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 OPENING BRIEF

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Certificate of Interested Persons

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

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Introduction

A preliminary injunction that changes the status quo should be granted only in "extreme cases where the right thereto is clearly established" and will be "closely scrutinized" on appeal. (*Brown v. Pacifica Foundation, Inc.* (2019) 34 Cal.App.5th 915, 925.) It is an extraordinary remedy, to be granted only with "great caution." (*Wilkins v. Oken* (1958) 157 Cal.App.2d 603, 606.) Judicial caution is particularly essential in cases involving "the conservation of the waters of the state," a matter of "transcendent importance." (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 702.)

The two orders appealed from here jeopardize the conservation and management of the waters of the Kern River. The first is a mandatory preliminary injunction requiring an unspecified amount of Kern River water, which otherwise would be available for Appellants' use, to be used "to keep fish in good condition" without considering the effect of such an operational change on the reasonable and beneficial uses of Kern River water. The second is a further injunctive order, entered without any hearing or any evidence, that "implements" the injunction by imposing an arbitrary, unscientific flow requirement based solely on a quid pro quo stipulation by Respondents.

Appellants are five long-established public water agencies in Kern County[1] responsible for delivering water from the Kern River

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[1] North Kern Water Storage District ("North Kern"), Kern Delta Water District ("Kern Delta"), Buena Vista Water Storage District ("Buena Vista"), Kern County Water Agency ("KCWA"), and Rosedale Rio-Bravo Water Storage District ("Rosedale").

to water users within their boundaries for beneficial uses, including irrigation, domestic, municipal, and industrial use. (8 AA 1836; 9 AA 2002, 2014; 10 AA 2035, 2302–06, 2134; 11 AA 2315–17, 2321–24, 2328–35, 2344–52.)

In this action, the Kern County Superior Court issued a preliminary injunction against the City of Bakersfield, which (in addition to diverting water for its own use) acts as Appellants' agent in diverting water for delivery to their users. (11 AA 2395–96 ("Injunction").) Bakersfield diverts water from the Kern River for itself and Appellants by operating of a series of diversion weirs[2] along the river. (*Ibid.*) The Injunction commands Bakersfield to alter its long-established practice of diverting water in accordance with the judgments, agreements, and procedures collectively referred to as the "Law of the River" and to instead release water "sufficient to keep fish downstream of said weirs in good condition," without specifying what volume or flow rate would be "sufficient." (12 AA 2769–70.) Instead of specifying a volume or flow rate, the trial court improperly delegated its authority and responsibility by instructing Bakersfield and Plaintiffs to set flow rates. (12 AA 2769.) The trial court then approved another order, stipulated between Bakersfield and Plaintiffs, that resulted in Appellants' water being used to satisfy fish flows that were imposed without any scientific basis, without any opportunity for Appellants to be heard and present evidence, and with significant

[2] 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.)

negative impacts to Appellants and hundreds of thousands of Kern County residents. (13 AA 2863–92 ("Implementation Order").) Both the Injunction and the Implementation Order should be reversed.

Statement of the Case

I. Factual Background

A. The Kern River

The Kern River originates high in the Sierra Nevada Mountains and drains a large portion (about 2,074 square miles) of the Southern Sierras. (11 AA 2356.) The north and south forks of the river join at Isabella Dam and Reservoir, where the waters of the river are impounded for purposes of flood control, conservation storage, and recreation. (*Id.*; 7 AA 1472–77.) The river then flows downstream approximately 33 miles through a steep canyon to the floor of the San Joaquin Valley and into Bakersfield. (11 AA 2356.) The annual, natural flow of the river is highly variable, ranging from a maximum of nearly 2.5 million acre-feet[3] (1983) to a low of approximately 139,000 acre-feet (2015). (11 AA 2357.) Average flows are highest during the spring snowmelt (April to July) and lowest during the fall and early winter (August to March). (*Ibid.*)

[3] An acre-foot of water is approximately 325,851 gallons of water. (*San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1134 fn.3.)

B. The "Law of the River"

Kern River water is allocated based on a complex and long-established set of water rights, court judgments and decrees, agreements, policies, and water management procedures that make up what is referred to as the "Law of the River." (11 AA 2358–60.) This includes the 1888 Miller-Haggin Agreement (and its various amendments) (7 AA 1387–1441), the 1900 Shaw Decree (7 AA 1443–64), the Kern River Water Rights and Storage Agreement (7 AA 1520–47), and numerous other agreements and judicial decisions. (See generally 6 AA 1339–41.)

The water rights underlying the "Law of the River" were first established in the late 1800s. (13 AA 2935.) Kern River rights are generally referred to by groupings derived from the Miller-Haggin Agreement: First Point, Second Point, and Lower River. (11 AA 2394, 2322.) The current First Point diverters are Kern Delta, North Kern, and Bakersfield. Buena Vista owns the vast majority of the Second Point right, and KCWA holds the Lower River right. (10 AA 2303; 11 AA 2322.) Bakersfield has several long-term contracts with various entities that purchase Kern River water for domestic and agricultural purposes. (6 AA 1341–49.) Rosedale is one of these contracting parties, providing Kern River water to growers and homeowners within Rosedale's boundaries. (11 AA 2316.)

C. Kern River Operations

For decades, prior to 1976, the operation of the weirs and the recordkeeping for Kern River diversions were administered by the Kern County Land Company and later its successor-in-interest,

Tenneco West, Inc. (13 AA 338.) In 1976, Bakersfield first acquired Kern River rights in a contract with Tenneco West, Inc., which specified that Bakersfield's purchase of water rights and assets was "subject to the terms, conditions, restrictions and reservations set forth in or arising from" various instruments, including the Miller-Haggin Agreement (as amended), the Shaw Decree, the 1952 Agreement with North Kern, the 1961 Kern River Water Service Agreement with Rosedale, and the 1964 Lake Isabella Water Storage Contract. (7 AA 1581, 1661; 11 AA 2339.)

Each day, Bakersfield operates the weirs to divert water for itself and as an agent for Appellants according to the "Law of the River." (11 AA 2358–59.) Bakersfield also maintains records of Kern River operations in coordination with Appellants. (*Ibid.*) In administering Kern River operations, Bakersfield receives daily orders from Appellants for a defined flow of water to be diverted at each of the weirs and then coordinates with the United States Army Corps of Engineers[4] for it to release the amount of water ordered from Lake Isabella to be delivered the next day to various points downstream. (*Ibid.*) Bakersfield owns and operates certain canal head gates and physical facilities along the Kern River, and routinely adjusts these facilities to ensure that the scheduled quantity of water, or rate of flow, is delivered into Appellants' canals. (11 AA 2395.)

[4] The United States Army Corps of Engineers operates Isabella Dam for the United States. (7 AA 1480.)

II. Procedural History

A. Plaintiffs' Complaint

Plaintiffs filed their original Complaint on November 30, 2022, naming Bakersfield as the sole defendant and Appellants as real parties in interest. (1 AA 21.) The Complaint asserted various causes of action against Bakersfield, seeking to compel changes to its operation of the weirs. (1 AA 32–37.) Plaintiffs did not directly seek any relief against Appellants. (*Ibid.*) Broadly, the Complaint asserted that Bakersfield was violating California law by not bypassing sufficient water downstream of the weirs to "keep fish in good condition." (1 AA 34.)

Bakersfield and Appellants filed demurrers to the Complaint. (1 AA 50–69, 85–117.) In response, Plaintiffs did not oppose the demurrers but instead filed a First Amended Complaint, in which Plaintiffs excluded Appellants from the action while directly challenging Bakersfield's diversion of water on behalf of Appellants for agricultural purposes. (See 1 AA 181–95; 11 AA 2440, 2467.) Given Appellants' historic water rights and contractual interests and Plaintiffs' stated goal in the First Amended Complaint of changing historic Kern River operations, Appellants filed a motion to intervene, and Bakersfield filed a demurrer based on Plaintiffs' failure to name Appellants as necessary parties. (1 AA 259–72; 1 AA 285–92.) The trial court sustained Bakersfield's demurrer on the ground that Appellants were indispensable parties. (6 AA 1313–14, 1318.) Plaintiffs then filed their Second Amended Complaint, which was the operative

complaint at the time of the Injunction, again naming Appellants as real parties in interest. (11 AA 2424, 11 AA 2429–30.)

