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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF KERN

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

18 Plaintiffs and Petitioners,

19 v.

20 CITY OF BAKERSFIELD, and DOES 1
21 through 500,

22 Defendants and Respondents,

23 BUENA VISTA WATER STORAGE
24 DISTRICT, KERN DELTA WATER
25 DISTRICT, NORTH KERN WATER
26 STORAGE DISTRICT, ROSEDALE-RIO
27 BRAVO WATER STORAGE DISTRICT,
28 KERN COUNTY WATER AGENCY, and
DOES 501-999,

Real Parties in Interest.

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

**FIRST AND SECOND POINT
PARTIES' NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION
OF PRELIMINARY INJUNCTION
AND IMPLEMENTATION ORDER**

Date: December 21, 2023
Time: 9:00 a.m.
Dept.: 8
Judge: Hon. Gregory Pulskamp

Complaint Filed: November 30, 2022
FAC Filed: March 6, 2023
SAC Filed: October 4, 2023
Trial Date: None Set

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Notice of Motion

TO EACH PARTY AND TO THE COUNSEL OF RECORD FOR EACH PARTY:

YOU ARE HEREBY NOTIFIED THAT on December 21, 2023 at 9:00 a.m. or as soon thereafter as the matter may be heard in Department 8 of the Kern County Superior Court, located at 1415 Truxtun Avenue in Bakersfield, California, Real Parties in Interest Kern Delta Water District, North Kern Water Storage District, and Buena Vista Water Storage District will move for reconsideration of the “Order Granting Plaintiffs’ Motion for Preliminary Injunction” and filed on November 9, 2023 (“Injunction”) and the “Order for Implementation of Preliminary Injunction” filed on November 14, 2023 (“Implementation Order”).

The motion for reconsideration will be made under Code of Civil Procedure section 1008 on the following grounds: First, the process of ‘good faith consultation’ required by the Injunction should not exclude the Real Parties in Interest, and there was no opportunity to brief this issue before the Injunction was granted. Second, the Implementation Order was issued without any notice or opportunity to be heard by the Real Parties in Interest, who are the only parties potentially harmed by the Implementation Order. Third, the Implementation Order provides for a new, first-priority diversion by Bakersfield, which is contrary to the Injunction and to the law. Fourth, the Interim Flow Regime in the Implementation Order is not supported by any scientific evidence as required by law.

The motion for reconsideration will be based on the attached Memorandum of Points and Authorities, the attached declarations and exhibits, the files and records in this action, and any further evidence and argument that court may receive at or before the hearing.

Dated: November 21, 2023 The Law Offices of Young Wooldridge, LLP

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

1 Dated: November 21, 2023

Ellison, Schneider & Harris

2

By: /s/ Craig A. Carnes, Jr.

3

Craig A. Carnes, Jr.

4

Attorneys for Real Party in Interest

Kern Delta Water District

5 Dated: November 21, 2023

McMurtrey, Hartsock, Worth & St. Lawrence

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By: /s/ Isaac L. St. Lawrence

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Isaac L. St. Lawrence

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Attorneys for Real Party in Interest

Buena Vista Water Storage District

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5 *Trout I*”)..... 18

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8 *Food and Grocery Bureau of Southern Cal. v. Garfield* (1941) 18 Cal.2d 174 16, 17

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Memorandum of Points and Authorities

I. Introduction

Real Parties in Interest Kern Delta Water District, North Kern Water Storage District, and Buena Vista Water Storage District (“Moving Parties”) submit this memorandum in support of their motion for reconsideration of the “Order Granting Plaintiffs’ Motion for Preliminary Injunction” and filed on November 9, 2023 (“Injunction”) and the “Order for Implementation of Preliminary Injunction” filed on November 14, 2023 (“Implementation Order”).

When the Court issued the Injunction, it believed that Plaintiffs and the City of Bakersfield (“Bakersfield”) could be relied upon to engage in ‘good faith consultation’ to implement the Court’s direction to establish flow rates under Fish and Game Code section 5937. Instead, Plaintiffs and Bakersfield have conspired to rewrite the water right priorities on the Kern River by giving Bakersfield a new, first-priority water right in addition to its existing rights. They have also implemented an Interim Flow Regime with no scientific evidence. Through the entire process, the Real Parties in Interest, who bear the entire burden of the Implementation Order, have been given no notice or opportunity to be heard.

