Case No. 24-7807

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAN LUIS OBISPO COASTKEEPER, et al.,

Plaintiffs and Appellees,

vs.

COUNTY OF SAN LUIS OBISPO,

Defendant and Appellant.

AMICUS BRIEF BY ASSOCIATION OF CALIFORNIA WATER AGENCIES, CALIFORNIA ASSOCIATION OF COUNTIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION

Appeal From The United States District Court
For The Central District of California
Case No. 2:24-cv-06854 SPG (ASx)

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1

The Association of California Water Agencies has no parent corporation, nor is it owned in any part by any publicly held corporation.

The California Association of Counties has no parent corporation, nor is it owned in any part by any publicly held corporation.

The California Special Districts Association has no parent corporation, nor is it owned in any part by any publicly held corporation.

Dated: January 31, 2025

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

This amicus curiae brief is submitted on behalf of the Association of California Water Agencies ("ACWA"), the California Association of Counties ("CSAC"), and the California Special Districts Association ("CSDA"). ACWA is a California nonprofit public benefit corporation comprised of over 430 water agencies, including cities, counties, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies. ACWA's member agencies develop, treat, store, manage, and supply water to most California residents for many purposes, including domestic, agricultural and industrial consumption, hydroelectric generation and the preservation of fish and wildlife. Because California's climate and hydrology are highly variable, ACWA's members depend extensively on dams and other surface water storage facilities to meet the public's water needs in dry times to meet the needs of the approximately 90% of California's population that ACWA serves. Simply put, in California, water must be stored in wet times for use in dry times. Dams are a critical component of such storage.

ACWA's Legal Affairs Committee ("LAC") is composed of attorneys from

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than Amici, its members or its counsel made a monetary contribution to its preparation or submission.

each of ACWA's regional divisions throughout the State. The LAC monitors litigation of significance to ACWA's members and has determined this is such a case. As precedent, this case presents a significant risk to the ability of ACWA's members to deliver critical water supplies to Californians in the future. The scope of the preliminary injunction granted in this case, and the District Court's asserted basis for it, is unprecedented in California and could put local water supplies at risk throughout California. ACWA therefore seeks reversal.

CSAC is a non-profit corporation whose membership consists of all 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California, and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide. It has determined that this case is a matter affecting all counties because the District Court's decision, and the overbroad mandatory preliminary injunction issued therein based on alleged violations of the Endangered Species Act ("ESA") and FGC § 5937, has the potential to adversely impact operation of critical infrastructure county facilities, which are essential for domestic and fire flows, statewide.

CSDA is a non-profit corporation with a membership of more than 1,000 special districts throughout California that was formed to promote good

governance and to improve core local services through professional development, advocacy, and other services for all types of independent special districts. Independent special districts provide a wide variety of public services to urban, suburban, and rural communities, including irrigation, water, recreation and parks, cemetery, fire protection, utilities, harbor, healthcare, community-service districts, and more. CSDA monitors issues of concern to special districts and identifies those matters that are of statewide significance, and has identified this case as having such significance.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

California experiences highly variable rainfall from season to season and from year to year. As a result, the flow of California's rivers and streams varies tremendously over time, but the needs of California's residents are much more constant. California has historically relied upon local surface water and groundwater storage to bridge this gap and ensure there is clean, reliable and affordable water for all State residents while also supporting other critical needs such as one of the most productive agriculture systems in the United States.[2] Climate change and increased temperatures have limited California's ability to rely

[2] During California's relatively wet winters, precipitation and snowmelt runoff collect in reservoirs, behind dams, throughout the state. Reservoir operators then convey the stored water to the water users during the dry periods in the spring, summer, and fall. For the past decade, California has faced historic drought conditions severely limiting the available water supply.

on Sierra snowpack as storage for much of the State's water needs. Meanwhile, the Colorado River—the source of supply for much of Southern California—is over-subscribed and potentially subject to significant future cutbacks as Upper Basin States and Mexico make greater demands.[3] Meanwhile, California's State Water Project ("SWP"), which moves water from northern to southern California through the bottleneck of the Sacramento/San Joaquin Bay Delta, seldom can deliver even half of its design capacity—with allocated deliveries of less than five percent in some years.[4]