B. Motion for Preliminary Injunction

Plaintiffs moved for a preliminary injunction, based solely on Fish and Game Code section 5937,[5] to require Bakersfield[6] to bypass sufficient water past the weirs to keep fish in good condition. (2 AA 305.) Appellants opposed the motion and submitted extensive evidence regarding their historic water rights and contractual interests, the "Law of the River," and the significant harm that would occur to Appellants and the public if the trial court granted Plaintiffs' motion. (See, 7 AA; 8 AA; 9 AA; 10 AA 2299–306; 11 AA 2307–68.) Appellants also filed various objections to evidence submitted by Plaintiffs in support of their motion for a preliminary injunction. (12 AA 2752–54.)

Following briefing and oral argument, the trial court issued a ruling granting Plaintiffs' motion for a preliminary injunction. (12 AA 2768–90.) The trial court stated, "the matter currently before this Court is neither a case of first impression, nor is it a case that affords this Court much – if any – discretion. To the contrary, it is a matter that involves established legal precedent and legislative mandate." (12 AA 2773.) The Injunction included the following provisions: (1) Bakersfield was required to bypass water downstream of the weirs in a volume sufficient to keep fish

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[5] All further statutory references are to the Fish and Game Code unless otherwise indicated.

[6] Consistent with their complaint, Plaintiffs did not directly seek any relief against Appellants.

in good condition, but no specific flow was specified; (2) Bakersfield and Plaintiffs were required to engage in good faith consultation to establish flows sufficient to keep fish in good condition; and (3) Plaintiffs were required to post a $1,000 bond or undertaking. (12 AA 2768–70.) As part of its ruling, the trial court found that the Injunction was a prohibitory injunction. (12 AA 2776–77.) Plaintiffs posted a $1,000 undertaking on October 31, 2023, and the Injunction order took effect immediately. (12 AA 2762, 2770.)

C. Implementation Order

Only four days after the trial court issued the Injunction, Bakersfield and Plaintiffs signed a joint stipulation agreeing to a proposed order, providing that Bakersfield would "implement, on an interim basis, an Interim Flow Regime for the Kern River whereby forty percent (40%) of the total measured daily flow of available water will remain in the river channel past the McClung Weir." (13 AA 2827–29.) Bakersfield and Plaintiffs stipulated that this 40% bypass requirement was "subject to Bakersfield's municipal needs and demands (currently 130,000 acre-feet per year, with an average daily flow of 180 cubic feet per second ('cfs'))." (*Ibid.*) To explain their agreement, the Implementation Order provided an example, stating as follows:

> "By way of example, using the average annual Kern River flow as stated in the Ruling on page 14 of 726,000 acre-feet per year, which converts to approximately 1,000 cfs average daily flow, Bakersfield will multiply that amount by 40% to arrive at 400 cfs to be left in the river for interim fish flows. Bakersfield will allocate 180 cfs of the 1000 cfs flow for the City's demands,

> leaving a balance of 820 cfs. 400 cfs will be left in the river for fish flows, **and the remaining 420 cfs of flow (1,000 cfs minus 180 cfs and 400 cfs) would be available for diversion by the Real Parties in Interest**." (*Id.*, emphasis added.)

As demonstrated by the example in the Implementation Order, Bakersfield was given a new first priority right to 180 cfs and all of Appellants' water rights and entitlements were subordinated. Appellants were not involved in negotiating the joint stipulation, were not signatories to the joint stipulation, and were not aware of the joint stipulation and proposed implementation order until they were served with it after it was filed. (13 AA 2987.) Without holding a hearing, taking any evidence, or providing Appellants an opportunity to object to the proposed implementation order, the trial court signed the Implementation Order one day after its submission. (13 AA 2863–66.) Immediately thereafter, Bakersfield began operating the weirs according to the Implementation Order. (13 AA 2905.) The operations resulted in the unlawful interference with Appellants' water rights and entitlements and the conversion of a substantial amount of Appellants' water. (13 AA 3215–16; Pet. for Writ of Supersedeas, 4/19/2024, p. 23.)

D. Motions for Reconsideration and Stay

After the trial court issued the Injunction and Implementation Order, Appellants filed motions for

reconsideration and a stay. (13 AA 2896–2916, 13 AA 2918–24.)[7] Appellants objected to the Injunction and Implementation Order on grounds that they violated Appellants' due process rights, unlawfully granted a new water right to Bakersfield, arbitrarily exempted Bakersfield's municipal diversions from contributing to the instream flows but not diversions by other municipal providers, and otherwise violated Appellants' water rights by requiring Bakersfield to bypass water accruing to their water rights to maintain flows for fish without defined parameters or competent evidentiary support. (*Ibid*.)

Following briefing and a hearing, the trial court issued an order denying the motions in part and granting them in part. (16 AA 3735–46.) The trial court (1) stayed (but did not void) the Implementation Order and (2) revised the Injunction Order to (a) provide Bakersfield an exemption from the fish flow bypass requirement for water needed for "dire necessity to sustain human consumption through the domestic water supply," and (b) require Appellants to engage in good faith consultation with Bakersfield and Plaintiffs to establish fish flows. (16 AA 3735–46.) Thus, following the trial court's order, Bakersfield was required to bypass water downstream of the weirs in an unspecified volume sufficient to keep fish in good condition (with an exemption for Bakersfield's "dire necessity"), and Bakersfield, Plaintiffs, and Appellants were required to engage in "good faith consultation" to

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[7] Rosedale joined the motions filed by North Kern, Kern Delta, and Buena Vista. (14 AA 3224–32.) KWCA filed a separate motion. (13 AA 3123–41.)

determine the flows necessary to satisfy the trial court's Injunction. (16 AA 3738–39.)

E. Appeal and Writ of Supersedeas

Between January 18 and February 1, 2024, each appellant filed a notice of appeal of the Injunction and the Implementation Order. (16 AA 3766, 3813; 17 AA 3864, 3912, 3960.) Following Appellants' notices of appeal, several of the Plaintiffs[8] filed a "Motion to Compel Compliance with Preliminary Injunction." (Pet. For Writ of Supersedeas, 4/19/2024, pp. 26–41.) Appellants petitioned this Court for a writ of supersedeas, which it granted on May 3, 2024. (Order, 5/3/2024.) Plaintiffs collectively filed two petitions for rehearing, which this Court denied. (Order Denying Pet. for Rehearing, 5/16/2024; Order Denying Pet. for Rehearing, 5/24/2024.)

Statement of Appealability

The Injunction is an appealable "order granting … an injunction." (Code Civ. Proc., § 904.1, subd. (a)(6); *Valley Casework, Inc. v. Comfort Construction, Inc.* (1999) 76 Cal.App.4th 1013, 1019 fn.4.) The Implementation Order is likewise appealable under the same statute, because it had the effect of granting further injunctive relief. (See *PV Little Italy, LLC v. MetroWork Condominium Assn.* (2012) 210 Cal.App.4th 132, 142–43.)

Statement of Contentions

1. The trial court misunderstood the scope of its discretion and erred by issuing a preliminary injunction without

[8] Plaintiff Water Audit of California did not join in this Motion.

balancing the harms to the parties, because it wrongly assumed that Plaintiffs' success on the merits was guaranteed as a matter of law.

2. The trial court erred by concluding that Appellants would not be harmed by the Injunction, a conclusion not supported by substantial evidence.

3. The trial court erred by issuing an injunction not definite enough to provide a standard of conduct and delegating the determination of flow requirements to the parties.

4. The trial court erred by issuing a preliminary injunction and requiring only a nominal $1,000 bond without holding any hearing or taking any evidence on the appropriate amount for the bond.

5. The trial court erred by issuing a further order "implementing" the Injunction on the stipulation of fewer than all the parties, without any hearing, and unsupported by substantial evidence.

Standard of Review

The trial court, considering a motion for a preliminary injunction, "evaluate[s] two interrelated factors … The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.) In the trial court, the moving party bears the burden of proof on

both elements. (*Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1571.)