II. Authority for Motion

Under Code of Civil Procedure section 1008, subdivision (a),¹ whenever the Court makes an order, “any party affected by the order” may move the Court to “reconsider the matter and modify, amend, or revoke the prior order.” The motion must be “based upon new or different facts, circumstances, or law.” Whether something is “new or different” requires a “satisfactory explanation” from the party seeking reconsideration as to why it was not provided prior to the order. (*In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 1468; *Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1013, disapproved of on other grounds by *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602.) It should also be noted that, although the grounds for a **motion** to reconsider an order are limited in this way, the Court’s **authority** to modify its own rulings is not so limited: “if a court believes one of its prior orders was erroneous,

¹ All further statutory references are to the Code of Civil Procedure unless otherwise noted.

1 it may correct that error no matter how it came to acquire that belief.” (*In re Marriage of Herr*
2 (2009) 174 Cal.App.4th 1463, 1469.)

3 **III. Procedural Posture**

4 **A. Injunction**

5 On October 13, 2023, the Court heard a motion for a preliminary injunction filed against
6 Bakersfield by Plaintiffs Bring Back the Kern, Water Audit California, Kern River Parkway
7 Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity
8 (“Plaintiffs”). (Stroud Decl., ¶¶ 3–4.) After taking the matter under submission, the Court issued
9 a ruling on the minutes on October 30, 2023, indicating that it would grant the preliminary
10 injunction and ordering Plaintiffs, as the prevailing parties, to prepare an order for signature.
11 (Stroud Decl., ¶ 5, Exh. A [“Decision”].) Under California Rules of Court, rule 3.1312, Adam
12 Keats, counsel for several of the Plaintiffs, circulated a proposed order for review by the parties.
13 (Stroud Decl., ¶ 6, Exh. B.) That order, with one spelling correction, was signed by the Court on
14 November 9, 2023. (Stroud Decl., ¶ 7, Exh. C [“Injunction”].)

15 The Injunction instructed Bakersfield not to operate the six weirs that are the subject of
16 this case “in any manner that reduces Kern River flows below the volume sufficient to keep fish
17 downstream of said weirs in good condition.” (*Id.*, p. 2, Ins. 19-23.) The Injunction also instructed
18 Bakersfield and the Plaintiffs to “engage in good faith consultation to establish flow rates
19 necessary for compliance with [the] order.” (*Id.*, p. 2, Ins. 24-25.) It also provided that if, “after
20 good faith consultation, Defendant and Plaintiffs are not successful in agreeing to flow rates
21 necessary for compliance, either Defendant or Plaintiffs may file a request for this Court to make
22 a determination regarding compliance, impose specific flow rates, or make any other legal
23 determination pertinent to the order, after reasonable notice to all parties including the Real
24 Parties in Interest.” (*Id.*, pp. 2-3, Ins. 28, 1-4.) The Injunction provided no opportunity for Real
25 Parties to participate in the process for implementation of the Court’s orders.

26 **B. Implementation Order**

27 On November 9, the same day that the Court signed the Injunction, Colin Pearce, counsel
28 for Bakersfield, informed the Real Parties by email that the City Council had voted to accept a

1 proposal from Plaintiffs and circulated what purported to be a proposed order under Rule of Court
2 3.1312. (Stroud Decl., ¶ 8, Exh. D.) Real Parties promptly notified Mr. Pearce, on November 10,
3 that such a procedure was inappropriate and that a noticed motion would be required to modify
4 the Court’s order. (Stroud Decl., ¶ 9, Exh. E.) Rather than file a noticed motion, on November
5 13, Plaintiffs and Bakersfield agreed and filed a “Joint Stipulation for Implementation of
6 Preliminary Injunction; [Proposed] Order,” signed by counsel for Bakersfield and the Plaintiffs.
7 (Stroud Decl., ¶ 10, Exh. F [“Stipulation”].) None of the Real Parties were consulted, and they
8 were given no opportunity to object before the Court signed the proposed order on November
9 14, 2023. (Stroud Decl., ¶ 11, Exhs. G, H [“Implementation Order”]; Ashlock Decl., ¶ 12.) The
10 Implementation Order provides for an ‘Interim Flow Regime,’ which will be discussed below.
11 (Implementation Order, ¶ 1.), and it also provides that this flow regime shall be “subject to
12 Bakersfield’s municipal needs and demands ... [equivalent to] an average daily flow of 180 cubic
13 feet per second.”

