Civil 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 DISTICT, et al.
Real Parties in Interest and Appellants.

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

APPELLANTS' JOINT REPLY BRIEF

SCOTT K. KUNEY, ESQ. (SBN 111115)
*BRETT A. STROUD, ESQ. (SBN 301777)
YOUNG WOOLDRIDGE, LLP
1800 30th Street, Fourth Floor, Bakersfield, California 93301
(661) 327-9661
skuney@youngwooldridge.com
bstroud@youngwooldridge.com
Attorneys for Real Party in Interest and Appellant North Kern Water Storage District

[Additional Counsel on Next Page]

ADDITIONAL COUNSEL	
Isaac Lee St. Lawrence (SBN 229789) McMurtrey, Hartsock, Worth & St. Lawrence 2001 22nd Street, Suite 100 Bakersfield, CA 93301 (661) 322-4417 isaac@mhwslegal.com	*Attorneys for Real Party in Interest and Respondent Buena Vista Water Storage District*
Robert Edward Donlan (SBN 186185) Craig A. Carnes, Jr. (SBN 238054) Kevin William Bursey (SBN 328999) Ellison Schneider Harris & Donlan LLP 2600 Capitol Ave, Suite 400 Sacramento, CA 95816-5931 (916) 447-2166 red@eslawfirm.com cac@eslawfirm.com kbursey@eslawfirm.com Richard L. Iger (SBN 263412) Kern Delta Water District 501 Taft Highway Bakersfield, CA 93307 (661) 834-4656 richard@kerndelta.org	*Attorneys for Real Party in Interest and Respondent Kern Delta Water District*

Daniel N. Raytis, Esq. (SBN 218374) Daniel M. Root (SBN 311840) Belden Blaine Raytis 5016 California Avenue, Suite 3 Bakersfield, CA 93309 (661) 864-7826 dan@bbr.law droot@bbr.law Jennifer Lynn Spaletta (SBN 200032) Stoel Rives LLP 500 Capitol Mall, Suite 1600 Sacramento, CA 95814 (916) 447-0700 jennifer.spaletta@stoel.com	*Attorneys for Real Party in Interest and Respondent Rosedale-Rio Bravo Water Storage District*
Somach Simmons & Dunn A Professional Corporation Nicholas A. Jacobs (SBN 210091) Louinda V. Lacey (SBN 275888) Michelle E. Chester (SBN 300632) 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 (916) 446-7979 njacobs@somachlaw.com llacey@somachlaw.com mchester@somachlaw.com	*Attorneys for Real Party in Interest and Respondent Kern County Water Agency*

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Constitutional Provisions

Introduction

The trial court issued a mandatory preliminary injunction ("Injunction") and an injunction "implementation" order ("Implementation Order") that fundamentally displaced and changed the status quo of the daily conservation and management of Kern River water. Appellants, five public water agencies, ask this Court to reverse both orders.

Appellants have demonstrated four separate ways in which issuing the Injunction was reversible error, and Respondents' arguments have not successfully rebutted any of them. First, the trial court applied an incorrect interpretation of the law that, if upheld, would undermine the fundamental public policies of California water law. (*Infra*, Part I.) Second, the trial court abused its discretion by not applying the correct standard and balancing the relative harms to the parties before issuing the Injunction. (*Infra*, Part II.) Third, the Injunction is so vague as to be unenforceable and void. (*Infra*, Part III.) Fourth, the trial court did not impose a sufficient bond as required by statute. (*Infra*, Part IV.) If this Court agrees with even one of these four arguments, it should reverse the Injunction. Appellants have also demonstrated that the Implementation Order was reversible error (*infra*, Part VI), and the Court should also disregard Bakersfield's arguments challenging the trial court's decision to stay the Implementation Order (*infra*, Part V).

Argument

I. Section 5937 does not constitute a legislative balancing of all water uses on all stream systems in California.

Respondents Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity (collectively, "BBTK") and Water Audit California ("WAC") argue that the trial court was correct in determining that Section 5937 constitutes a legislative balancing of all competing uses of water on all stream systems in California, including the Kern River. (Comb. Resp. Brief of Bring Back the Kern, et al., hereafter "BBTK", p.15; Water Audit California's Comb. Resp. to App. Real Parties in Interests' Joint Open. Brief and J.G. Boswell Co. Open. Brief (version filed on September 6, 2024), hereafter "WAC", p. 27; see 12 AA 2781.) BBTK accuses Appellants of "ignor[ing] the plain language of Article X, section 2, that delegates to the Legislature the power to establish the reasonableness of specific uses of water." (BBTK, p. 16.) BBTK parodies Appellants' position as a claim that "there is no role for the Legislature in making such determinations." (*Id.*, p. 19.)

Not so. Appellants acknowledge the role the Constitution gives to the Legislature in implementing the rule of reasonable use, which was discussed by the *Cal Trout I* court. (Cal. Const., art. X, § 2; see *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 (hereafter "*Cal Trout I*"), 625.) However, that fact does not support the trial court's Injunction for two reasons. First, there is no indication that Section 5937 was intended as an exercise of that legislative discretion. (See AOB, pp.

31–37; see *infra* Part I.A.) Second, even if there was, "the Legislature's broad authority is not unlimited," and such an absolute rule without regard to varying and changing conditions and circumstances would be unconstitutional. (207 Cal.App.3d at p. 625; see AOB, pp. 35–36; see *infra* Part I.B.)

A. Section 5937 was not enacted as a legislative determination of the relative reasonability of all water uses on all stream systems.

The central conceit of BBTK's argument regarding Section 5937 is that "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." (BBTK, p. 35.) The authorities cited by BBTK stand only for the uncontroversial proposition that the Legislature can make rules pertaining to the reasonable use of water. (*L.A. Waterkeeper v. State Water Res. Control Bd.* (2023) 92 Cal.App.5th 230, 268; *Fullerton v. State Water Resources Control Board* (1979) 90 Cal.App.3d 590, 597; *Cal Trout I*, *supra*, 207 Cal.App.3rd at p. 625; *In re Waters of Long Valley Creek Steam System* (1979) 25 Cal.3d 339, 351-252.) None of the authorities involved Section 5937 or considered how it is to be interpreted. In fact, no California appellate court has yet addressed this issue. (Karrigan S. Börk et. al., The Rebirth of California Fish & Game Code Section 5937: Water for Fish (2012) 45 U.C. Davis L. Rev. 809, 883, 900–01.[1])

[1] Respondents rely on this law review article to support the trial court's interpretation of Section 5937. (BBTK, p. 21; WAC, pp. 51–53.) Courts appropriately give "little weight" to "advocacy-based law review articles." (*People v. Bocanegra* (2023) 90 Cal.App.5th

BBTK and WAC have cited nothing, either in the text or the legislative history of Section 5937, that would indicate the Legislature intended or performed any such determination. Indeed, it is apparent that the Legislature did not and could not have so intended, since the text now codified as Section 5937 originated in 1915, prior to the 1928 constitutional amendment and the 1943 enactment of Water Code section 100 which establish California's rule of reasonable use. (*Id.* at p. 822; BBTK, p. 22.) "This amendment … establishes state water policy. All uses of water, **including public trust uses**, must now conform to the standard of reasonable use." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443, 446 [emphasis added].)