With imported water becoming less and less reliable each year, Californians must be able to rely on local water supplies. The California Legislature has emphasized that water suppliers need to rely more on local supplies in statute. In the Sacramento-San Joaquin Delta Reform Act of 2009, the Legislature declared:

> *Each region that depends on water from the Delta watershed shall improve its regional self-reliance* for water through investment in water use efficiency, water recycling, advanced water technologies, *local and regional water supply projects*, and improved regional coordination of

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[3] *See* https://calmatters.org/environment/water/2024/03/california-colorado-river-agreement/ (cutbacks from 10-20% with potentially even greater cutbacks to Southern California long term).

[4] *See* California Department of Water Resources ("DWR") SWP Allocations, 1996-2025, at https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/SWP-Water-Contractors/Files/Historical-SWP-allocations-1996---2025-w-NOD-tables-010625.pdf. The SWP allocation to Southern California in 2025—after two wet years in a row and spilling reservoirs in Northern California—is only 15 percent. See https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/State-Water-Project/Management/SWP-Water-Contractors/Files/24-08-122324b.pdf.

local and regional water supply efforts.

Cal. Water Code § 85021 (emphasis added).

Indeed, California law *encourages* local water supply projects like the County of San Luis Obispo County's project for which Lopez Dam is the water source. However, the preliminary injunction here would severely impact that local project's capacity to provide critical water supplies to the County's communities, and the precedent set thereby could have deleterious impacts on other local water supplies throughout California.

This brief addresses three of the largest problems (among many) with the district court's decision in this case. The Order Granting in Part Plaintiffs' Motion for Preliminary Injunction ("Order Granting Preliminary Injunction") and accompanying Preliminary Injunction Order (collectively "Orders"), if allowed to stand, will set a dangerous precedent with the potential to greatly frustrate the provision of critical water supplies in California in the future.

Improper Use of Steelhead Recovery Plan: As this Court has previously held, recovery plans adopted pursuant to section 4(f) of the ESA are non-legislative and non-binding. *See, e.g.*, *Center for Biological Diversity v. Zinke*, 399 F.Supp.3d 940, 947 (D. Ariz. 2019) ("As stated by the Ninth Circuit, 'Recovery Plans are prepared in accordance with section 1533(f) of the Endangered Species Act . . . while they provide guidance for the conservation of those species, they are not

binding authorities"; *Conservation Congress v. Finley*, 774 F.3d 611, 614 (9th Cir. 2014) (same); *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1141 n.8 (9th Cir. 2015) ("The [ESA] does not mandate compliance with recovery plans for endangered species.") Without evidence documenting actual "take" of Steelhead at Lopez Dam, the district court improperly treated the goals and strategies of the National Marine Fisheries Service's ("NMFS") South-Central California Coast Steelhead Recovery Plan ("Recovery Plan"), which by its own terms is "guidance,"[5] as if they are binding legal standards for determining whether take is occurring. This theory fundamentally misinterprets the ESA and is inconsistent with federal courts' interpretation of what recovery plans are, and what they are intended to do, under the ESA.

Improper Utilization of FGC § 5937: In addition to its misapplication of section 4(f) of the ESA, the district court improperly determined a preliminary injunction was warranted under FGC § 5937. Unlike the ESA, FGC § 5937 does not prohibit the taking of an endangered or threatened species. It requires dam operators to ensure sufficient water passes dams to keep existing fisheries in good condition. It does not create new fisheries or restore historic fisheries. Notably, "good condition" is not defined in the statute and there is no indication of how far

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[5] NATIONAL MARINE FISHERIES SERVICE, *South-Central California Steelhead Recovery Plan* (2013) (recovery plans are "guidance documents, not regulatory documents, do not create new legal obligations, and are subject to modification on several grounds.")

below a dam the requirements apply, nor is it clear if FGC § 5937 imposes obligations on a dam owner when there is no documented fishery below a dam. Putting aside the lack of clarity in the statute's language, any injunction issued under FGC § 5937 requires a court to balance the competing needs associated with any proposed increase in flow to keep fish in good condition with all of the other myriad of beneficial uses supported by dams. The district court failed to perform the balancing requirement while conflating the requirements of the ESA and FGC § 5937, thereby making it impossible to determine the precise source of law upon which the district court's broad injunction rests.