14 **C. Post-Order Conduct of Bakersfield**

15 Beginning on November 16, 2023, Bakersfield has sent to Real Parties a table entitled the
16 “Daily Kern River Operations Interim Flow Regime” which summarizes the actions, each day,
17 that Bakerfield has taken under the Implementation Order. Each Interim Flow Regime table
18 shows that Bakersfield has distributed to itself a new first priority right to 180 cfs each day which
19 it calls the “City of Bakersfield Domestic (per Court Order).” Next, the table provides a “Fish
20 Flow Requirement (40% of Total Available Water).” Lastly, some of the remaining available
21 water is distributed to Real Parties according Kern River entitlements. Significantly, in addition
22 to the 180 cfs each day claimed under no existing water right, Bakersfield also distributes to itself
23 a share of the remaining available water under its existing Kern River rights. Detailed information
24 evaluating the impacts of the daily Interim Flow Regime are provided in the declarations of
25 Steven Teglia, Perry Hyatt, Ram Venkatesan, and Tim Ashlock submitted herewith.

26 **IV. Argument**

27 The Moving Parties ask the Court for reconsideration on four grounds: 1) the consultation
28 procedure set forth in the Injunction is prejudicial to the due process rights of the Real Parties in

1 Interest, 2) the Implementation Order was issued without appropriate procedures or due process,
2 3) the ‘carve-out’ in favor of Bakersfield is unsupported by any record, is contrary to law, and
3 fundamentally alters the status quo of Kern River operations; and 4) the Interim Flow Regime is,
4 by Plaintiffs’ and Bakersfield’s admission, not based on science and is thus contrary to the
5 Injunction and the law.

6 **A. The Consultation Procedure Set Forth in the Injunction Is Prejudicial to the**
7 **Due Process Rights of the Real Parties In Interest**

8 **1. The Real Parties should be included in all discussions and decisions**
9 **regarding implementation of the Injunction, as a matter of due**
10 **process of law.**

11 In the Court’s previous ruling on Bakersfield’s demurrer to the First Amended Complaint,
12 filed on September 9, 2023 (“Demurrer Ruling”), the Court found that the Real Parties in Interest
13 in this action are necessary and indispensable parties because the relief Plaintiffs are seeking
14 could “directly affect the water rights and contractual interests” of those parties. (Stroud Decl.,
15 ¶ 12, Exh. I.) The Injunction, however, directs only the Plaintiffs and Bakersfield to engage in
16 ‘consultation’ regarding flow limitations to be implemented on the river. Real Parties urge the
17 Court to reconsider this process, which is prejudicial to the due process interests of the Real
18 Parties. The exclusion of the Real Parties from these negotiations is an invitation to abuse. The
19 clearest evidence of that fact is the actual conduct of the Plaintiffs and Bakersfield in that process
20 thus far, which will be discussed in the next section.

21 **2. The conduct of Bakersfield and the Plaintiffs demonstrates that the**
22 **exclusion of the Real Parties is violative of due process.**

23 The Implementation Order that Bakersfield and the Plaintiffs stipulated to has two core
24 provisions: (1) the creation of a new, first-priority diversion purporting to be a ‘carve-out’ for
25 Bakersfield’s claimed “municipal needs and demands” and (2) a 40% “Interim Flow Regime.”
26 They agreed to these terms without notice or consultation with the Real Parties, because only the
27 Real Parties bear the burden of this Interim Flow Regime. But by their own admission these terms
28 are not supported by evidence and are contrary to law.