On appeal from a preliminary injunction, the overall standard of review is abuse of discretion. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) If the trial court abused its discretion as to **either** factor, reversal is required. (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625; *Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493.) It is the appellant's burden to demonstrate an abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.)

However, other standards of review apply to specific determinations made by the trial court. For example, a pure question of law is reviewed de novo, including questions of law relevant to the plaintiff's probability of success on the merits. (*Law School Admission Council, Inc. v. State of California* (2014) 222 Cal.App.4th 1265, 1280–81.) And where the trial court makes factual findings relevant to its exercise of discretion, they are reviewed for substantial evidence. (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 739.)

A trial court abuses its discretion when it "exceed[s] the bounds of reason or contravene[s] the uncontradicted evidence." (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1047.) A pure error of law is also an abuse of discretion. (*The Bakersfield Californian v. Superior Court* (2023) 96 Cal.App.5th 1228, 1251, review denied (Feb. 21, 2024).) Therefore, the reviewing court must first "determine whether the trial court applied the correct legal standard to the issue in exercising its discretion, which is a

question of law for [the reviewing] court. 'The scope of discretion always resides in the particular law being applied; action that transgresses the confines of the applicable principles of law is outside the scope of discretion and [reviewing courts] call such action an abuse of discretion.'" (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420–21.)

Where a preliminary injunction is mandatory in character, rather than prohibitory, it is "subject to stricter review on appeal," because mandatory preliminary injunctions are "not permitted except in extreme cases where the right thereto is clearly established." (*People ex rel. Herrera v. Stender* (2012) 212 Cal.App.4th 614, 630, quoting *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 295.)[9]

Argument

I. The trial court abused its discretion by applying incorrect legal standards to both the underlying claims and the standard for a preliminary injunction.

When a trial court fails to exercise discretion, or acts "on a mistaken view about the scope of its discretion," it has abused its discretion. (*Riskin v. Downtown Los Angeles Property Owners Association* (2022) 76 Cal.App.5th 438, 445–46, review denied (June 15, 2022).) The trial court in this case expressly concluded that "established legal precedent and legislative mandate" compelled a result and thus the case did not "afford[] [the] Court

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[9] This Court implicitly determined that the Injunction and Implementation Order are mandatory injunctions when it granted Appellants' Petition for a writ of supersedeas. (See, *supra*, Statement of the Case, Part II.E.)

much — if any — discretion." (12 AA 2773.) As shown below, that conclusion was legal error.

A. The trial court erroneously believed that Fish and Game Code section 5937 precluded any judicial application of Article X, Section 2 of the Constitution and accordingly did not require Plaintiffs to show likelihood of success under the correct legal standard.

Plaintiffs' motion for a preliminary injunction was based on their claim under Fish and Game Code section 5937. (2 AA 305.) That section provides as follows:

> "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam." (Fish & G. Code, § 5937.)

The trial court described this rule as a "specific rule" concerning the public trust doctrine. (12 AA 2779.) The public trust doctrine is a common law doctrine "comprised of a set of principles that protect the public's right to use and enjoy property held within the public trust." (*San Francisco Baykeeper, Inc. v. State Lands Com.* (2018) 29 Cal.App.5th 562, 569.) The doctrine reflects the state's "duty … to protect the people's common heritage of streams, lakes, marshlands and tidelands." (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1185–86 [internal citations omitted].) That includes the preservation of fisheries. (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1360–61.) The use of water for such

public trust purposes is classified by the Water Code as a beneficial use of water. (Wat. Code, § 1243.) "But public trust interests, like other interests in water use in California, are not absolute." (*Santa Barbara Channelkeeper,* 19 Cal.App.5th at p. 1186.) Like all beneficial uses of water, they are necessarily subject to the limitations of Article X, Section 2 of the California Constitution, which provides as follows:

> "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." (Cal. Const., art. X, § 2.)

This provision, enacted in 1928, establishes a core principle of California water law and 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, emphasis added.) The determination of

what is a 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"]; *see also* Wat. Code, § 100.5.) Indeed it must, because this constitutional mandate "requires a comparison of uses" in view of the "limited water resources available to the state." (*Imperial Irrigation Dist. v. State Wat. Resources Control Bd.* (1990) 225 Cal.App.3d 548, 570.) The "reasonableness of any particular use depends largely on the circumstances." (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1185, citing *Light v. State Water Resources Control Bd*. (2014) 226 Cal.App.4th 1463, 1479.)

Therefore, in order for Plaintiffs to show any likelihood of success on the merits, they must show that, in light of all of the facts and circumstances of the Kern River, providing the fish flows they requested would be consistent with the constitutional mandate. The trial court, however, did not require Plaintiffs to make that showing. Instead, it concluded that "Section 5937 was deliberately adopted by the State Legislature after balancing the competing uses of water and is enforceable as a legislative mandate." (12 AA 2781.) Plaintiffs argued that Section 5937 imposed a categorical rule that the court must "put the fish in living rivers ahead of all other uses of our water." (Augmented

Trans., p. 24.)[10] Thus, the Court believed that "the State Legislature already considered the competing uses of water when they passed Section 5937 and came down on the side of minimum flow requirements" and therefore it had "no jurisdiction to override the State Legislature and re-weigh the competing interests." (12 AA 2786.) This misapprehension of the applicable law was based on the misreading of two cases: *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 ("*Cal Trout I*") and *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 ("*Cal Trout II*"). (12 AA 2780–81.)

The trial court misread the *Cal Trout* cases to hold that courts must refuse to consider and apply the constitutional balancing test in implementing Section 5937. An understanding of those cases is thus necessary to demonstrate the flaws in its interpretation.[11] *Cal Trout I* was a writ of mandate case, challenging the State Water Resources Control Board's ("State Board") issuance of water rights licenses to the Los Angeles

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[10] Appellants have filed an unopposed motion to augment the record on appeal to include a transcript of the hearing on the motion for preliminary injunction. (Motion to Augment Record on Appeal (Unopposed), 6/7/2024.) Where that transcript is cited in this brief, it is cited as "Augmented Trans." with page references to the transcript as attached to the motion.

[11] Other issues pertaining to the interpretation of Section 5937 and its application to the Kern River were decided by the trial court. However, this appeal concerns only a limited set of issues, including whether Section 5937 constitutes a legislative mandate determining the proper balancing between beneficial uses of water on each and every stream system under Article X, Section 2 of the California Constitution.

Department of Water and Power ("LADWP") for "diversion of water by means of dams from four creeks in Mono County." (207 Cal.App.3d at p. 592.) The petitioners challenged the licenses, **not** based on Section 5937, but instead based on Section 5946, a critical distinction. (*Ibid.*) Section 5946 provides, among other things, "No permit or license to appropriate water **in District 4½** shall be issued … unless conditioned upon full compliance with Section 5937." (Fish & G. Code, § 5946, subd. (b), emphasis added.) District 4½ consists of portions of the Counties of Mono and Inyo and includes the four stream systems at issue in *Cal Trout I*. (Fish & G. Code, § 11012; 207 Cal.App.3d at p. 604 fn.9.) The licenses issued by the State Board did not contain the required condition. (207 Cal.App.3d at p. 598.) LADWP argued that the licenses were not required to contain the Section 5946 condition because "(1) section 5946 only reiterates section 5937 as it applied before the enactment of section 5946; [and] (2) section 5937 does not apply to limit the appropriation of water." (*Id.* at p. 599.) The Court of Appeal rejected these arguments, holding it was inappropriate in that case to consider the meaning of 5937 in abstraction from the intent of section 5946. (*Id.* at p. 600.) The Court explained,

> "**We need not reach the question of the application of section 5937 alone as a rule affecting the appropriation of water.** In any event the manifest flaw in the argument is that, regardless of the original scope of application of section 5937, the purpose of its incorporation into section 5946 is, as section 5946 says, to 'condition,' and therefore limit, the 'appropriat[ion]' of water by the priority given to the preservation of fish as set

> forth in section 5937." (*Id.* at p. 601, alterations in original, emphasis added.)