Courts of Equity Should Not Ignore the Importance of Local Water Supplies: Broad mandatory injunctions directing water use for environmental priorities – like the injunction issued in this case – can have profound unintended consequences in local communities, such as the County, that rely on local supplies to provide drinking water, irrigation for long established agriculture, and essential emergency services (such as fire flows—which are critically important to fighting wildland fires and catastrophic wind-driven urban fires as have occurred in Santa Rosa and most notably Los Angeles).[6] These obligations cannot be met if local

[6] The California Legislature has also declared it the policy of the state that domestic water use is the "highest use of water" followed by agricultural use. *See* Water Code § 106. Additionally, it is California's stated policy that every citizen have the right to safe, clean affordable, and accessible water. Water Code § 106.3.

supplies are required by courts to flow to the ocean, rendering obsolete water infrastructure facilities that have supported local communities for decades.

While there are times when consumptive beneficial uses essential to humans should yield to competing environmental priorities, those occasions should be carefully circumscribed, with curtailment of water resources required to serve local supplies limited to those circumstances where absolutely necessary and legally required. This case did not present the district court with such a circumstance; there was no evidence that operation of Lopez Dam actually caused take of Steelhead in violation of Section 9 of the ESA.

Across the state, local water agencies rely on water stored in reservoirs, like Lopez Lake, to provide a safe and affordable water supply to all Californians. For many agencies, stored water in reservoirs represents a significant portion—or in some cases all—of their total water supply. With water supplies from the Colorado River and SWP dwindling each year, the importance of local water supplies will only increase. In issuing the preliminary injunction with seemingly a sole focus on protecting Steelhead, the district court failed to consider and balance all of the other important beneficial uses as required by California law.

ARGUMENT

I. Recovery Plans Are Non-Binding Guidance Documents Without the Force of Law

In the Orders, the district court relied heavily on the requirements of the

Recovery Plan in finding Plaintiffs established the essential elements required to obtain a preliminary injunction under the ESA and FGC § 5937. Specifically, the district court stated that the relief sought and obtained by Plaintiffs "overwhelmingly align" with the "core principles" for Steelhead recovery contained in the Recovery Plan, and the district court explicitly relied on the contents and requirements of the Recovery Plan in tailoring the preliminary injunction. Yet the body of ESA case law makes clear that recovery plans are aspirational, not regulatory. They are non-binding documents issued for "guidance purposes only." *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996). Recovery plans do not create any "rights or obligations…from which legal consequences will flow." *Ctr. for Biological Diversity v. Haaland*, 58 F.4th 412, 417 (9th Cir. 2023) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)) (internal quotations omitted). Nor do recovery plans "contain any 'binding legal obligations to which [the agency] is subject.'" *Id.* at 418 (alterations in original). But reading "rights and obligations" into the Recovery Plan is the only way the district court could justify the Orders against the County here. Accordingly, the district court's use of the Recovery Plan to justify its preliminary injunction erroneously transformed an advisory document into one with the "full force of law" from which "legal consequences" certainly will flow. This Court should correct this error by clarifying the proper role for recovery plans in cases where a party seeks injunctive

relief.