At the hearing on the motion, Bakersfield’s counsel, Mr. Pearce, derisively referred to

1 this 40% number as a “magical figure” having “no bearing at all on the Kern River.” (Stroud
2 Decl., ¶ 13.) Now, however, Bakersfield is willing to agree to that number, **provided** it receives
3 in the bargain special treatment (in the form of its new 180 cfs diversion under no claim of right)
4 and can shift the entire risk of loss of Kern River water onto other parties, including parties with
5 water rights senior to its own as confirmed by Bakersfield’s legal title and decades of daily flow
6 and diversion records.

7 When Plaintiffs circulated the draft order that became the Injunction, Mr. Pearce
8 attempted to insert substantially the same ‘carve-out’ language into that order. (Stroud Decl.,
9 ¶ 14, Exh. J.) Mr. Keats responded that such language did not accurately reflect Plaintiff’s view
10 of the law and that “the court **cannot** make that an order under section 5937.” (Stroud Decl., ¶ 15,
11 Exh. K, emphasis added.) In response, Mr. Keats reported that Bakersfield dropped that proposed
12 change. (Stroud Decl., ¶ 16, Exh. L.) Now, however, Plaintiffs are willing to agree to special
13 treatment for Bakersfield so long as Bakersfield agrees to the 40% flow requirement despite the
14 absence of any scientific evidence. Thus, Plaintiffs and Bakersfield have mutually agreed to give
15 one another everything they both want with no evidentiary support or justification **and** agreed to
16 do so solely to the injury of the Real Parties, who are not parties to the stipulation and were not
17 privy to any of those private negotiations. That is not ‘good faith consultation’ as required in the
18 Court’s ruling, and the Court should not countenance the Plaintiffs and Bakersfield negotiating
19 away the rights of other parties. Nor should good faith be expected when most of the parties
20 interested in outcome of the consultation are excluded from the process.

21 **B. The Implementation Order Was Issued Without Appropriate Procedures or**
22 **Due Process**

23 The process by which the Implementation Order was drafted and submitted is not
24 authorized by any statute or by the California Rules of Court. There is no authority for a subset
25 of the parties to simply stipulate to an order affecting all parties with no motion pending before
26 the court and no opportunity for other parties to be heard. Particularly in light of the enormous
27 impact of the Implementation Order on the Real Parties’ rights, as discussed below, notice and
28 an opportunity to be heard is a requirement of due process. (See *United States v. State Water*

1 *Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101.)

2 A self-serving stipulation by less than all of the parties is not a substitute for due process.
3 This is particularly the case here because this Court has determined that such actions could
4 “directly affect the water rights and contractual rights” of other parties. And even if Bakersfield
5 and the Plaintiffs were the only interested parties, while stipulations may be made regarding
6 procedural and factual matters, the Court is not bound by a stipulation of the parties reaching
7 conclusions that are erroneous as a matter of law. (*Valdez v. Taylor Auto. Co.* (1954) 129
8 Cal.App.2d 810, 821.) Both the 40% interim flow number and the ‘carve-out’ in favor of
9 Bakersfield are examples of such erroneous conclusions, as will be discussed in the following
10 sections.

11 **C. The New Diversion Disguised as a ‘Carve-Out’ in Favor of Bakersfield Is**
12 **Unsupported by Any Record, Is Contrary to Law, and Fundamentally Alters**
13 **the Status Quo of Kern River Operations**

14 **1. The Implementation Order’s carve-out for Bakersfield is inconsistent**
15 **with the Injunction itself and is unsupported by any evidence.**

16 The carve-out in favor of Bakersfield (i.e., the new first priority diversion of 180 cfs under
17 no claim of right) is not consistent with the Injunction. The Court indicated, in its ruling attached
18 to and incorporated into the Injunction, that it “has no option to exempt entities from compliance,
19 even if compliance is burdensome.” (Decision, p. 15.) Plaintiffs took the same position, both at
20 the hearing and in the process of approval of the proposed order, and they should not now be
21 permitted to change that position to support this stipulated Implementation Order.