By contrast, the legislative record of Section 5946, which was at issue in the *Cal Trout* cases, shows extensive evidence that the details of specific stream systems and even specific projects were considered. (*Cal Trout I*, 207 Cal.App.3d at pp. 601–03.) WAC continues to ignore this essential difference by the sleight of hand of quoting *Cal Trout I* and replacing "5496" with a bracketed "5937." (WAC, p. 26.) The trial court incorrectly adopted this conflation. As discussed in Appellants' opening brief, this elision of

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1236, fn.6.) The authors of this article include Dr. Karrigan Börk and Dr. Peter Moyle. While Drs. Börk and Moyle are without doubt well-credentialed scholars, they are also members of the advisory board of WAC, and this article relates directly to the program of litigation undertaken by WAC, including this case. (16 AA 3663; see Water Audit California. "Advisory Board," Accessed September 4, 2024. https://waterauditca.org/advisory-board/.) The Court should thus be wary of relying on this article as an indication of scholarly opinion on the subjects it discusses.

the two statutes is unjustified. (AOB, pp. 31–36.) BBTK admits that Section 5946 was the statute at issue in *Cal Trout I*, but it insists without explanation that "the same logic applies" to Section 5937. (BBTK, pp. 24–25.) But the logic of *Cal Trout I*'s analysis of Section 5946 had everything to do with the Legislature's specific consideration of the stream systems in District 4½. (*Cal Trout I*, 207 Cal.App.3d at pp. 596–97.) This analysis of the details pertinent to each individual system is crucial, because "what is a reasonable use of water depends on the circumstances of each case." (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140.) "What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes." (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility District* (1980) 26 Cal.3d 183, 194.)

BBTK's appeal to the "plain language of the statute" is also unavailing, for at least two reasons. (BBTK, p. 37.) First, while BBTK argues its interpretation is simply "believing that the Legislature meant what it said when it enacted the unambiguous language of section 5937," nothing in the text of Section 5937 indicates that it constitutes a judgment as to the relative reasonableness of different uses of water in regard to a specific stream system at any point in time. (*Id.*, p. 36.) In fact, as BBTK admits, the language now located in Section 5937 predates the constitutional amendment establishing the reasonable use standard. (*Id.*, p. 22.)

Second, the interpretation of Section 5937 advanced by Respondents—that it constitutes a determination of the

appropriate balancing of interests on all stream systems under the constitution—would result in absurdity if applied consistently to other sections of the Water Code that make similarly broad policy statements. For example, Water Code section 106 provides that domestic use and irrigation are the "highest" uses of California's water resources. Does this constitute a legislative determination that in all cases the constitutional balance places those two uses before other uses, including public trust uses? Surely not. Nor does Section 5937 constitute such a determination in the other direction. Both are general policy judgments that "declare principles of California water policy applicable to any allocation of water resources" and "must be read in conjunction" with one another and with similar policy statements. (*National Audubon Society,* 33 Cal.3d at p. 447 fn.30.) In short, "neither domestic and municipal uses nor in-stream uses can claim an absolute priority." (*Ibid.*) Instead, the constitution and Water Code require "the right to water or the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served." (Art. X, sec. 2; Wat. Code, § 100.) The assessment of what is reasonable **under the circumstances** allows a court to harmonize what may otherwise be conflicting state policy proclamations.

B. BBTK and WAC's incorrect interpretation of Section 5937, if accepted, would render it unconstitutional.

BBTK claims that Appellants are asking this Court to hold Section 5937 unconstitutional. (BBTK, p. 29.) Appellants have not

argued that Section 5937 is facially unconstitutional, but instead assert that Respondents propound an interpretation (adopted by the trial court) that would render the statute unconstitutional, which therefore must be rejected. (AOB, p. 36.) Appellants' argument is based on two implications of their position.

First, BBTK's position implies that the Legislature made a determination as to the relative reasonableness of different uses of water, on **every** stream system in the state, without considering **any** of the factual circumstances of those stream systems or the competing uses of water. Such a determination is impossible, as the analysis of reasonable and beneficial use, "of course, depends upon the facts and circumstances of each case." (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567; *United States v. State Water Res. Control Bd.* (1986) 182 Cal.App.3d 82, 129 ["determination of reasonable use depends upon the totality of the circumstances presented"]; *Joslin,* 67 Cal.2d at p. 139 ["What is a reasonable use or method of use of water is a question of fact to be determined according to the circumstances in each particular case"]; *Light v. SWRCB* (2014) 226 Cal.App.4th 1463, 1479 ["the reasonableness of any particular use depends largely on the circumstances"]; *see also* SWRCB Revised Order WRO 2002-0013, p. 80 ["the reasonableness doctrine embodied in article x, section 2 of the Constitution calls for consideration of all relevant facts"]; Wat. Code, § 100.5.) This foundational principle is directly related to the principle that a reasonable use determination may change with changed circumstances. (See, *Tulare Dist.,* 3 Cal.2d at p. 567; *Light*, 226 Cal.App.4th at pp. 1479, 1488.) Furthermore, the

analysis is necessarily **comparative**, requiring a consideration of the competing demands for California's scarce water resources. (*Imperial Irrigation Dist. v. State Wat. Resources Control Bd.* (1990) 225 Cal.App.3d 548, 570 ["The Constitution requires not only that water use be 'reasonable' but that 'the water resources of the State be put to beneficial use to the fullest extent of which they are capable.' Obviously, this mandate requires a comparison of uses."].) Section 5937, having been first enacted before the constitutional standard was adopted and reaffirmed in Water Code section 100, could not have made those determinations.

Second, BBTK's proposed interpretation of Section 5937—as an **absolute** rule that all water must be used first to support fish populations and only then can other uses be considered—would lead to absurdities in practice. As noted in Appellants' opening brief, "Even if the facts were such that 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, Plaintiffs maintain that such must be the outcome." (AOB, p. 38.) BBTK attempts to avoid this implication by citing "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." (BBTK, p. 36.) BBTK simply dodges the hypothetical. Under BBTK's interpretation of Section 5937, even if the entire flow was required to save one fish, and there is not enough water in the system to support hatcheries or planting of fish or such mechanisms are not otherwise available, then Section 5937 requires that all human use of the water of the

stream be foregone. That cannot be the law in California, given 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." (Cal. Const., art. X, § 2; Wat. Code, § 100.)

Further, Appellants' position does not require a conclusion that Section 5937 is facially unconstitutional after the 1928 constitutional amendment. It is a well-recognized principle of constitutional law that a statute "may be constitutional in operation with respect to some … states of fact and unconstitutional as to others." (*Paul v. Allied Dairymen, Inc.* (1962) 209 Cal.App.2d 112, 124.) Such a statute "may nevertheless be effective in those instances where the Constitution is not offended." (*Mulkey v. Reitman* (1966) 64 Cal.2d 529, 543.) Ultimately, the application of Section 5937 to this case must be determined in the first instance by the trial court applying the constitutional principle of balancing reasonable and beneficial uses in light of all the circumstances (i.e., all of the competing beneficial uses). BBTK and WAC's argument that all considerations except fish needs must be ignored is unsupported by Section 5937's text and legislative history and is contrary to this States' "overriding feature of California water law." (*National Audubon Society*, 33 Cal.3d at p. 442.)

II. The trial court did not appropriately balance the harms between the parties, because it did not apply the correct legal standard or consider evidence of harm to Appellants.