A recovery plan is an aspirational document describing how a federal agency, in this case NMFS, can improve conditions sufficiently to remove a species from the endangered list. *Conservation Cong. v. Finley*, 774 F.3d 611, 614 (9th Cir. 2014) ("Recovery plans are prepared in accordance with section 1533(f) of the [ESA]. . . while they provide guidance for the conservation of those species, they are not binding authorities."). The content of the recovery plan is left largely to the discretion of the pertinent Secretary, but the ESA requires certain elements be included. However, these obligations are imposed on NMFS in developing the recovery plan, not on local governments. And NMFS has broad discretion in how it chooses to achieve the goals of a recovery plan, discretion that the courts have largely been unwilling to disturb. *See Fund for Animals, Inc.*, 85 F.3d at 548. Indeed, the courts have ruled that the contents of recovery plans are not enforceable—even against NMFS and the U.S. Fish and Wildlife Service ("USFWS"), the agencies charged with developing recovery plans. *See CBD v. Zinke*, 399 F. Supp. at 949–50; *CBD v. Jewell*, No. 15-cv-19, 2018 WL 1586651, at *15 n. 14 (D. Ariz. 2018) ("Recovery plans do not govern all aspects of recovery under the ESA, but rather are non-binding statements of intention with regards to the agency's long-term goal of conservation.").

Moreover, the ESA imposes no specific obligation on non-federal entities,

like the County, to do anything other than avoid take of listed species, *see* 16 U.S.C. § 1538 (prohibiting "take" of a listed species without incidental take permit), and there is nothing in the ESA that imposes an obligation on a local agency to implement elements of a recovery plan. In fact, the ESA directs that the federal agencies implementing the ESA cooperate with local agencies in addressing water issues. *See* 16 U.S.C. § 1531(c) ("It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."). Consistent with the text of the ESA, Amici know of no instance where a federal court has mandated a non-federal entity to comply with specific requirements from a recovery plan.

The specific nature of recovery plans, and their tendency to become stale as new science emerges, casts further doubt on their suitability for site-specific implementation. Guidance published by the USFWS makes clear that while "a species' biological condition, threats to its existence, and our understanding of how to address these stressors can change frequently and significantly . . . many recovery plans have become outdated." *Recovery Planning and Implementation*, U.S. FISH & WILDLIFE SERVICE, https://www.fws.gov/project/recovery-planning-and-implementation (last visited Jan. 23, 2025).

Accordingly, agencies tasked with administering the ESA have turned to a

"more flexible operational document" known as a recovery implementation strategy ("RIS") to guide implementation of specific recovery actions. *Id.* The more focused and short-term RIS allows agencies to adapt to changed circumstances in implementing its recovery strategy unburdened by some of the strictures associated with the more "visionary" recovery plans. *Id.* The RIS also allows agencies to tailor implementation strategies based on specific timeframes, conservation partners, or recovery activities. While an RIS is not at issue in this case, the USFWS's guidance is indicative of the Recovery Plan's limited utility in this case.

The language of the ESA itself establishes the non-mandatory nature of recovery plans, and the body of ESA case law makes this clear—as reflected in the Recovery Plan.[7] In *Fund for Animals, Inc. v. Rice*, the Eleventh Circuit rejected an argument seeking to invalidate a construction permit because it allegedly conflicted with the provisions of a recovery plan for the Florida panther. The court found that such a position would unduly elevate the recovery plan "into a document with the force of law," whereas the ESA "makes it plain that recovery plans are for guidance purposes only." *Fund for Animals, Inc.*, 85 F.3d at 548; *see also*

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[7] At the outset, the Recovery Plan is forthcoming about its effect. It states recovery plans are "guidance documents, not regulatory documents, do not create new legal obligations, and are subject to modification on several grounds." NATIONAL MARINE FISHERIES SERVICE, SOUTH-CENTRAL CALIFORNIA STEELHEAD RECOVERY PLAN (2013).

WildEarth Guardians v. United States Fish & Wildlife Serv., 416 F. Supp. 3d 909, 919, 926 (D. Ariz. 2019) (recovery plans are "merely advisory"); *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012) (recovery plan not binding on agency delisting decisions); *Cal. Native Plant Soc'y v. EPA,* No. C06-03604 MJJ, 2007 WL 2021796, at *21 n.7 (N.D. Cal. Jul. 10, 2007); *Grand Canyon Tr. v. Norton*, No. 04-CV-636PHXFJM, 2006 WL 167560, at *2 (D. Ariz. Jan. 18, 2006).