22 The carve-out is also arbitrary and capricious, because Bakersfield has provided no
23 evidence to support its claimed demand of 130,000 acre-feet per year or to use 180 cfs every day
24 from the Kern River. The Court itself noted that Bakersfield only asserted its “overall annual
25 water demand” is approximately 130,000 acre-feet, not that it had a right to or a demand for that
26 much **Kern River** water.² (Decision, p. 12.) The Court in fact concluded that “the present action
27 does not appear to threaten the domestic water supply,” and Bakersfield has provided no evidence
28 to the contrary. (*Ibid.*) The Court noted several reasons that the ‘overall demand’ figure claimed

² The Moving Parties do not concede that this demand figure is correct.

1 by Bakersfield was not dispositive:

2 This conclusion is buttressed by the fact that: 1) Defendant does not
3 rely exclusively on the Kern River to satisfy its demand and may
4 have access to water from the State Water Project (Defendant’s
5 Opposition Brief, p. 6 and Declaration of Maldonado, parag. 8); 2)
6 a significant percentage of water left to flow in the natural river
7 channel would not be lost, but would be recouped in other forms
8 such as replenished ground water (RDEIR for the Kern River Flow
9 Program, p. 2-39 and 2-40); and 3) the “overall” demand identified
by Defendant may include secondary obligations or uses (such as
waste water treatment facilities) for which alternative sources of
water may be available. (RDEIR for the Kern River Flow Program,
p. 2-36).

10 (Decision, pp. 12-13.) Bakersfield has not provided the Court with any information addressing
11 any of these matters. Instead, the carve-out simply creates a new diversion by Bakersfield,
12 without any claim of right, equal to its entire, unsubstantiated ‘overall demand’ figure. Further,
13 it assigns itself the “first priority” to any available water every day of the year. That approach is
14 contrary to California law³, as discussed in the next section.

15 **2. The Implementation Order’s new diversion for Bakersfield by**
16 **Bakersfield is contrary to California law.**

17 Where the amount of water available for diversion is limited and curtailment must take
18 place, the remaining available water must still be apportioned according to established water
19 right priorities. (*Stanford Vina Ranch Irrigation Company v. State* (2020) 50 Cal.App.5th 976,
20 994.) As detailed in the record before the Court on Plaintiff’s motion for a preliminary injunction,
21 the water rights on the Kern River have been established and followed for many decades. (See,
22 Intervenor-Defendants’ Joint Opposition to Plaintiffs’ Motion for Preliminary Injunction [“RPI PI
23 Opposition”], § II.B.) With respect to First Point right holders (i.e., Kern Delta, North Kern, and
24 Bakersfield), the respective water rights were adjudicated in 1900 and have been exercised
25 consistently every day since. (*Id.* at § II.B.2; Exhs. 2 and 9 to RPI Opposition.) The priority of First

26
27 ³ Under the Water Commission Act, a new appropriative water right requires an application to
28 the State Water Resources Control Board, which since 1914 has been the “exclusive method” of
creating appropriate rights. (*United States v. State Water Resources Control Bd.* (1986) 182
Cal.App.3d 82, 102; see Wat. Code, §§ 1200–1814.)

1 Point water rights, like the priority of all water rights, is not established by the end use (i.e., domestic
2 or irrigation) but by “the date of their establishment.” (*North Kern Water Storage Dist. v. Kern Delta*
3 *Water Dist.* (2007) 147 Cal.App.4th 555, 561.) The “City of Bakersfield Kern River First Point
4 Flow and Diversion Record” identifies all Bakersfield’s existing Kern River water rights by
5 name, river stage, and amount in order of right and priority. (Venkatesan Decl., ¶ 21–27; Hyatt
6 Decl., ¶ 2–3; Teglia Decl., ¶ 5.) This long-established schedule of rights does not include
7 Bakersfield’s newly claimed “City of Bakersfield Domestic (per Court Order)” right to divert
8 180 cfs as reflected in its November “Daily Kern River Operations Interim Flow Regime” reports
9 sent immediately following the Court’s signing the Implementation Order. Such a right has never
10 been recognized nor administered on the Kern River. (*Id.*)