A. Respondents' formalistic theory of the status quo is contrary to *Daly* and other extensive Supreme Court precedent.

Whether the Injunction is mandatory or prohibitory determines the correct legal standard as well as the strictness of appellate review. (*People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 630; *Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 448.) As demonstrated in Appellants' opening brief and by this Court's implicit finding in issuing the writ of supersedeas in this matter, the Injunction was a mandatory injunction. (AOB, pp. 24, 40–41.) Respondents' arguments that the Injunction was prohibitory and merely preservative of the status quo are unavailing.

BBTK rests its arguments almost entirely on the **form** of the injunction: "Bakersfield was not ordered to take an affirmative act; it was **prohibited** from taking an unlawful one." (BBTK, p. 38, emphasis in original.) This formalism is not the law. The "substance of the injunction, not the **form**," determines how it is to be characterized. (*Davenport*, 52 Cal.App.4th at pp. 446–47, emphasis added.)

Nothing cited by BBTK or WAC rebuts the general principle that an injunction is mandatory where it causes a "change in the relative positions or rights of the parties from those existing at the time the injunction is granted." (*Stewart v. Superior Court* (1893) 100 Cal. 543, 547.) To escape the application of this rule, WAC

asserts a distinction between the "status quo" and the "status quo ante litem," the later of which it defines as "the last, uncontested status which preceded the pending controversy." (WAC, p. 49, quoting *Daly v. San Bernardino County Bd. of Supervisors* ("*Daly*") (2021) 11 Cal.5th 1030, 1046, quoting *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80, 87.) Relying on this distinction, WAC defines the **status quo** as "the condition that existed before the diversions were made that deprived the public trust of sufficient water, (i.e. in approximately 1870) or alternatively, and more practically, at the time the injunction was granted." (WAC, p. 47.) That definition is not consistent with the holding in *Daly*. To the extent *Daly* differs from *United Railroads*, it **limits** the application of *United Railroads*. (*Daly*, 11 Cal.5th at p. 1049 ["If *United Railroads* were understood as plaintiffs suggest, then the decision would all but negate the basic rule….]") The *Daly* Court supported its limitation of *United Railroads* by citing cases finding injunctions preventing allegedly unlawful diversions of water, just as the present Injunction does, as mandatory. (*Ibid.*, citing *Byington v. Superior Court* (1939) 14 Cal.2d 68.) Similarly, the court noted that prior cases found an injunction was mandatory because it "required the defendant to act contrary to her contractual obligations at the time the order was made," just as the Injunction does. (*Id.* at p. 1043, citing *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 838; AOB, p. 17 [referencing Kern River decrees and agreements].) The reported cases thus support Appellants' position on the status quo and the application of the mandatory/prohibitory distinction in

this case. WAC is thus reduced to citing *Wu v. Crestview Dr Laguna Beach, LLC* (Cal. Ct. App., Feb. 8, 2024, No. G062041) 2024 WL 484857, an unreported case, in violation of Rule 8.1115(a) of the California Rules of Court. (WAC, p. 59.)

WAC also accuses Appellants of claiming "comity and peace among the Appellants on the Kern River" as the status quo, a claim it describes as "pure fiction," listing in a footnote a variety of disputes relating to Kern River issues among holders of Kern River water rights. (WAC, p. 54.) But Appellants' position is not that no disputes have ever taken place regarding Kern River issues. Their position is that Bakersfield's long-established daily practice of operating the weirs and diverting Kern River water in accordance with the judgments, agreements, and procedures referred to as the "Law of the River" remained in effect until displaced by the Injunction. (AOB, pp. 17–18.) Respondents have not cited any dispute precluding the implementation of those foundational judgments, agreements, or procedures. (See WAC, p. 65, fn.18.) Indeed, the "Law of the River" has been the basic assumption underlying all of the disputes cited by WAC, the modification of which would severely alter the status quo.

B. Respondents misstate the trial court's decision and the record on the balance of the harms.

BBTK argues that the trial court "extensively considered" the balance of harms. (BBTK, p. 37.) BBTK also equivocates on this point, arguing that the trial court "noted … *in its assessment of the relative harms* that the legislature had imposed a compulsory balance" under their interpretation of Section 5937. (*Id.,* pp. 44–45, emphasis in original.) This amounts to an

admission that the trial court, to the extent it even considered possible harms to Appellants, incorrectly believed that it was required to issue the injunction regardless of those harms.

More importantly, BBTK's argument misstates the record. The trial court concluded, without analysis, 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." (12 AA 2785.) It reached this conclusion while acknowledging that it did not know how much water Appellants' reasonable use required. (*Ibid.*) It reached this conclusion despite the fact that Respondents were demanding an **undefined** quantity of water for the fish flow. (2 AA 305.) The trial court's analysis of the likely harms is simply not supported by substantial evidence, and the rationale for the Injunction is not a balancing of the harms but rather a **refusal** to balance the harms based on the trial court's misreading of Section 5937.

C. Respondents did not meet their burden of showing irreparable harm.

BBTK and WAC had the burden of proving to the trial court that they would suffer "irreparable injury" if the mandatory Injunction was not issued. (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 295.) BBTK argues it met that burden by showing irreparable injury to specific fish that would purportedly die when the river intermittently dried back. (BBTK, pp. 50, 51.) This argument relies on an incorrect definition of irreparable injury, which was unsupported by the record.

1. Irreparable injury must relate to the condition of the fish population as a whole,

not to individual fish.

As noted in Appellants' opening brief, BBTK's own evidence indicates that "downstream reaches of the river that dryback are repopulated with fish when higher flows return in wetter hydrologic years." (AOB, p. 46; See also, WAC, p. 9 [acknowledging that a wet year in 22/23 "rewatered the River and repopulated it with fish"].) In order to avoid addressing the fact that dryback of the river does not irreparably harm fish species or populations as a whole, BBTK argues that there would have been irreparable harm to individual fish if the trial court did not issue the Injunction: "harm to the fish that sometimes do inhabit the often-dry stretches of the river" is "irreparable for those fish." (BBTK, p. 51.) BBTK does not cite any authority for this individual fish specific approach to assessing irreparable harm, and Appellants are not aware of a California case addressing the issue. However, the federal courts have addressed the issue and rejected BBTK's position.[2]

In federal environmental cases, the courts have long required plaintiffs to demonstrate likely harm to the species or population as a whole in order to demonstrate irreparable injury to support an injunction. (*Fund for Animals v. Frizzell* (D.C. Cir. 1976) 530 F.2d 982.) In *Frizzell*, plaintiffs challenged regulations allowing the hunting of certain non-threatened/endangered bird species, which caused temporary reductions in the bird

[2] While not binding on state courts, the decisions of federal courts are entitled to great weight. (*Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486, 497.)

populations. (*Id.* at p. 986.) On the issue of whether there was irreparable injury, the court reasoned as follows:

> "[T]he appellants have made only nonspecific claims of 'the destruction and loss of wildlife. [FN] We cannot accept their extreme contention that the loss of only one bird is sufficient injury to warrant a preliminary injunction; rather, a proponent of such an injunction must raise a substantial possibility that the harvest of excessive numbers of these waterfowl will **irretrievably damage the species**. To equate the death of a small percentage of a reasonably abundant game species with irreparable injury without any attempt to show that the **well-being of that species may be jeopardized** is to ignore the plain meaning of the word." (*Id.* at p. 987, emphasis added.)