The Court showed, by extensive discussion of the legislative history of Section 5946, that the protection of fish life in District 4½ was manifestly the purpose of that provision. (*Id.* at pp. 601–04.) The specific stream systems located in District 4½ and the specific plans of LADWP to divert from them were discussed in hearings before the legislature. (*Id.* at pp. 596–97.) Summarizing that legislative history, the Court concluded, "The legislative hearings preceding the enactment of section 5946 were addressed *inter alia* to the amelioration of projects already begun," and specifically LADWP's project. (*Id.* at p. 604.)

Cal Trout I's discussion of Article X, Section 2 must be understood in light of that context. LADWP argued the legislature could not make statutory rules regarding reasonable and beneficial use because "reasonableness of use requires comparison of contending alternative uses which is an adjudicative question" to be resolved by the courts. (*Id.* at p. 622.) The Court rejected that argument, holding that when the legislature adopted Section 5946 it had the "power to make rules concerning what uses of water are reasonable, at least so long as those rules are not themselves unreasonable." (*Ibid.*) That authority "is not unlimited," and a statute that "sanctioned a manifestly unreasonable use of water … would transgress the constitution." (*Id.* at p. 625.) But in the context of Section 5946, the Court concluded as follows:

> "The Legislature's policy choice of the values served by a rule forbidding the complete drying up of fishing streams in Inyo and Mono Counties in favor of the

> values served by permitting such conduct as a convenient, albeit not the only feasible, means of providing more water for L.A. Water and Power, is manifestly not unreasonable. Accordingly, we have no warrant to override the Legislature's rule in section 5946 concerning that balance." (*Id.* at p. 625.)

That this holding is specific to Section 5946 and the specific streams in District 4½ is clear throughout the *Cal Trout I* decision. The constitutional balancing test, according to the Court, calls for "development of a standard of reasonableness **on the facts of the case**," and the Court concluded that Section 5946 appropriately provided such a standard "in the areas it affects," i.e. District 4½ (*Id*. at p. 622, emphasis added.) Thus, the Court ordered the State Board to impose the conditions as required by Section 5946. (*Id.* at pp. 632–33.)

Cal Trout II was a further appeal in the same action, wherein the appellants sought to enforce the writ issued in *Cal Trout I*. The opinion largely concerns remedial issues that will be addressed later in this brief, but it also contains the Court's own interpretation of its *Cal Trout I* decision:

> "[W]e are at pains to repeat, that the Legislature has already balanced the competing claims for water **from the streams affected by section 5946** and determined to give priority to the preservation of their fisheries." (*California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 201, emphasis added.)

The Court likewise rejected arguments based on Water Code provisions requiring the State Board to balance the interests served by competing claims to water, stating that those provisions were "not applicable in [that] case for the balancing therein contemplated [had] been done by the Legislature in enacting **section 5946**." (*Id.* at p. 209, emphasis added.)

In summary, the discussions of the comparative balancing of different water needs under the constitution in both *Cal Trout I* and *Cal Trout II* are limited to the legislative mandate in Section 5946 applicable to District 4½. The legislature enacted that statute with those specific stream systems and specific diversion proposals in mind and made a policy judgment about the appropriate balance of interests **on those systems in Inyo and Mono Counties**. The Court of Appeal, appropriately, did not disturb that judgment in the absence of compelling contrary arguments.

In the Injunction, the trial court quoted several passages from *Cal Trout I* and *Cal Trout II*, replacing each reference to Section 5946 with the bracketed phrase "[5937 via 5946]." (12 AA 2780–81.) That equivocation is unfounded and resulted in the trial court's legal error. This case does not concern a stream system in District 4½ for which the legislature has made an assessment of fish flow needs like it did for the Mono Lake tributaries when it passed Section 5946. But Plaintiffs took the position, which the trial court adopted, that Section 5937 itself constitutes a legislative determination as to every stream system in the state—without regard to the facts or circumstances of those systems, the hydrology and ecology of those systems, the competing needs for

the water of those systems, or the social and economic effects of such a determination on the communities served by those systems. Plaintiffs did not provide any legislative history or other argument to support that interpretation, other than their incorrect interpretation of *Cal Trout I*. The Court should reject that interpretation, because for the legislature to make such an arbitrary determination would be what the *Cal Trout I* court described as "manifestly unreasonable" and "would transgress the constitution." (207 Cal.App.3d at p. 625.) This Court has a duty to interpret statutes in a fashion that avoids such constitutional deficiencies. (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1110; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357.)

Moreover, Plaintiffs' interpretation of Section 5937 would render Section 5946 entirely superfluous. "When two statutes touch upon a common subject, they are to be construed in reference to each other, so as to 'harmonize the two in such a way that no part of either becomes surplusage.'" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 778.) If Section 5937 itself constitutes a legislative determination of the priority of beneficial use as to **every** stream in the State, as Plaintiffs propose and the trial court accepted, the legislature would not have needed to enact Section 5946 to "balance[] the competing claims for water from streams affected by section 5946 [to] determine[] to give priority to the preservation of their fisheries." (*Cal Trout II*, *supra*, 218 Cal.App.3d at p. 201.) As interpreted by Plaintiffs and the trial court, Section 5937 would have already established an absolute priority for fisheries in District 4½ (and in every other District for

every stream in the state) and Section 5946 would have been unnecessary.[12] The legislature did not read Section 5937 to establish such a bright-line priority determination of beneficial use, or it would not have enacted Section 5946, specific to District 4½, to require the prioritization of preserving fisheries in that District.

B. The trial court's failure to require any factual showing of likelihood of success was fatal error.

For the reasons discussed above, the trial court assumed that Plaintiffs' Section 5937 claim could be established as a matter of law and did not require Plaintiffs to make any factual showing regarding the Kern River's fisheries, hydrology, or beneficial uses that would suggest the Injunction constituted a reasonable use of water under Article X, Section 2. In fact, Plaintiffs did not submit any competent evidence regarding the species, prevalence, or water needs of fish in any reach of the Kern River. (5 AA 990–91, 997–98, 1005–07, 1010–11, 1031–32, 1041–43; 11 AA 2515–20.) They did not provide even an estimate of the flows that would be sufficient to keep any fish population in good condition. (*Ibid.*) They certainly did not attempt to show that the balancing required by Article X, Section 2 would weigh in favor of changing Kern River operations to incorporate any particular fish flow requirement.

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[12] The legislative history discussed in *Cal Trout I* suggests that the proponents of Section 5946 did not believe that Section 5937 has this effect, because they "requested the committee to aid attempts to secure provisions in state laws establishing a priority in the use of water for the benefit of fish, plant and wildlife." (207 Cal.App.3d at pp. 596–97.)

(*Ibid*.) In fact, Plaintiffs' motion did not mention, let alone address, the balancing of any impacts on Appellants and their water users.

Plaintiffs persuaded the trial court that they had no burden to make any such showing:

> "That's the start and stop of our burden. Owner of a dam shall allow sufficient water at all times, pass over, around, and through the dam to keep in good condition any fish that may be planted or exist below the dam. It's a strict liability statute. There's no wiggle room on it, as our courts have said repeatedly, Section 5937 is a legislative determination of priorities of water. The legislature passed Section 5937, and it decided when it did so that fish will get the water first. That's throughout the state in every situation where there's a dam. And there's fish that could exist in good condition below that dam. We have fish. We have a dam. There's no leeway on that." (Augmented Trans., p. 14.)

Plaintiffs' position, adopted by the trial court, is absolute. 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. In order to grant their motion on the record before it, the trial court had to adopt that extreme position. To be clear, Appellants are not asking this Court to hold that flows can never be determined to be required on the Kern River under Section 5937 due to the constitutional balancing of uses required in Article X, Section 2. Appellants are pointing out that this question was never considered by the trial court and no factual record has been

developed on which the trial court could "carefully weigh the evidence and decide whether the facts required such relief." (*Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 66.) All uses, including proposed fish flows under Section 5937, must be considered under the Constitution. Although this balancing task is "difficult[,] it does not follow that it cannot be done. The requirements of public welfare **demand** that it be done." (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 375, emphasis added.) By ruling all such balancing considerations were precluded by Section 5937, the trial court committed reversible legal error.