11 A detailed review of Bakersfield’s historical Kern River diversion records demonstrates
12 that when this new 180 cfs right is added, it substantially increases Bakersfield’s Kern River
13 water supply to seven times its historic entitlement and use. (*Id.*, ¶¶ 8-15.) This is especially the
14 case because Bakersfield now asserts a new first priority right each day under all hydrologic
15 conditions. (*Id.*) Bakersfield’s increased use is compounded further by its additional claim that it
16 is still retains the right to a further distribution of Kern River entitlement under its existing Kern
17 River rights (i.e., Castro and South Fork.) For example, on November 17, 2023 Bakersfield insists
18 it was authorized by the Court’s Implementation Order to distribute to itself a total of 210 cfs of
19 Kern River water, 180 cfs “City of Bakersfield Domestic (per Court Order) plus its historic 30
20 cfs entitlement authorized to be used by the Castro and South Fork rights. (*Id.*, ¶ 16.) Historically,
21 Bakersfield would only have been entitled to use 30 cfs.

22 Predictably, such significant increased use by Bakersfield necessarily causes significant
23 reductions in the available Kern River supply for other First Point right holders such as Kern
24 Delta and North Kern and Second Point right holders such as Buena Vista. (Venkatesan Decl.,
25 ¶¶ 17–21; Perry Decl., ¶¶ 5–7; Teglia Decl., ¶¶ 12–15; Ashlock Decl., ¶ 13.) Put another way,
26 Bakersfield is taking water (without a valid claim of right to that water) belonging to other water
27 right holders, which is an unauthorized diversion. Importantly, these significant reductions in
28 supply imposed on Kern Delta and North Kern are in addition to the “Fish Flow Requirement

1 (40% of Total Available Water)” requirements in the Court’s Implementation Order. It is
2 impossible at this time to quantify the full extent of the impacts from Bakersfield’s
3 implementation of the Court’s Order. (Venkatesan, ¶ 22; Teglia, ¶ 12–15.) However, each day’s
4 impact will continue and is expected to become even greater as irrigation requirements increase
5 beginning in February, 2024. (*Id.*)

6 **3. In light of these facts, the Court should recognize that the Injunction**
7 **is a mandatory injunction.**

8 The Court previously considered the question of whether the Injunction is prohibitory or
9 mandatory, concluding that it is prohibitory based on the argument that it merely prohibited the
10 continuation of an allegedly unlawful course of conduct by Bakersfield. (Decision, p. 6, citing
11 *Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1046.) However, the
12 form of an injunction does not determine whether it is mandatory or prohibitory. It is the actual
13 effect of the order that is determinative. (*Food and Grocery Bureau of Southern Cal. v. Garfield*
14 (1941) 18 Cal.2d 174, 177.) The subsequent Implementation Order and the conduct of the
15 Plaintiffs and Bakersfield with regard to the injunction make clear that the rule stated in *Daly* is
16 inapposite.

17 The language from *Daly* cited in the Court’s decision summarized *United Railroads of*
18 *San Francisco v. Superior Court* (1916) 172 Cal. 80. In *United Railroads*, the Court noted that
19 the defendant had never been in “uncontested possession” of the property at issue, and so
20 prohibiting it from continuing its trespass was a return to the “last actual peaceable, uncontested
21 status.” (172 Cal. at p. 87.) In this case, by contrast, the water rights administered under the Law
22 of the River have been established and uncontested for well over a century. The Court in *United*
23 *Railroads* also relied heavily on a balancing of the equities, concluding that the potential harm
24 to the enjoined defendant would be fully compensated by the undertaking required of the
25 plaintiff. (*Id.* at pp. 82-83.) In this case, by contrast, only a nominal undertaking of \$1,000 was
26 required by the Court. (Decision, p. 19.) If the Court is inclined to leave the Injunction and
27 Implementation Order in place, the Moving Parties reiterate their request, made at oral argument
28 on the motion, that the Court hold an evidentiary hearing on the appropriate amount of an

1 undertaking.