BBTK is making that same "extreme contention" in this case. Even in the context of endangered species, which are not at issue here, the courts have focused on population level impacts. The Ninth Circuit also applies the *Frizzell* rule. (See *Fund for Animals, Inc. v. Lujan* (9th Cir. 1992) 962 F.2d 1391 [finding no irreparable harm from bison deaths based on remaining "herd's ability to increase its numbers"].) One California district court summarized the rule as follows: an "injunction may issue if … agency action during the time it will take to conclude litigation will cause 'significant' harm to the species." (*Pac. Coast Fed'n of Fishermen's Associations v. Gutierrez*, 606 F. Supp. 2d 1195, 1207 (E.D. Cal. 2008).) Another district court in the Ninth Circuit concluded that "the death of a small number of individuals may

constitute irreparable harm, but this situation exists when the loss of those individuals would be significant for the species as a whole." (*Defs. of Wildlife v. Salazar* (D. Mont. 2009) 812 F.Supp.2d 1205, 1210.) Other federal circuit courts agree. For instance, the First Circuit has explicitly held that the death of individual members of a species does not constitute irreparable harm and instead requires a "concrete showing" that not issuing the injunction will "impact the species." (*Water Keeper Alliance v. U.S. Dept. of Defense* (1st Cir. 2001) 271 F.3d 21, 34.)

Based on these authorities, BBTK and WAC had the burden to demonstrate that Kern River operations would damage the fish **population** irreparably if the trial court did not issue the Injunction. The record includes no such evidence. In fact, there was no evidence of: (a) the actual number of fish then present in the river; (b) the areas of the river that would have dried up, if any, if the Injunction was not issued; (c) what would have happened to the fish present if those areas had dried up (e.g., movement to areas of refuge, death, etc); or (d) the level of population impact to any fish species. Instead, the evidence demonstrated that fish repopulate the areas of the Kern River that may intermittently dry up. (AOB, pp. 45-46; BBTK, p. 50; WAC, p. 9.) Thus, this case is analogous to *Frizzell* and *Lujan*, and Respondents failed to meet their burden of showing a likelihood of irreparable harm.

2. No evidence in the record supports the assertion that dryback occurs only because of diversions.

BBTK also asserts that periodic dryback in the river is entirely caused by water diversions rather than by natural forces.

(BBTK, pp. 50, citing 12 AA 2803.) This assertion is not supported by any evidence in the record. Further, the undisputed evidence presented by Appellants demonstrates Kern River flows are extremely variable, ranging from a high of nearly 2.5 million acre-feet per year to a low of approximately 139,000 acre-feet per year. (6 AA 1338.) This extreme hydrological variation (i.e., a natural force) influences how much water is in each reach of the Kern River and thus impacts when, where, and for what duration a dryback may occur from year to year.

III. The Injunction did not provide an intelligible standard that could be implemented, and the trial court had no discretion to abdicate its duty to do so.

WAC argues that the trial court's failure to provide a defined injunction standard is acceptable because it "**considered** the alternative of the Court establishing exact flows" and decided to instead parrot the statutory language in Section 5937. (WAC, p. 30.) Like the trial court, WAC cites *Cal Trout II* as authority for such an approach. (*Id*., p. 38.) BBTK likewise argues that Appellants "ignore … the [trial court's] "nearly three pages of discussion" in which it decided to delegate the determination of flow rates to Respondents. (BBTK, p. 53.) But the trial court's consideration of this issue is premised on the permissibility of the approach it took, which it based solely on how it read *Cal Trout I*. (12 AA 2815.) As discussed in Appellants' opening brief, the trial court misinterpreted *Cal Trout I*. (AOB, pp. 48–49.) The order issued in *Cal Trout I* was crystal clear: the SWRCB was to amend the licenses at issue to include the conditions required by Section **5946**. (*Cal Trout I*, 207 Cal.App.3d at p. 632–33.) There were no

further details to be specified because Section 5946 only required that a Section 5937 condition be included in a license or permit (e.g., it did not require a determination of flow to comply with Section 5937). (Fish & G. Code, § 5946.) As detailed in Appellants' opening brief, the *Cal Trout* cases did not involve the interpretation of Section 5937. Thus, *Cal Trout I* provides no authority for a judicial injunction "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. [Citations.]" (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651, emphasis added.) The trial court noted that courts "do not need to itemize **every** detail of compliance." (12 AA 2817 emphasis added.) But the Injunction did not specify **any** detail of compliance.

BBTK attempts to distinguish *Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, which held that an injunction requiring a party to simply "follow the law" without providing direction as to the details was void. (BBTK, pp. 54–56.) BBTK argues that *Monterey Coastkeeper* involved a petition for writ of mandate rather than a motion for an injunction. (*Id.*, p. 55.) This is a distinction without a difference. An injunction is not a cause of action but a remedy. (*Ivanoff v. Bank of America* (2017) 9 Cal.App.5th 719,734; accord *City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293 ["A permanent injunction is merely a remedy for a proven cause of action. It may not be issued if the underlying cause of action is not established."].) The underlying cause of action in this case is for a writ of mandate. (11 AA 2444–

47.) More importantly, the rationale of *Monterey Coastkeeper* is fully applicable to this case, namely that a "follow the law" injunction would simply lead to disputes among the parties as to whether the defendant complied with the injunction (i.e., followed the law), as evidenced by the issuance of the Implementation Order and Appellants' motion for reconsideration (76 Cal.App.5th at p. 22.)

IV. The appeals are timely as to the amount of the bond, and the bond amount is indefensible.

A. Appellants timely appealed from the Injunction, because their time to appeal was extended by the filing of their motion for reconsideration.

BBTK argues that the notices of appeal are untimely with respect to the Injunction and therefore the challenge over the bond amount is likewise untimely, based on the 60-day time limit in Rule of Court 8.104(a)(1). (BBTK, pp. 57–58.) However, the deadline was extended by Rule of Court 8.108(e), which provides,

> "If any party serves and files a valid[3] motion to reconsider an appealable order under Code of Civil Procedure section 1008, subdivision (a), the time to appeal from that order is extended for all parties until the earliest of:
>
> (1) 30 days after the superior court clerk or a party serves an order

[3] As used here, "'valid' means only that the motion … complies with all procedural requirements; it does not mean that the motion … must also be substantively meritorious." (Cal. Rule Ct. 8.108, Advisory Committee Comment.)

> denying the motion or a notice of entry of that order;
>
> (2) 90 days after the first motion to reconsider is filed; or
>
> (3) 180 days after entry of the appealable order.

Here, it is undisputed that Appellants filed and served a valid motion for reconsideration under Code of Civil Procedure section 1008(a), which the trial court heard and granted in part and denied in part. (13 AA 2896 *et seq*.; 16 AA 3735 *et seq*.; BBTK, pp. 11-15; WAC, pp. 9, 11, 20.) Thus, per Rule 8.108(e), Appellants' time to appeal the Injunction was extended to the earlier of the following dates:

- February 16, 2024 – 30 days after the notice of entry of the order partially denying Appellants' motion for reconsideration on January 17, 2024 (16 AA3749)
- February 21, 2024 – 90 days after the filing of Appellants' motion for reconsideration on November 21, 2023 (13 AA 2896)
- May 7, 2024 – 180 days after notice of entry of the Injunction on November 9, 2023 (12 AA 2798)

Appellants filed their notices of appeal before February 16, 2024, the earliest of these dates. (16 AA 3766, 16 AA 3813, 17 AA 3864, 17 AA 3912, 17 AA 3959.) Therefore, Appellants' appeals of the Injunction were timely and Appellants did not waive their right to challenge the bond amount.