II. The trial court's balancing of the relative harms to the parties applied the wrong legal standards and is not supported by substantial evidence.

A. The trial court applied the wrong legal standards, requiring a lesser showing by Plaintiffs when it should have required a stronger showing.

1. The trial court relied on its erroneous conclusion that Plaintiffs were certain to succeed on the merits and thus did not require Plaintiffs to make a showing on the balance of interim harms.

The trial court relied heavily on the rule articulated in *Butt v. State of California* (1992) 4 Cal.4th 668 and *King v. Meese* (1987) 43 Cal.3d 1217. (12 AA 2776.) That rule, in short, is that the "two 'interrelated' factors" of likelihood of success on the merits and balance of the interim harms are correlative, such that "the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt*, 43 Cal.3d at pp. 677–78.) Based on this rule, Plaintiffs argued that the trial court's "inquiry should

start and stop with the strong showing by Plaintiffs of the likelihood of their success on the merits." (2 AA 320.) At the hearing, Plaintiffs' counsel argued that this was an "open and shut strict liability case." (Augmented Trans., pp. 14–15.) The trial court apparently agreed, holding based on the Section 5937 arguments discussed above that "Plaintiffs are very likely to prevail on the merits" and that therefore less showing was required on the balance of the harms. (12 AA 2786.) As discussed above, those arguments are unfounded, and thus the rule of *Butt* and *King* did not apply. Failure to apply the correct legal standard is an abuse of discretion. (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420–21.)

2. The trial court should have applied a stricter standard to Plaintiffs' motion, but failed to do so because it wrongly believed the Injunction was prohibitory rather than mandatory.

Injunctions are characterized as either mandatory or prohibitive, and it is the "substance of the injunction, not the form" which determines how it is characterized. (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 446–47.) The trial court concluded that the Injunction was prohibitory because it purportedly required Bakersfield to "desist[] from a pattern of unlawful conduct." (12 AA 2777, citing *Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal.5th 1030, 1046.) But this interpretation of *Daly* is untenable, because *Daly* itself stated that the question is whether an injunction changes the status quo—the "last actual peaceable, uncontested status which preceded the pending controversy." (11 Cal.5th at p. 1045, quoting *United*

Railroads of San Francisco v. Superior Court (1916) 172 Cal. 80, 87.) In *United Railroads*, the practice enjoined was never uncontested. (*Ibid.*) In *Food and Grocery Bureau of Southern Cal. v. Garfield* (1941) 18 Cal.2d 174, 178, by contrast, the California Supreme Court considered an injunction against a long-established practice, concluding that the injunction was mandatory. In this case, the Kern River has been operated in accordance with the "Law of the River" for over a century. (11 AA 2358–59; 13 AA 338, 2935.)

The trial court acknowledged that the distinction was relevant because "mandatory injunctions generally require a stronger showing by the moving party and because mandatory injunctions are automatically stayed on appeal, while prohibitory injunctions are not." (12 AA 2777.) This Court already implicitly determined that the Injunction was mandatory when it issued its writ of supersedeas using the language of the statute providing for the automatic stay. (*Compare* Order, 5/3/2024, p. 3 ["the superior court's orders … are both stayed, as are all proceedings embraced or affected by said orders"], *with* Code Civ. Proc., § 916 ["the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby"].) For the same reason, the trial court should have applied the stricter standard, "requiring that the right [to the Injunction] be clearly established and that irreparable injury will flow from its refusal." (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 448.) Again, failure

to apply the correct legal standard is an abuse of discretion. (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420–21.)

B. The trial court ignored the evidence of potential harms to Appellants as a result of the Injunction.

Appellants, in their opposition to the preliminary injunction motion, presented the trial court with uncontested and detailed evidence of potential harms to their agencies and their constituents' beneficial use of water if diversions from the Kern River were reduced under the Injunction. For example, the Injunction would impact Appellants' ability to meet the water demands of its water users (10 AA 2306; 11 AA 2351), impact routine water management operations in a manner equivalent to drought conditions (11 AA 2334–35), require increased groundwater pumping that would thwart local efforts to sustainably manage a subbasin classified as being in critical overdraft under the Sustainable Groundwater Management Act (11 AA 2335, 2351), and cause water purveyors serving disadvantaged communities to deepen their wells, which causes water quality issues (11 AA 2351).

The trial court's analysis ignored this extensive evidence and stated in a conclusory fashion that "the 'overall annual water demand' for the [Appellants] is not nearly as apparent as it is for [Bakersfield]"[13] but that "the average annual Kern River flows of

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[13] Appellants did submit extensive information regarding their water demand, and in some cases even average annual numbers. For instance, North Kern Water Storage District's annual water requirements for agricultural use within its service area were

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.) This analysis is not supported by substantial evidence. The trial court's determination that the long-term annual average (726,000 acre-feet) "should suffice" for all reasonable uses is arbitrary and baseless in light of the fact that it did not consider the magnitude of each water agency's needs **and** the fact that Plaintiffs' motion sought an unspecified amount of water. (2 AA 305; 12 AA 2784–85; 14 AA 3145–46.) Further, Plaintiffs' briefing to the trial court failed to meet their burden of addressing harm to Appellants. (2 AA 319–20; 11 AA 2471–74, 2506–10; Augmented Trans., pp. 71–74.)

C. The trial court concluded without evidence that Bakersfield would not be harmed, by assuming it could use the entire flow of the Kern River.

Bakersfield opposed the motion partly based on the argument that "[a]ny restrictions on the City's diversion of water would threaten the City's ability to deliver water to its residents, particularly in the areas of the City not served by groundwater." (11 AA 2384.) The trial court dismissed this concern, stating, "the potential conflict between compliance with Section 5937 and providing a safe, clean, and affordable domestic water supply appears to be a theoretical legal issue, rather than a practical factual issue." (12 AA 2783.) It reached this conclusion by comparing Bakersfield's asserted "overall annual water demand"

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clearly stated to be approximately 160,000 acre-feet per year. (11 AA 2331.)

of 130,000 acre-feet against the long-term average annual flow of 726,000 acre-feet and the historic low of 131,000 acre-feet. (*Ibid.*) Comparing these numbers, the trial court concluded that "it appears that the Kern River has never failed to provide sufficient water for domestic use and, in the 'average year,' the river provides over five times [Bakersfield's] total current use," and therefore the Injunction would not "threaten the domestic water supply." (*Ibid.*)

The trial court abused its discretion in making this finding for at least three reasons. First, it wrongly assumed that Bakersfield represented the only demand for municipal use from the Kern River. In fact, KCWA also provides Kern River water for municipal use, and the trial court did not consider its needs. (11 AA 2321–24; 14 AA 3195.) Second, the trial court implicitly assumed that Bakersfield could take the entire flow of the Kern River for its claimed demands even though Bakersfield has only certain discrete rights to Kern River water, which are not first priority rights. (8 AA 1812; see, *infra*, Part V.B.1.) Third, Plaintiffs' motion did not provide any indication of even an approximate quantity of water that would be required for their proposed minimum flow. (5 AA 990–91, 997–98, 1005–07, 1010–11, 1031–32, 1041–43; 11 AA 2515–20.) Therefore, it was arbitrary for the trial court to conclude that there would be enough water for both fish flows and Bakersfield's municipal water needs, or any other existing beneficial use.

D. The trial court's finding that Plaintiffs showed a likelihood of irreparable harm is not supported by substantial evidence.

Injunctive relief "is an extraordinary remedy and courts have consistently proceeded with great caution in exercising their power." (*Wilkins v. Oken* (1958) 157 Cal.App.2d 603, 606). This is particularly true in the case of a mandatory preliminary injunction, such as the one at issue in this case, which "is not permitted except in **extreme** cases, where the right thereto is **clearly** established, and it appears that **irreparable** injury will flow from its refusal." (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 295, quoting *Hagen v. Beth* (1897) 118 Cal. 330, 331, emphasis added.)