2 *Daly* and *United Railroads* cannot be read to hold that every “injunction preventing the
3 defendant from committing additional violations of the law” is necessarily prohibitory. That
4 would contradict other California Supreme Court authorities, such as *Food and Grocery Bureau*
5 *of Southern Cal. v. Garfield* (1941) 18 Cal.2d 174, 178, which held that parties who have relied
6 on practices that have been in place for many years and are now attacked as violations of statute
7 are entitled to “continued operation ... without disturbance during the period of [the] appeal.”
8 The present situation is analogous to *Food and Grocery Bureau* rather than *United Railroads*.

9 **D. The Interim Flow Regime Is, by Plaintiffs’ and Bakersfield’s Admission, Not**
10 **Based on Science and Is thus Contrary to the Injunction and the Law**

11 The Interim Flow Regime set forth in the Implementation Order is also not consistent
12 with the Injunction. The Injunction provides that Bakersfield is “prohibited from operating [the
13 weirs] ... in any manner that reduces Kern River flows below the volume sufficient to keep fish
14 downstream of said weirs in good condition.” (Injunction, ¶ 2.) It then directs Plaintiffs and
15 Bakersfield to engage in a “good faith” process “to establish flow rates necessary for compliance
16 with” the Injunction, i.e. necessary to keep fish in good condition. (*Id.*, ¶ 3.) The Supplemental
17 Proposed Order makes no effort to determine what flows are necessary for that purpose, instead
18 adopting a 40% ‘Interim Flow Regime.’

19 **1. The Interim Flow Regime is not founded in any scientific evidence**
20 **regarding the Kern River.**

21 The proposed 40% interim flow number would also be arbitrary and capricious, because
22 it has no bearing on flows that are alleged to be “necessary to keep fish in ‘good condition’,”
23 which the Court acknowledged is a “complex undertaking that encompasses a wide variety of
24 topics including the physical, biological, and hydrological sciences.” (*Id.*, Exh. A, p. 16.)
25 Plaintiffs and Bakersfield have provided no scientific evidence regarding the relevant questions,
26 which include without limitation the following: 1) the existence, number, and species of fish
27 below each weir; 2) the current condition of such fish; 3) the aquatic conditions (temperature,
28 flow, depth, other requisites) necessary to maintain such fish in good condition; 4) the duration
and season that such conditions must exist; 5) whether the interim flows proposed would meet

1 those requirements; or 6) whether the ‘carve-out’ in favor Bakersfield would prevent meeting
2 those requirements. Not only have Plaintiffs and Bakersfield not presented the Court with any of
3 this necessary scientific information, but they admit they do not have it. Following the entry of
4 the Implementation Order, William McKinnon, counsel for Plaintiff Water Audit California,
5 emailed the parties with a frank admission that they have none of the technical information
6 necessary to determine appropriate flow requirements. (Stroud Decl., ¶ 17, Exh. M.)

7 The 40% interim flow concept originated in the Declaration of Theodore Grantham, filed
8 on reply in support of the motion. Professor Grantham admitted that the 40% number derived
9 from “recommendations from the Water Board for San Joaquin River watershed tributaries,” a
10 completely different river system. (Grantham Decl. ISO Mot. for Prelim. Inj., p. 5, Ins. 13-16.)
11 He also admitted that appropriate flow requirements “can differ among rivers and between
12 locations along the same river” and also depend on “the desired ecological condition to be
13 maintained and the demands of consumptive water users.” (*Id.*, p. 4, Ins. 13-15.) Yet Plaintiffs
14 and Bakersfield have done nothing to address the actual conditions of the Kern River. The Interim
15 Flow Regime also does not account for differences between low and high flow conditions or for
16 water already present in the channel as part of deliveries ordered by water right holders.