B. Nominal bonds are not authorized by California law and should not be allowed in cases involving competing public interests.

BBTK and WAC both admit that the bond amount in the Injunction is a nominal amount and unrelated to the probable damage[4] Appellants would suffer if wrongfully enjoined.(BBTK, pp. 58–59; WAC, pp. 44, 53-55.) To excuse the trial court's error, they argue that this Court should adopt the rule applied by some federal courts, that a nominal bond may be imposed in environmental cases. (*Ibid.*) However, the Court should decline to adopt that rule, or at least decline to apply it in cases like this one that involves the balancing of competing public interests.[5]

BBTK and WAC cite *Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, which pointed out that some federal courts have held "only a nominal injunction bond should be imposed in cases which seek to protect the environment" but that "[n]o published California appellate decision has approved and followed" that rule.[6] (*Mangini*, 31 Cal.App.4th at pp. 217–18.) As

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[4] See, AOB, p. 53, explaining that a bond amount must be set by the judge "based on the probable damage the enjoined party may sustain because of the injunction." (*Hummell v. Republic Fed. Savings & Loan Assn*. (1982) 133 Cal.App.3d 49, 51; See also, *Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1.)

[5] Respondents do not refute that Appellants are public water agencies responsible for delivering water to water users within their boundaries. (AOB, pp. 14-15.)

[6] The California Supreme Court previously decertified for publication two decisions adopting the federal rule. (*Libeu v.*

the *Mangini* court acknowledged, there are several statutory exceptions to the bond requirement, none of which apply to the public water agencies here, and "in the absence of one of these exceptions, the courts have interpreted section 529's bonding requirement strictly." (*Ibid.*) This strict application of the rule is consistent with reported cases in other contexts that have rejected such non-statutory exceptions. For example, in *Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545, the court addressed whether a bond exception exists in actions under the California Public Records Act:

> "**[T]he Legislature certainly could have included a specific exemption from section 529's requirements had it wanted**. Indeed, the Legislature has done so for various other laws that specifically do away with any undertaking requirement. But for whatever reason, the Legislature did not provide a similar exception in the PRA. And **its declining to do so is telling, as we must assume that the Legislature knew how to create an exception if it wished to do so**." (*Id.* at p. 553, emphasis added, internal quotations and citations omitted.)

The Court should follow the same principle here. If the Legislature intended to exempt environmental plaintiffs from the bond requirement, it could and would have done so. Because the Legislature did not provide any such exception, there is no basis

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Johnson (1987) 240 Cal.Rptr. 776; *Albion River Watershed Protection Assn. v. Superior Court* (1993) 21 Cal.Rptr.2d 475.)

for the Court to read in exceptions that do not exist under California law.

Furthermore, even if the Court were inclined to adopt the federal rule providing an exception to the bond requirement for environmental cases, it should not apply that exception to this case. "The federal rule is based on the perception that the public interest in preserving the environment pending a hearing on the merits is more significant than the defendant's economic interest." (*Mangini*, 31 Cal.App.4th at p. 218.) In a case like this one, that rationale does not apply. The constitutional rule of reasonable use is based on a fundamental policy of California law:

> "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**." (Cal. Const., art. X, § 2.)

The purpose of this clause is to ensure that the water resources of this state are "available for the constantly increasing needs of all of its people." (*Central and West Basin Water Replenishment District v. Southern California Water Co.* (2003) 109 Cal.App.4th 891, 904, quoting *Meridian, Ltd. v. City and County of San Francisco* (1939) 13 Cal.2d 424, 449.) To be clear, this involves appropriately balancing **all** of the competing

demands for water: domestic, municipal, agricultural, environmental, industrial, recreational, and any other reasonable and beneficial use. Balancing these competing demands and reasonably managing our scarce resources is "of transcendent importance" to the public welfare of this state. (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist., supra.* 26 Cal.3d 183, 194.) A rule, therefore, that absolutely privileges one use over others, is inconsistent with the California Constitution and with the public welfare. Applying the federal rule allowing nominal bonds in a case like this one would create such a rule—an implicit conclusion that no amount of harm to other beneficial uses compares with any harm to claimed environmental needs. Therefore, even if the Court did find that California law allows for nominal bonds in environmental cases, it should not apply that exception to this case.

V. Bakersfield waived its right to challenge the trial court's stay of the Implementation Order.

Bakersfield attacks the trial court's order staying the Implementation Order by requesting this Court to reverse that order (i.e., to lift the stay and reinstate the Implementation Order). (Bakersfield, pp. 7, 30.) Because it is an "order made after" an appealable order, the order staying the Implementation Order was an appealable order. (Code Civ. Proc., § 904.1, subd. (a); *Findleton v. Coyote Valley Band of Pomo Indians* (2021) 69 Cal.App.5th 736, 755.) Bakersfield did not appeal the order staying the Implementation Order and thus cannot now seek its reversal. (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 665; *In re Estate of*

Powell (2000) 83 Cal.App.4th 1434, 1439; *Drell v. Cohen* (2014) 232 Cal.App.4th 24, 31.)

VI. The Implementation Order was void ab initio and must be reversed, not merely stayed.

A. The Implementation Order remains appealable.

BBTK and WAC assert that the trial court's issuance of an order staying the Implementation Order vacated the Implementation Order or otherwise mooted the errors therein such that it is no longer appealable. (See, BBTK, pp. 13, 59-60; WAC , pp. 20-23.) Respondents are incorrect.

The trial court's order **staying** the Implementation Order did not vacate, void, or otherwise moot the Implementation Order, it simply "stayed" the order. (16 AA 3739.) The Implementation Order remains in place, but its effect is temporarily halted so long as the trial court keeps the stay in place. (*People v. Flores* (2005) 129 Cal.App.4th 174, 187.) However, the trial court at any time could lift the stay and reinstate the Implementation Order. In fact, Bakersfield asks this Court to do just that as part of this appellate proceeding. (See *supra*, Part V.) If Appellants are precluded from pursuing an appeal of the Implementation Order in this circumstance, the stay of the Implementation Order could be lifted **after** Appellants' time to appeal the order has passed and the Appellants would be foreclosed from challenging the order.

Code of Civil Procedure section 918 (i.e., the statute under which Appellants moved the trial court for a stay (13 AA 2922) expressly recognizes that an appeal may be taken from a stayed order. (Code Civ. Proc., § 918, subd. (c) [trial court may grant a stay

"whether or not an appeal will be taken from the judgment or order and whether or not a notice of appeal has been filed"].) Thus, the Implementation Order is appealable even though it was stayed by the trial court.