Assuming for the sake of argument that Plaintiffs did show some downstream reaches of the Kern River would dry up, impacting fish, they failed to provide any evidence that **irreparable** harm would occur during the pendency of this action. To the contrary, Plaintiffs provided uncontroverted evidence that periodic dryback of the downstream reaches of the river does not cause irreparable harm. By Plaintiffs' own admission, much of the Kern River is dry "[i]n the vast majority of years." (2 AA 312; see 5 AA 1101.) In fact, according to one of Plaintiffs' own declarations, between 2018 and March of 2023, with the exception of the 2019 wet year, there was no flow downstream of Calloway Weir. (5 AA 1109.) Then, in one wet year (2023), another of Plaintiffs' declarants observed fish between River Canal Weir and Bellevue Weir, both of which are downstream of Calloway Weir. (6 AA 1191; 8 AA 1810.) Thus, according to Plaintiffs' own evidence,

downstream reaches of the river that dryback are repopulated with fish when higher flows return in wetter hydrologic years. There is no evidence in the record showing that the intermittent dryback of the downstream reaches will cause irreparable harm to any fish population. In fact, this is the status quo and the history of the Kern River based on hydrologic variability and frequent droughts in the region. (11 AA 2356–58.)

III. The Injunction did not specify required flows and thus was not definite enough to provide a standard of conduct.

When Plaintiffs brought their motion for a preliminary injunction, they did not request the trial court set any particular flow requirements. (2 AA 305.) Instead, they requested "a simple reiteration of the statutory [i.e., Section 5937] directive without quantification of the amount of water required to satisfy the direction." (2 AA 316.) The trial court granted that request, providing as follows in the Injunction: "Defendant City of Bakersfield … and all persons acting on its behalf are prohibited from operating the [weirs] in any manner that reduces Kern River flows below the volume sufficient to keep fish downstream of said weirs in good condition." (12 AA 2769.) Rather than requiring Plaintiffs to submit evidence and conducting a hearing on the appropriate flow rates to satisfy Section 5937, the trial court delegated that duty to Plaintiffs and Bakersfield: "Defendant and Plaintiffs shall engage in good faith consultation to establish flow

rates necessary for compliance with this order."[14] (12 AA 2769.) Issuing the Injunction without first determining the actual flow requirements based on evidence was legal error.

A. An injunction must provide a definite standard of conduct for the enjoined party.

Any injunction, to be valid,

> "must be **definite enough to provide a standard of conduct for those whose activities are proscribed, as well as a standard for the ascertainment of violations of the injunctive order by the courts called upon to apply it.** An injunction which forbids an act in terms so vague that men of common intelligence must necessarily guess at its meaning **and differ as to its application** exceeds the power of the court. [Citations.]" (*Pitchess v. Superior Court* (1969) 2 Cal.App.3d 644, 651, emphasis added.)

An injunction that does not do so is "presumptively void." (*KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 859.) Put another way, an injunction must be "narrowly drawn" to give "reasonable notice" to the enjoined party of what conduct is prohibited. (*Strategix, Ltd. v. Infocrossing West, Inc.* (2006) 142 Cal.App.4th 1068, 1074.) Despite ultimately issuing an injunction in violation of this legal standard, the trial court actually recognized the principle during the hearing on the Injunction:

> "I understand the authority that you've cited in your papers regarding the use of

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[14] Later, on reconsideration, the trial court included Appellants in this "good faith consultation" requirement. (16 AA 3742.)

> the term, quote, sufficient water, end quote. But despite that, **I don't think I've ever come across a situation where a Court has been asked to impose an injunction with terms that would be defined by the party subject to the injunction**.
>
> "So if you have a mandatory or a prohibitory injunction against a certain entity and you tell that person that you figure it out what you can or can't do. **It seems inherently contradictory to me**.. . .
>
> "**But you have to draft language in a way that in the event there is a breach, an alleged breach of the injunction, there's some sort of metric to determine whether it's breached**. So if you're going to allow the people that are subject to the injunction to define the terms of the injunction, isn't that just a big circular mix that will in effect, negate the very purpose of the injunction." (Augmented Trans., p. 40, emphasis added.)

The trial court's reservations were well-founded, and issuing the Injunction despite those basic flaws was an abuse of discretion.

B. *Cal Trout I* does not provide support for issuing an injunction under Section 5937 that does not specify the required flows.

The trial court believed, based on its interpretation of *Cal Trout I*, that it had the option to simply order compliance with Section 5937 and "entrust Defendant and Plaintiff, along with input from subject matter experts, to determine the specifics of the necessary flows." (12 AA 2786, citing 207 Cal.App.3d at p. 632.)

However, *Cal Trout I* provides no support for that proposition. As discussed above, the issue in that case was the application of Section 5946, not Section 5937. All Section 5946 requires is that certain water right permits and licenses in District 4½ contain specific conditions. (Fish & G. Code, § 5946, subd. (b).) The State Board issued the licenses at issue in *Cal Trout I* without those conditions, and so the mandamus remedy was simple: the State Board was ordered to revise the licenses to include the required condition. (207 Cal.App.3d at p. 632 ["The relief required here is limited to attachment of the appropriate conditions."].) No analogous statute is at issue in this case.

In *Cal Trout II*, after the State Board failed to amend the licenses to include the required condition, the Court of Appeal held that imposition of the license term did not have to wait until technical studies were done to determine flow rates because "the Water Board regulations (Cal. Code Regs., tit. 23, § 782) sanction such a condition on permits for the appropriation of water, and by analogy to licenses, by a simple reiteration of the statutory directive without quantification of the amount of water required to satisfy the direction." (218 Cal.App.3d at p. 195.) Here again, that holding is specific to what is required in a State Board permit or license term pursuant to Section 5946, not in a judicial injunction implementing Section 5937.

However, *Cal Trout II* does give some guidance on how judicial injunctions enforcing minimum fish flows must be determined: by judicial process and according to scientific evidence. The Court did not direct LADWP, as owner of the dam,

to confer with the plaintiffs and determine release rates. Instead, it concluded that, particularly in light of the State Board's disavowal of any power to provide interim relief, "the **trial court** shall determine and impose interim release rates." (*Id*. at p. 211, emphasis added.) It also did not suggest that an analysis of the hydrological and biological issues necessary to determine a flow regime could be dispensed with. Instead, it relied on evidence in the record that a preliminary analysis could be done by the California Department of Fish and Wildlife and that the trial court could hold an evidentiary hearing at which CDFW would present that evidence. (*Id*. at pp. 206–07, 211.)

C. A "follow the law" injunction of the kind the trial court issued is an abuse of discretion.

A recent case involving the public trust doctrine provides a clear explanation of why the trial court's "follow the law" injunction is not appropriate. (See *Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, 22, as modified (Mar. 28, 2022), review denied (June 1, 2022).) The Court in *Monterey Coastkeeper* reviewed a trial court's refusal to impose a writ of mandate against the State Board requiring it to comply with its duties under the public trust doctrine. (*Ibid*.) The Court held that,

> "Simply ordering the State Board to apply the public trust doctrine would be an empty judgment, while actually determining whether the State Board is properly applying the doctrine would necessarily require the trial court to consider the many decisions within the State Board's mandate, decisions that will

> typically require the exercise of administrative discretion and will often require technical expertise." (*Ibid.*)

The trial court in *Monterey Coastkeeper* saw the problem with issuing an injunction like the trial court did in this case, explaining:

> "When [sustaining] the demurrer to the first petition, the trial court stated: 'But isn't that just such an open-ended remedy, where I say, 'Okay, I order you guys to follow the law,' and then what? You guys come back in two or three months and say, 'Judge, they're not following the law, they're not doing what you told them to do. The law says this and they're not following it.' [¶] I mean, it would be ongoing—I would be a receiver. I would be sitting on top of them—I'd be—I'd be reviewing everything they did, to make sure they're following the law.'" (*Ibid.*)

As the Court of Appeal said in *Monterey Coastkeeper*, "The trial court was right." (*Ibid.*) Already in this case the trial court has twice been called upon to adjudicate disputes about the interpretation of the Injunction. First, Appellants brought their motions for reconsideration, which challenged the Injunction and the stipulated Implementation Order discussed below. (13 AA 2898, 2920.) Second, Plaintiffs brought their motion to compel compliance with the Injunction, which gave rise to this Court's issuance of its writ of supersedeas. (See, *supra*, Statement of the Case, Part II.E.) Leaving the Injunction in place would assuredly lead to extensive additional proceedings of the same kind. Thus, sound judicial policy requires that, if a preliminary injunction is to

issue in this case, it must be one that provides **court-determined** flow requirements supported by substantial evidence.

