconsideration of its PI Order as an abandonment of the use of a percentage of natural flows for a future injunction, nor should this Court make any such ruling regarding this methodology. The question

the Trial Court was forced to ask, and will be forced to ask upon remand, is: how to determine what flows are sufficient to keep fish in good condition in the absence of long-term historical data? Dr. Ted Grantham is one of the state's foremost authorities on answering this very question, having helped develop the California Environmental Flows Framework (CEFF), "a collaborative, science-based approach for establishing environmental flow protections in California's rivers." (11 AA 2515; 2522-2534.) Dr. Grantham declared:

> In the absence of [a long history of biological, water quality, and hydrologic monitoring data], it is common to estimate environmental flows needs as a proportion of natural, unimpaired flows. Such percent-of-flow (POF) approaches explicitly recognize the importance of maintaining natural flow variability, are conceptually simple, and can be implemented in rivers that are regulated by large dams and those impaired by diversions.

(11 AA 2517.)

Appellants are thus incorrect in claiming that "[t]he trial court did not have any scientific evidence before it to support the imposition of a 40% fish flow standard…." (Joint Br. at p. 60.) In fact, the Trial Court had the best available science regarding the very question needing to be answered. Appellants would instead impose a legal standard that would require scientific certainty as to flows required to

keep fish in good condition without permitting the collecting of the data required for that certainty. A dry river will reveal no data that will ever be acceptable to Appellants, making the enforceability of section 5937 impossible. Such a result may be what Appellants desire, but it is not what the law allows.

Appellants' wish also gets the burden reversed: it is not the burden of Plaintiffs 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. Either way, the Trial Court must have the power to enjoin violative activities on an interim basis, pending further study and collection of data, with the power to amend that injunction as further data is revealed.

CONCLUSION

For the above reasons, the appeal should be rejected and the Trial Court's well-reasoned and lawful injunction reinstated. The Trial Court committed no error in issuing the injunction and Appellants have failed to demonstrate any basis for reversing its factual or legal conclusions. The Trial Court was compelled by the law to enjoin the violative acts committed by the City of Bakersfield and there is no

basis for concluding otherwise. Bring Back the Kern thus respectfully requests that this Court find in their favor and deny Appellants' appeals.

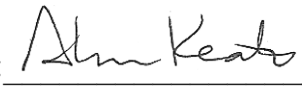
Respectfully Submitted,

DATED: August 20, 2024 By: 

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

CERTIFICATE OF COMPLIANCE

Pursuant to CRC Rule 8.204(c)(1), this brief contains 11838 words, according to the word count feature of Microsoft Word.

DATED: August 20, 2024 By: 

Adam Keats

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 service took place. My business address is 2489 Mission St., Suite 16, San Francisco CA 94110.

On August 20, 2024, I caused to be served the following document on the parties in this action, whose attorneys are listed in the True-Filing service directory for this matter, by utilizing the e-filing service offered by True-Filing:

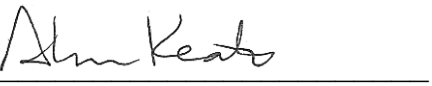
COMBINED RESPONDENTS' BRIEF OF BRING BACK THE KERN ET AL.

On August 21, 2024, after receiving notice that the above document was missing a Certificate of Interested Parties, I caused to be served an updated version of the same document, that included the Certificate of Interested Parties with an updated Table of Contents and Table of Authorities.

I also caused to be served, via US Mail, a copy of this document addressed to:
Hon. Gregory Pulskamp, Division J
Metropolitan Division Justice Building
1215 Truxtun Ave
Bakersfield, CA 93301

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

Executed this 21st day of August, 2024, in Chebeague Island, Maine.

By: 

Adam Keats