BBTK claims that the defects associated with the Implementation Order were "mooted by the Reconsidered Injunction," because the Injunction as revised requires Appellants to participate in the "consultation" process. (BBTK, p. 60.) BBTK also claims that the first-priority water right granted to Bakersfield and the arbitrary fish flow standard were "amended and voided by the Reconsidered Injunction and are not properly the subject of appeal." (*Ibid.*) WAC makes a similar claim, that both the Injunction and Implementation Order "were replaced by the newly appealable Reconsidered Injunction." (WAC, p. 13.) This "Reconsidered Injunction," it is claimed, "no longer allowed Bakersfield the 180 CFS ordered by the Implementation Order." (*Id.*, p. 39.) Each of these arguments were addressed by Appellants in their opposition to BBTK and WAC's motion to dismiss these appeals (Appellants' Opposition To Motion To Dismiss Appeal)[7] which was denied by this Court in its Order dated August 27, 2024.

B. The Implementation Order is indefensible as a matter of the law and based on the factual record.

1. Respondents misstate the burden of proof,

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[7] To the extent this Court has not fully addressed these arguments, Appellants incorporate herein by this reference all the authorities and arguments in Appellants' Opposition To Motion To Dismiss Appeal, filed August 14, 2024.

which is always on the party seeking affirmative relief.

Throughout this litigation, and again in their briefs, Respondents argue that they do not carry the burden of proof. (BBTK, p. 62.) However, the law is clear that a plaintiff prosecuting a case has the burden to prove its case, and a party seeking a preliminary injunction similarly bears the burden of proof on the elements necessary for its issuance. (See, Evid. Code, §500; *Vaughn v. Coccimiglio* (1966) 241 Cal.App.2d 676, 678–79; *Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1571.) For example, in this case Respondents assert that actions (i.e., diversions) at each of the diversion weirs[8] result in violations of Section 5937. As such, it was Respondents' burden to demonstrate that Section 5937 is being violated at each of those diversion weirs (i.e., there is insufficient water immediately below each diversion weir such that fish in those areas are not in good condition). Only then could the trial court find that the owner/operator of each weir is liable under Section 5937 and impose a lawful remedy to address a violation. Respondents, without any citation to authority, turn the burden upside down and assert that the weir owner/operator has the burden "to prove that their diversions will not be in violation of the law before those actions are taken." (BBTK, p. 62.) Respondents have failed to provide any authority to support their contentions.

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[8] The specific weirs at issue are Beardsley Weir, Rocky Point Weir, Calloway Weir, River Canal Weir, Bellevue Weir, and McClung Weir. (11 AA 2439; 8 AA 1810.)

2. The fish flow set by the Implementation Order is not founded on science but on the policy preferences of Respondents'.

In their opening brief, Appellants go into great detail regarding the evidence demonstrating that the 40% fish flow set in the Implementation Order is not supported by science, to wit: (a) how Respondents submitted incompetent evidence (on **reply** in support of the Injunction) regarding fish flows applied to **another** stream system (i.e., San Joaquin River watershed) drastically different than the Kern River; (b) how Respondents' experts had not performed any scientific review of the Kern River; (c) how Respondents' expert admitted that what constitutes sufficient flows "can differ among rivers and between locations on the same river," but then inexplicably borrowed a flow standard developed for the San Joaquin River and applied it to the Kern River; and (d) how Respondents acknowledge that when the Injunction and Implementation Order were issued there had been no scientific determination of the flow sufficient to satisfy Fish and Game Code section 5937 in regard to the Kern River. (AOB, pp. 61-62.) The Court should reasonably expect that Respondents would have addressed these deficiencies in their opposition briefs. However, Respondents provide no response and thus concede the merits of Appellants' assertions. (See, *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [stating that a party conceded points it ignored].)

The most Respondents do in their briefs is recite that their expert opined that 40% was a "reasonable starting point" for fish

flows, and generally state that their expert is an authority on establishing stream flows. (See, BBTK, pp. 48, 61; WAC, pp. 32-33.) However, what Respondents fail to explain is the most telling. Respondents do not address: (a) how fish flows developed over years of study for the San Joaquin watershed are relevant to the Kern River; (b) why their experts failed to conduct any scientific study of the Kern River; or (c) how they can both acknowledge there was no scientific data available to establish necessary flows under Section 5937 but nonetheless insist that a 40% fish flow was required by Section 5937. In an effort to explain these contradictions, Respondents argue that the 40% flow was simply a "starting point for scientific investigation" given the lack of Kern River information. (BBTK, p. 48; WAC, p. 33.) However, while BBTK and WAC lament "the inadequacy of the hydrological and biological data then available" (WAC, p. 32, fn.10), they fail to inform this Court that they filed their first complaint over eight months before they moved for a preliminary injunction. (1 AA 39, 1 AA 303.)

BBTK also attempts to defend the fish flow requirement first introduced in Dr. Theodore Grantham's reply declaration. (BBTK, p. 61.) Appellants timely objected to the reply declaration (12 AA 2745–48, 2752–59.) but were afforded no opportunity to develop and present rebuttal scientific evidence prior to filing their opposition to the preliminary injunction. Dr. Grantham's reply declaration provides that in the absence of a long history of data, "it is common to estimate environmental flows needs as a proportion of natural, unimpaired flows." (BBTK, p. 61; 11 AA

2517.) Assuming for the sake of argument that this method is scientifically valid, which Appellants do not, Dr. Grantham provided no information supporting the 40% flow figure for conditions on the Kern River. (11 AA 2518.) Instead, he plainly declared without evidence or scientific analysis that "40 percent (or more) of unimpaired flow would be an appropriate and scientifically-defensible benchmark for setting interim flow requirements for the Kern River," based upon "recommendations from the Water Board for San Joaquin River watershed tributaries." (11 AA 2518.) Thus, while BBTK and WAC failed to conduct any scientific investigation of the Kern River, they contend that their lack of data provides reason for imposing a flat percentage metric developed for a wholly different stream system. This Court should not countenance such tactics.

3. Issuance of the Implementation Order violated Appellants' due process rights.

WAC and BBTK argue that any due process violations were cured or mooted when the trial court "stayed" the Implementation Order. (BBTK, p. 60; WAC, pp. 24, 46.) Respondents do not explain how this occurred. The trial court did not hold a hearing on whether the Implementation Order was appropriate, as requested by Appellants. (13 AA 2896–2916, 13 AA 2918–24, 13 AA 3123–41, 14 AA 3224–32.) Instead, the trial court refused to hold any evidentiary hearing on these issues prior to trial. (3 RT 354.) Bakersfield contends, with respect to the trial court's issuance of the Implementation Order, that the trial court did not violate Appellants' due process rights because Appellants had notice and an opportunity to be heard prior to issuance of the Injunction. (Def.

and Rsp. City of Bakersfield's Resp. Brief, hereafter "Bakersfield", p. 19.) Bakersfield's arguments are misplaced for several reasons. Importantly, the denial of due process resulting from the Implementation Order occurred **after** the issuance of the Injunction. Bakersfield and Respondents were on notice that Appellants requested a noticed motion before the trial court adopted any supplemental order implementing the Injunction. (13 AA 3029–30, 3037–38.) However, Appellants' notice to Respondents and Bakersfield did not stop the prompt execution of their joint (*quid pro quo*) stipulation that prevented Appellants from receiving notice and an opportunity to be heard on the Implementation Order before it was signed by the trial court the next morning. (13 AA 2863-66.)