D. The trial court impermissibly delegated its authority to the parties by not setting flow requirements judicially.

The trial court's order, by declining to set flow requirements, constituted an "impermissible delegation of authority" to the parties. (*Stadish v. Superior Court* (1999) 71 Cal.App.4th 1130, 1144.) In *Stadish*, a trial court issued a protective order permitting the answering party in discovery to withhold documents based on the trade secret privilege, but the order allowed the answering party to determine for itself which documents were privileged as trade secrets. (*Id.* at p. 1144.) The Court of Appeal held that this delegation of authority to a party in litigation was improper, citing the importance of the questions at issue in the litigation. (*Id.* at p. 1145 ["[T]he court will be required to consider the public interest."].) Particularly in light of those issues, the Court determined that, "The trial court is in the best position to weigh fairly the competing needs and interests of parties affected…." (*Ibid.*)

The present case implicates the same concerns. As the California Supreme Court has said, issues of water resource management involve "statewide considerations of transcendent importance." (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.) If a discovery dispute like the one at issue in *Stadish* requires judicial resolution rather than delegation to the parties, certainly consequential water

management issues like those presented by the Injunction deserve the same consideration and judicial review.

IV. The trial court required only a nominal, $1,000 bond, and refused to hold any hearing or take any evidence on the appropriate amount for the bond.

When a court issues a preliminary injunction, the requirement of an undertaking is mandatory. (Code Civ. Proc., § 529, subd. (a) ["On granting an injunction, the court or judge **must** require an undertaking"], emphasis added.) The amount of such an undertaking 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.) If the trial court makes "an estimate that is arbitrary or capricious, or is beyond the bounds of reason," it is an abuse of discretion. (*Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 14.) In *Abba Rubber*, as in this case, the trial court issued a preliminary injunction and required only a nominal $1,000 undertaking. (*Id.* at p. 15.) The enjoined party had presented evidence that the potential damages caused by the injunction were much higher (on the order of $315,000 per year). (*Id.* at p. 13.) In light of that uncontradicted evidence, the Court determined that "the utter inadequacy of the undertaking [was] clear." (*Id.* at p. 17.)

Appellants raised the issue of setting an undertaking at the hearing on the motion for a preliminary injunction. (Augmented Trans., p. 131.) The trial court did not set any hearing or take any evidence to determine what the appropriate amount of an undertaking would be but instead ordered a nominal $1,000

undertaking just as in *Abba Rubber*. (12 AA 2770.) Appellants then reiterated their request for an evidentiary hearing on the appropriate amount of an undertaking in their motion for reconsideration. (13 AA 2911–12.) The trial court did not conduct a hearing on the amount or change the amount in its order on reconsideration. (16 AA 3738.) Its ruling provided no explanation and did not address the issue. (16 AA 3741–43.) As Appellants explained in their petition for a writ of supersedeas, in only five months the estimated harm to Appellants was probably closer to $5,714,170. (Pet. for Writ of Supersedeas, 4/19/2024, p. 23.)

The potential damages to Appellants that would be compensable by a claim against the undertaking would include not only those damages resulting from loss of water supply but also attorneys' fees for the prosecution of this appeal and any other proceedings to attack the Injunction. (*Abba Rubber Co.*, 235 Cal.App.3d at pp. 15–16.) Thus, by setting a $1,000 undertaking, the trial court "impliedly estimated that those two classes of damages would total no more than that sum," a conclusion which is "not within the bounds of reason." (*Id*. at p. 16.) The *Abba Rubber* Court stated the correct remedy for this abuse of discretion: "An injunction cannot remain in effect without an adequate undertaking. Therefore, the preliminary injunction is reversed." (*Id.* at p. 22.) It also instructed the trial court that, "No further preliminary injunction shall be issued unless its issuance is conditioned upon the furnishing of an adequate undertaking." (*Ibid.*) This Court should order the same in this case.

V. The Implementation Order was issued in violation of Appellants' due process rights and is unsupported by substantial evidence.

The flaws in the trial court's Injunction are made clear by its immediate outcome: the Implementation Order. On the very day the Court issued its order granting the Injunction, Plaintiffs and Bakersfield reached an agreement to "implement" the Injunction, which eventually became the trial court's Implementation Order. (13 AA 3021.) As will be shown below, the process by which the trial court adopted the Implementation Order was a complete circumvention of Appellants' due process rights, and the substance of the Implementation Order clearly reflected a bad-faith quid pro quo arrangement on the part of Plaintiffs and Bakersfield.

A. It was structural error to issue the Implementation Order on the stipulation of fewer than all parties and without giving Appellants an opportunity to be heard.

Plaintiffs' and Bakersfield's submission of the stipulation and proposed order for the trial court's signature was not authorized by any statute or rule of court. After they reached their agreement, on November 9, Bakersfield's counsel circulated what it claimed was a supplemental proposed order under Rule of Court 3.1312. (13 AA 3021–30.) But the trial court had already ruled on Plaintiffs' motion for a preliminary injunction, and Plaintiffs had already circulated an order under Rule of Court 3.1312, which was signed by the trial court and became the Injunction. (13 AA 3012–30.) There was no further motion pending that would allow for the submission of a proposed order pursuant to Rule of Court 3.1312. Appellants objected and stated that a noticed motion would be

required to modify the Injunction. (13 AA 3029–30, 3037–38.) Rather than file a noticed motion, which would have provided Appellants with notice and an opportunity to submit an opposition, Plaintiffs and Bakersfield proceeded to file their joint stipulation and proposed order. (13 AA 3032–35.) Before Appellants could object, and with no hearing or other process, the trial court signed the Implementation Order the very next morning. (13 AA 3040–43.)

There is no authority for a subset of the parties to simply stipulate to an order affecting all parties with no motion pending before the court and no opportunity for other parties to be heard. Notice and an opportunity to be heard before the trial court grants orders is a requirement of due process. (See *United States v. State Water Resources Control Bd*. (1986) 182 Cal.App.3d 82, 101.) This is especially true when the parties deprived of notice and an opportunity to be heard are the only parties adversely impacted by the resulting order.

B. The Implementation Order was a pure quid pro quo and not supported by substantial evidence.

In addition to being procedurally improper, the Implementation Order was completely unfounded as a matter of law and substantial evidence. The Implementation Order originated from a joint stipulation between Plaintiffs and Bakersfield detailing a bargained-for-exchange of two key provisions: (1) Bakersfield would each day receive the first 180 cfs of Kern River water for its "municipal needs" and (2) Plaintiffs would thereafter each day receive 40% of the entire flow of the Kern River to remain in the channel for fish flows. (13 AA 3041–

42.) Both terms are abuses of discretion and were not supported by substantial evidence.

1. The Implementation Order's distribution of the first 180 cfs to Bakersfield is unlawful and unsupported by substantial evidence.

The Implementation Order provided Bakersfield with a new, first priority water right, exempt from Section 5937, despite (1) evidence confirming no such right existed, (2) Plaintiffs' acknowledgment that the trial court did not have the authority to exempt Bakersfield's water rights from application of Section 5937, and (3) the trial court's own ruling that it could not exempt Bakersfield from complying with Section 5937.