17 **2. *Cal Trout I* and *Cal Trout II* are clear that flow requirements must be**
18 **based on scientific work.**

19 The Court, in its Decision, relied on *California Trout, Inc. v. State Water Resources*
20 *Control Bd.* (1989) 207 Cal.App.3d 585 (“*Cal Trout I*”) to support its decision that Bakersfield
21 and the Plaintiffs could come up with a defensible interim flow measure. (Decision, pp. 15–16.)
22 It appears the Court believed Bakersfield and the Plaintiffs would undertake additional scientific
23 work to develop a defensible fish flow regime. (*Id.* at p. 16 [discussing the resources available to
24 Bakersfield and the Plaintiffs and stating that “[g]iven these resources, it seems that Defendant
25 and Plaintiff, along with input from subject matter experts, would be in a better position than the
26 Court to quickly develop flow standards in good faith compliance with the law”].) However, a
27 comparison of the circumstances in *Cal Trout I* and *California Trout, Inc. v. Superior Court*
28 (1990) 218 Cal.App.3d 187 (“*Cal Trout II*”) with the facts in this case demonstrates that the

1 Plaintiffs and Bakersfield did not develop a defensible flow measure in this case.

2 Following *Cal Trout I*, where the appellate court directed the SWRCB to impose a Section
3 5937 condition in the dam owner’s water rights licenses and assumed the dam owner would
4 adhere to the conditions, *Cal Trout II* considered the failure of such flow measures to be
5 developed and implemented. In *Cal Trout II*, the dam owner specifically raised the issue of
6 needing guidance on the flows necessary to satisfy section 5937 (as applicable through Section
7 5946). (See *Cal Trout II, supra* 218 Cal.App.3d at pp. 194, 209.) The evidence before the court
8 included declarations from the Department of Fish and Wildlife (“CDFW”) regarding setting fish
9 flows. (*Id.* at pp.198-199.) The *Cal Trout II* Court ultimately ordered the trial court to set interim
10 flows while the SWRCB developed long term flows. However, the *Cal Trout II* explained that
11 questions of fish flows invoke the primary expertise of CDFW. (*Id.* at pp. 203, 210, 211.) Because
12 of this expertise, the court noted that resort to CDFW’s judgment was “peculiarly appropriate,”
13 and the trial court was required to take CDFW’s recommendations into consideration when
14 setting interim flows. (*Id.* at p. 210.)

15 Here, the parties have provided no technical information to support the imposition of the
16 fish flow agreed to by Plaintiffs and Bakersfield (i.e., 40% of natural flow). Bakersfield itself
17 previously strongly opposed the imposition of this arbitrary requirement. Further, neither the
18 Plaintiffs or Bakersfield provided any further technical support for their stipulation to impose the
19 agreed to flow number. Instead, it appears Bakersfield and the Plaintiffs made a deal whereby
20 Bakersfield would accept the 40% natural flow amount in return for a new first priority right
21 (which is entirely unlawful). Thus, this case is nothing like the situation in the *Cal Trout* cases
22 where the end result included the trial court (not the parties) setting interim flows with
23 recommendations from DFW.

24 **3. Imposition of arbitrary flow requirement is not consistent with the**
25 **California Constitution.**

26 As the Court acknowledged at the outset of its decision, the central principle of all
27 California water law is found in our state’s constitution:

28 “It is hereby declared that because of the conditions prevailing in
 this State the general welfare requires that the water resources of the

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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.)

To impose flow requirements without any evidence of their appropriateness contradicts this basic principle. As discussed above, the *Cal Trout I* and *Cal Trout II* cases show that extensive technical work is required to determine an appropriate fish flow. Without that technical work and scientific evidence, the Court cannot determine whether the flows are necessary, whether the flows are sufficient, and how the flows should be implemented.

The Plaintiffs and Bakersfield have demonstrated that this technical and scientific work cannot proceed without the involvement of the Court. They have shown that they are willing to strike an unscientific bargain at the expense of parties who have been given no opportunity to be heard. The California Constitution’s mandate for reasonable use requires consideration of all relevant facts and circumstances and the balancing of all the relevant interests. (See, e.g., *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1488; *Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th 992, 1037.) The Court must require that evidence be brought before it on a properly noticed motion, with opportunity for all parties to be heard and to present evidence regarding these critical questions.

V. Conclusion

For the foregoing reasons, the Moving Parties respectfully request that the Court reconsider the Injunction and the Implementation Order.

Dated: November 21, 2023

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