Further, the substantive issues raised by the Injunction and the Implementation Order were not the same. The Injunction broadly prohibited Bakersfield from operating the weirs in manner that reduced flows below a certain level and directed Bakersfield, BBTK and WAC to consult to determine the required flow. (12 AA 2769.) The Injunction did **not** set any fish flow standard or compel changes to existing rights and priorities to Kern River water. (12 AA 2769 – 2770; Augmented Trans., p. 400.) In contrast, the Implementation Order directed that the Injunction be implemented by granting Bakersfield a new first priority water right to 180 cfs of water and imposed a uniform 40% fish flow. (AOB, pp. 21–22; 13 AA 2864–65.) Neither of these substantive terms were disclosed in the notice of preliminary injunction filed prior to the trial court granting the Injunction. (1 AA 301-303.)

Finally, Bakersfield's contention that California Rule of Court 3.1150(f) authorized the trial court to issue the Implementation Order without notice and a hearing is incorrect. (Bakersfield, pp. 20-21.) The plain language of that rule applies only to proposed orders on an **application for** a preliminary injunction (i.e., an order on the initial grant of a preliminary injunction). It does not apply to any order "related" to a motion for a preliminary injunction. Here, the Implementation Order was issued **after** the trial court issued the Injunction and was not an order granting an application for a preliminary injunction. Rule 3.1150(f) does not apply.

4. Bakersfield's argument for a priority right to 180 cfs is contrary to law.

Bakersfield asserts that the Implementation Order did not result in the unlawful creation of a "new" water right but merely "imposed a short term, interim shift in the diversion and use of Kern River flows, as mandated and required by the statutes intended to protect and preserve Bakersfield's domestic water supply." (Bakersfield, pp. 24, 26.) Bakersfield is incorrect on the facts and the law.

First, there is no question that the Implementation Order created a new and separate water right for Bakersfield. The record establishes that Bakersfield's rights to use Kern River water have never included a first priority right to 180 cfs of water. (AOB pp. 57-58.) Under the Implementation Order, Bakersfield's diversions changed as follows: (1) Bakersfield was provided a first priority right to 180 cfs of water under all hydrologic conditions (i.e., a

senior right taking more water, more often); and (2) Bakersfield was allowed to (and did) take the first 180 cfs of Kern River water while also diverting water pursuant to its historic rights. (13 AA 2910.)

The Implementation Order allowed Bakersfield to divert water pursuant to its historic water rights **and** take an additional 180 cfs, first-in-line and more often than it could divert under its historic junior rights. This resulted in Bakersfield taking substantially more water, more often, than it could under its historic rights. (13 AA 2910.) Specifically, on each day that the Implementation Order was in effect, a total of 210 cfs (180 cfs under the new "City of Bakersfield Domestic (per Court Order)" plus an additional 30 cfs under its existing diversion rights) was diverted by Bakersfield. (14 AA 3099, 3106; 15 AA 3408-3434.) However, during this period, Bakersfield's daily deliveries of water to treatment plants for domestic use never exceeded 18 cfs. (15 AA 3401-3403, 3407-3492.) Bakersfield directed the significant remainder of its diversions to groundwater recharge (15 AA 3401-3405, 3407-3506), which on its own does not constitute a beneficial use of water. (Wat. Code § 1242 ["The storing of water underground … constitutes a beneficial use **if** the water so stored is thereafter applied to beneficial purposes for which the appropriation for storage is made"], emphasis added; *Hillside Memorial Park & Mortuary v. Golden State Water Co* (2011) 205 Cal.App. 4th 534, 539.) Bakersfield's counsel admitted these facts in describing the effect of the Implementation Order: (a) Bakersfield is "getting the water at different times of the year

throughout the year **when it didn't get that water previously**" (b) "Now [Bakersfield is] getting water every day;" (c) Bakersfield "is … getting [its] water first ahead of everyone else at different times of the year;" and (d) "on a given day [Bakersfield] may take more than 180 [cfs]." (Augmented Trans., pp. 395, 398, emphasis added.)

As such, the Implementation Order created a new water right contrary to law. (*Johnson Rancho County Water Dist. v. State Water Rights Bd.* (1965) 235 Cal.App.2d 863, 879 [a water rights change allowing a diverter to take more water constitutes the initiation of a new water right]; SWRCB Order WR 2009-0061[9], pp. 6-7 ["A fundamental principle of water right law, however, is that a right cannot be so changed that it in essence constitutes a new right. (Cal. Code Regs., tit. 23, § 791, subd. (a).) For example, an appropriator cannot expand an existing right to appropriate a greater amount of water, to increase the season of diversion, or to use a different source of water"].)

Second, the authority cited by Bakersfield to support the Implementation Order does not authorize Bakersfield (as a junior water rights holder) to alter the order of right and priority, quantity, timing for diversion and use of existing Kern River water rights in Bakersfield's favor. Water Code section 106.3 simply declares a state policy (i.e., the human right to water) that state agencies must take into account when taking certain actions. (See, Wat. Code § 106.3(a), (b).) This provision does not address water

[9]https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wro2009_0061.pdf

rights priority at all, let alone authorize a junior water rights holder to jump to the most senior priority position and be able to divert water more, at a greater frequency than existing water rights in a stream system. Similarly, Water Code section 1460 addresses post-1914[10] appropriative water rights. The Kern River water rights at issue in this case were all initiated in the late 1800's (i.e., are "pre-1914" water rights), and this case does not concern any issue relating to water right permitting under authority of the State Water Resources Control Board. (AOB, p. 17.)

Bakersfield principally relies on Water Code section 106 to defend the Implementation Order, as well as *Deetz v. Carter* (1965) 232 Cal.App.2d 851 and *County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91, 100 ("*Inyo*"). Bakersfield's reliance is misplaced. Section 106 does not provide Bakersfield any authority for the creation of a new water right. (*Antelope Valley Groundwater Cases* (2020) 59 Cal.App.5th 241, 268–69 [rejecting the argument that Section 106 provides municipalities with an avenue to obtain a

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[10] Appropriative water rights are referred to as "pre-1914" or "post-1914" water rights. This distinction is based on the passage of the Water Commission Act ("Act"), now codified in the Water Code and administered by the State Water Resources Control Board. (Water Code §§1200, *et seq*.) Following the Act, appropriative water rights must be obtained through an application process and the issuance of a water rights permit. (*Id*.) Prior to the the Act, two methods existed for establishing appropriative water rights: (1) non-statutory appropriations, made before 1914 by simply diverting water and putting it to beneficial use without following any statutory requirements; and (2) appropriations also made before 1914, under the 1872 Civil Code provisions.

new water right].) Furthermore, Section 106 is a policy statement regarding domestic use that does not change priority among water rights holders:

> "Section 106 declares that it is '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,' thus ranking agricultural use above industrial and all other uses except domestic. **This statement of policy does not specify under what circumstances or to what legal problems it is applicable or, when applicable, what weight it is to be given**. It was derived from an old principle relating to apportionment among riparians [citations], and it first appeared in our statutes as part of a section relating to appropriation of water (Stats.1921, ch. 329, p. 443.) [Footnote] No case has been cited which applies the policy outside these fields. **Even as to applications for appropriation of water the policy is not conclusive; section 1257 provides that the relative benefits to be derived from all uses of the water concerned shall be considered**." (*Metropolitan Water Dist. of Southern Cal. v. Marquardt* (1963) 59 Cal.2d 159, 184–85 [emphasis added].)

In sum, Section 106 does not transform a municipality's junior water right into senior water right.