Bakersfield's water rights on the Kern River have been in existence for decades, and those rights have never included a first priority right to 180 cfs of water. (8 AA 1812; 14 AA 3097–99; 15 AA 3400–05.) The evidence before the trial court confirmed that Bakersfield did not have any such right. (*Ibid*.) With respect to First Point right holders (i.e., Kern Delta, North Kern, and Bakersfield), the respective water rights were adjudicated in 1900 and have been exercised consistently every day since. (See 3 AA 426–27; 7 AA 1443–64.) Under California's water rights system, the relative priority of water rights is determined, not by the end use (i.e., domestic, municipal, or irrigation), but by "the date of their establishment." (*North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 561.) When insufficient water exists in a system to satisfy all rights on the system, the available water must be distributed in order of

priority. (*Stanford Vina Ranch Irrigation Company v. State* (2020) 50 Cal.App.5th 976, 994.) The "City of Bakersfield Kern River First Point Flow and Diversion Record" identifies all Bakersfield's existing Kern River water rights by name, river stage, and amount in order of right and priority. (14 AA 3096–97, 3103.) This long-established schedule of rights does not provide for the first 180 cfs of Kern River flow to go to Bakersfield. (*Ibid.*) The first priority right is Kern Delta's Kern Island right. (*Ibid.*) Despite this evidence before the trial court, the trial court issued the Implementation Order, which resulted in a new water right for Bakersfield that allowed it to increase its water supply to **seven times** its historic entitlement and use. (14 AA 3097–3119.) This aspect of the Implementation Order is improper under the Water Commission Act, which since 1914 has been the "exclusive method" of creating appropriate rights and requires an application to the State Water Resources Control Board for the creation of any new appropriative water rights. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 102; see Wat. Code, §§ 1200–1814.)

Furthermore, this new fictitious water right, unlike the historic rights, was satisfied **before** any water was allocated to fish flow under Section 5937. (15 AA 3408–34.) Plaintiffs' position had always been that Bakersfield's water rights were subject to any Section 5937 obligation imposed by the trial court. (11 AA 2447.) Following the trial court's ruling on the Injunction, Plaintiffs' counsel circulated a draft order. (13 AA 3012–15.) In response, Bakersfield's counsel attempted to include language in

the draft order that would have exempted Bakersfield's water rights from application of Section 5937 (i.e., those rights would not be required to supply fish flows). (13 AA 3062–66.) Plaintiffs' counsel bluntly responded, "I … don't think your proposed language accurately reflects the law. For all practical purposes the city is not going to see a diminishment in its diversions with a flowing river, but the court **cannot make that an order** under section 5937." (13 AA 3073, emphasis added.) Thus, even Plaintiffs' counsel acknowledged the trial court lacked the authority to shield Bakersfield's existing water rights, let alone create a **new**, fully exempt first priority right to 180 cfs of water. Plaintiffs' position on this issue only changed when Bakersfield improperly agreed to use Appellants' water rights to provide Plaintiffs with a 40% fish flow.

Finally, the trial court itself held that it lacked the authority to exempt any water rights holder (including Bakersfield) from the application of Section 5937. In its ruling granting the Injunction, the trial court expressly stated that "compliance with Section 5937 is required as a matter of law. This Court has a duty to uphold the law and has no option to exempt entities from compliance, even if compliance is burdensome." (12 AA 2786.) Despite this understanding of its duty under the law, the trial court nonetheless exempted Bakersfield's newly created first priority right from complying with Section 5937 in the Implementation Order. (13 AA 2863–66.)

2. The requirement of a 40% fish flow was not based on any scientific evidence and was arbitrary and capricious.

The 40% fish flow standard is arbitrary and capricious, because it has no bearing on the flows necessary to keep fish in good condition on the Kern River. Plaintiffs' moving papers seeking a preliminary injunction did not include any proposed flow standard. (2 AA 303–24.) The trial court did not have any competent scientific evidence before it to support the imposition of a 40% fish flow standard (or any other standard) when it issued the Injunction or the Implementation Order. (5 AA 990–91, 997–98, 1005–07, 1010–11, 1031–32, 1041–43; 11 AA 2515–20.) In opposition to Plaintiffs' motion for a preliminary injunction, Appellants argued that the injunction sought was vague and unenforceable because it did not include any scientifically supported quantitative or objective metric by which Bakersfield could assess whether it was bypassing sufficient water. (6 AA 1349.) Acknowledging this deficiency, Plaintiffs attempted to remedy this defect by submitting the Declaration of Theodore Grantham with their **reply** papers. (11 AA 2514–34.) Despite not having done any scientific review of the Kern River (e.g., identifying the existence and condition of fish present, aquatic conditions, etc.) and acknowledging that what constitutes sufficient flows "can differ among rivers and between locations on the same river" and "also depend[s] on the desired ecological condition to be maintained and the demands of consumptive water users," Dr. Grantham inexplicably opined that it would be appropriate to use a 40% flow standard developed for the San Joaquin River and its three eastside tributaries as part of an unrelated scientific review process specific to those streams. (11

AA 2518.) None of the references Dr. Grantham relied upon included any analysis of the Kern River. (11 AA 2519–20.)

In addition to these substantive defects in Plaintiffs' arguments from Dr. Grantham's declaration, Appellants (and Bakersfield) objected to Dr. Grantham's declaration on procedural grounds. (12 AA 2745–48, 2752–59.) Plaintiffs submitted **no** evidence in support of any flow requirement with their motion, offering the Grantham declaration only in reply to the oppositions. (12 AA 2754.) It is a "general rule of motion practice … that new evidence is not permitted with reply papers." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537–38.) Where, as here, a moving party "waited until their reply to proffer any evidence to meet their moving burden," such late declarations should not be considered. (*RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co., Inc.* (2020) 56 Cal.App.5th 413, 432.) The trial court erroneously overruled the objections. (12 AA 2776.)

Despite agreeing to the 40% fish flow standard as part of their quid pro quo stipulation with Plaintiffs (i.e., 40% fish flow for Plaintiffs in exchange for Bakersfield getting a new first priority water right protected from fish flow requirements), both Bakersfield and Plaintiffs acknowledged the lack of a scientific basis for implementing the 40% fish flow standard on the Kern River. In addition to its formal objections to the declaration of Dr. Grantham noted above, Bakersfield's counsel argued that the 40% flow standard has "no bearing at all on the Kern River" and constitutes a "magical figure … that the State Board took years to develop through scientific studies of [other] rivers, and it has not

even been imposed yet." (13 AA 3107; Augmented Trans., p. 61:15–25.) As for Plaintiffs, their counsel acknowledged that when their motion was filed and heard and when the Implementation Order was agreed upon they did not have any of the technical information necessary to determine appropriate flow requirements on the Kern River. (13 AA 3077–78.) While acknowledging that "what is sufficient [under Section 5937] is a scientific question," Plaintiffs' counsel stated that "it is time to get down to business to scientifically determine what is a 'sufficient' bypass to keep fish in 'good condition'" **after** entering into the stipulation with Bakersfield setting the 40% flow standard as sufficient. (13 AA 3077; Augmented Trans., p. 36.) This admission demonstrates that the 40% fish flow standard in the Implementation Order was **not** based on a scientific determination of how much water Bakersfield must bypass to keep fish in good condition.

C. The Implementation Order was void *ab initio*, and rather than staying it the trial court should have declared it void.

Based on Appellants' motions for reconsideration and stay, the trial court eventually stayed the Implementation Order and revised the Injunction to include Appellants in the "consultation" process. (16 AA 3738–39.) In light of the procedural and substantive defects explained above, there is no justification for preserving the Implementation Order. Rather than having been stayed, it should have been declared void *ab initio*. Because the trial court did not provide notice and an opportunity to be heard, issuing the order was structural error and requires "per se

reversal." (*Severson & Werson, P.C. v. Sepehry-Fard* (2019) 37 Cal.App.5th 938, 950.)

Conclusion

The Injunction must be reversed for two reasons. First, it was an abuse of discretion, both as to Plaintiffs' likelihood of success on the merits, which was based on a misreading of the *Cal Trout* cases, and as to the balancing of the harms, in that the trial court did not require Plaintiffs to show irreparable harm and did not consider the evidence of harms to Appellants, because the trial court believed Plaintiffs' success on the merits was guaranteed and that the Injunction was prohibitory. Second, the Injunction did not provide a sufficiently clear standard of conduct by which Bakersfield could operate the weirs.

The Implementation Order was issued in violation of Appellants' due process rights, and its fundamental terms are inconsistent with the law and unsupported by substantial evidence. The trial court instead approved a self-serving arrangement between Bakersfield and Plaintiffs at the expense of Appellants.

Both orders should be reversed.

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Date: July 2, 2024 /s/ Brett A. Stroud

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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
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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: July 2, 2024 /s/ Brett A. Stroud

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