Furthermore, Bakersfield confuses its use of the terms "municipal" and "domestic," as if they are interchangeable and have the same meaning, in an attempt to inflate the amount of its use it argues is within Water Code section 106. (See, Bakersfield,

pp. 8, 9, 13, 23 – 26, 30.) However, the terms do not have the same meaning. (Compare 23 Cal. Code Regs. § 660 [domestic use] and § 663 [municipal use].) "Domestic" use is very narrow and is limited to "consumption for the sustenance of human beings, for household conveniences, and for the care of livestock." (*Deetz,* 232 Cal.App.2d at 854; See also, 23 Cal. Code Regs. § 660.) "Municipal" use is much broader and includes all of the "use[s] of water for the municipal water supply of a city, town, or other similar population group, and use incidental thereto for any beneficial purpose." (23 Cal. Code Regs. § 663.)

The cases of *Deetz* and *Inyo* similarly do not support Bakersfield's position. Bakersfield's brief omits critical factual details from the *Deetz* case. In that case, the creek at issue was the only water source that provided a supply for the domestic user and the non-domestic user had never diverted water from the creek. The opposite is true in this case, to wit: (1) the Kern River is not Bakersfield's only source of supply; and (2) Appellants (including their predecessors) have diverted water from the Kern River for over a century. (See, 6 AA 1339 – 1349; 11 AA 2394; AOB, p. 17.) Further, and more importantly, the domestic user and non-domestic user in *Deetz* were both riparian water rights holders.[11]

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[11] A riparian shares the right to divert water with all other riparians on that stream. (*Prather v. Hoberg* (1944) 24 Cal.2d 549, 559-60.) That is, riparian landowners all have correlative rights that are not usually quantified in terms of diversion rate or quantity. (*Millview County Water Dist. v. SWRCB* (2014) 229 Cal.App.4th 879, 889 ["Although riparian users must share with other riparian users on the watercourse, there is no predetermined

(*Deetz*, 232 Cal.App.2d at 853, 854.) The *Deetz* court applied the domestic preference to right holders of **equal** priority. This situation is not present in the current case where Bakersfield's water rights are not of equal priority with Appellants' water rights. (See, 14 AA 3097 [Paragraph 7], 3103 [listing Kern River water rights in order of priority; Bakersfield's rights highlighted].) Given these material differences, the analysis and decision in *Deetz* is inapplicable.

Similarly, *Inyo* does not support Bakersfield's position. Bakersfield appears to cite *Inyo* for the proposition that a trial court has discretion to impose conditions on water diversions when issuing an injunction.[12] (Bakersfield, p. 27.) However, while the court in *Inyo* exercised its pendent lite injunctive power to establish an interim groundwater pumping rate, the decision does not support the contention that a trial court can grant new surface water rights or reorder existing water rights. The dispute in *Inyo* focused on compliance with the California Environmental Quality

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limit on the amount of water an individual riparian user may divert, so long as the uses to which the diverted water is put are riparian, beneficial, and reasonable"].)

[12] Bakersfield also cites *Allen v. Pitchless* (1973) 36 Cal.App.3d 321, 329-330 for the position that the trial court's issuance of the Implementation Order was within its equitable authority to issue a preliminary Injunction. (Bakersfield, p. 26.) However, the discussion in *Allen* addresses a trial court's authority to designate obligees for an undertaking required in association with a temporary restraining order. (*Allen*, 36 Cal.App.3d at 329-330.) The discussion did not involve water rights or even tangentially relate to a trial court's authority to create a new water right or reorder existing water rights.

Act and potential environmental damage from increased groundwater pumping, not surface water rights. (*Inyo*, 61 Cal.App.3d at 93 ["This litigation focuses primarily on the obligation of Los Angeles to comply with the California Environmental Quality Act ("CEQA") as a prerequisite to increasing its extraction of subsurface water from the Owens Valley Basin"].) The court's imposition of pumping limits on the City of Los Angeles was **not** based on any water rights issue and was not associated with the creation of a new water right or adjusting existing water right priorities. The *Inyo* Court noted that, "[t]he city is not extracting water owned by others; it [sought] to utilize water rights belonging to it as overlying or appropriative owner." (*Id.* at 96.) Plainly, a court's power to impose restrictions on the exercise of a party's water rights pending environmental review is drastically different than creating a new water right and/or reordering water rights so that a junior water rights holder is empowered to divert water held by senior water rights holders. Especially in this case, where BBTK and WAC have not named Appellants as defendants and do not seek any relief against them. (See, 14 AA 3233; 6 AA 1283 ["No liabilities are alleged against the [Appellants]".) *Inyo* cannot salvage the trial court's Implementation Order.

Conclusion

The trial court abused its discretion by applying incorrect legal standards, making findings unsupported by substantial evidence, denying Appellants' due process, and failing to comply with the law regarding preliminary injunctions. Based on the

record and the arguments presented in the briefing, Appellants respectfully urge the Court to reverse both the Injunction and the Implementation Order.

Date: Sep. 30, 2024 The Law Offices of Young Wooldridge, LLP

By: /s/ Brett A. Stroud
Brett A. Stroud
Attorneys for Real Party in Interest and Appellant North Kern Water Storage District

Date: Sep. 30, 2024 Ellison, Schneider, Harris & Donlan LLP

By: /s/ Craig A. Carnes, Jr.
Craig A. Carnes, Jr.
Attorneys for Real Party in Interest and Respondent Kern Delta Water District

Date: Sep. 30, 2024 McMurtrey, Hartsock, Worth & St. Lawrence

By: /s/ Isaac L. St. Lawrence
Isaac L. St. Lawrence
Attorneys for Real Party in Interest and Respondent Buena Vista Water Storage District

Date: Sep. 30, 2024 Somach Simmons & Dunn

By: /s/ Nicholas A. Jacobs
Nicholas A. Jacobs
Attorneys for Real Party in Interest and Respondent Kern County Water Agency

Date: Sep. 30, 2024 Belden Blaine Raytis

By: /s/ Dan N. Raytis
Dan N. Raytis

Attorneys for Real Party in Interest and Respondent Rosedale-Rio Bravo Water Storage District

Certificate of Word Count

Cal. Rules of Court, rule 8.204(c)(1)

The text of this Brief consists of 12,207 words as counted by the Microsoft Word software used to generate the Brief.

Date: September 30, 2024 /s/ Brett A. Stroud

Brett A. Stroud

Proof of Electronic Service

The undersigned declares:

I am employed in the County of Kern, in the State of California. I am over the age of 18 and am not a party to the within action. My business address is 1800 30th Street, Fourth Floor, Bakersfield, California. My electronic service address is bstroud@youngwooldridge.com.

On the date set forth below, I served the foregoing document on the parties to this action, whose attorneys are listed in the TrueFiling© service directory for this matter, and the Superior Court, by submitting an electronic version of the document(s) to TrueFiling©, through the user interface at www.truefiling.com.

On the same date, at my said place of business, a copy of the foregoing document enclosed in a sealed envelope, was placed for collection and mailing following the usual business practice of my firm, addressed as follows:

Hon. Gregory Pulskamp
Kern County Superior Court
1415 Truxtun Avenue
Bakersfield, CA 93301

I am readily familiar with my firm's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Bakersfield, California.

Date: September 30, 2024 /s/ Brett A. Stroud

Brett A. Stroud