Recently, in *Center for Biological Diversity v. Haaland*, this Court rejected a challenge to the USFWS 's grizzly bear recovery plan. 58 F.4th 412 (9th Cir. 2023). This Court held that the adoption of a recovery plan is not reviewable under the APA because it is not a final agency action "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.*; *see also Ctr. for Biological Diversity v. Bernhardt*, 509 F. Supp. 3d 1256, 1264 (D. Mont. 2020) ("APA does not authorize a challenge to a recovery plan as a rulemaking petition because recovery plans are not rules."). Specifically, the ESA "does not mandate compliance with recovery plans for endangered species," recovery plans "do not create any legal rights or obligations" for the USFWS or any third parties, and that the USFWS does not initiate enforcement actions based on recovery plans. *Ctr. for Biological Diversity v. Haaland*, 58 F.4th at 417–18. Even when challenges to recovery plans are brought under the ESA's citizen suit provision, agency decisions are generally only reviewable if the challenger alleges that the agency failed to

abide by one of the enumerated statutory requirements for the development of recovery plans in Section 1533(f). Challenges to the contents or substance of the plan generally must fail because they do not allege a failure to perform a nondiscretionary duty under § 1533(f). *See, e.g.*, *Friends of the Wild Swan, Inc. v. Dir. of United States Fish & Wildlife Serv.*, 745 F. App'x 718, 719–20 (9th Cir. 2018); *Ctr. for Biological Diversity v. Zinke*, 399 F. Supp. 3d at 949. Thus, because recovery plans are merely non-binding guidance documents, whose contents are neither "rules" nor subjects for substantive review, they cannot reasonably form the factual basis for a judicial intervention as invasive and "disfavored" as a mandatory injunction. *See Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (mandatory injunctions are disfavored unless law and facts clearly support issuance).

Other federal decisions support this conclusion while casting further doubt on the status and independent enforceability of recovery plans within the overall structure of the ESA. The court in *Oregon Natural Resource Council v. Turner* found that species are afforded full protection under the ESA regardless of any recovery plan in effect because such plans offer mere guidelines for future goals but do not mandate any specific remedial actions. 863 F. Supp. 1277, 1284 (D. Or. 1994) ("The recovery plan may provide added conservation benefits . . . . However, the immediate concern of insuring the continued existence of [the

species] has been served by the provisions of the ESA itself."). In other words, the effectiveness of the *protections* afforded to threatened and endangered species by the ESA—such as the prohibition on take in ESA Section 9, and the consultation requirements for federal projects in ESA Section 7—are independent basis protecting species that are independent from any recovery plan and its contents.

Similarly, in *Cascadia Wildlands v. Thrailkill*, this Court upheld a lower court's ruling denying a request for a preliminary injunction seeking to invalidate a "biological opinion" issued by the USFWS. There, the plaintiffs argued that the USFWS departed from the standards contained in the recovery plan, representing a fatal flaw in its biological opinion determination. *Cascadia Wildlands v. Thrailkill*, 806 F.3d 1234 (9th Cir. 2015). This Court, however, upheld the lower court's rejection of plaintiffs' attempt to "conflate jeopardy with recovery," since the focus of the former is on the likelihood of a particular action to reduce the likelihood of survival and recovery, while the latter's is on actually bringing about recovery. *Id.* at 1239, 1243. Under this line of reasoning, a recovery plan is ill-suited to inform a determination about the likely detrimental impact of a *particular action* – such as operation of the Lopez Dam – and instead is better geared towards achieving positive, specified recovery goals. *Cascadia Wildlands* thus stands for the proposition that actions described in a recovery plan may be worthy goals, but they are not regulatory requirements that are the proper subjects of a mandatory

injunction.

Last, courts in the Ninth Circuit have held that unlike other sections of the ESA, 16 U.S.C. § 1533(f), "does not explicitly require that determinations be based on the best scientific and commercial data available." *Save Bull Trout v. Williams*, 544 F. Supp. 3d 1047, 1059–60 (D. Mont. 2021) (quoting *Grand Canyon Tr. v. Norton*, No. 04-CV-636PHXFJM, 2006 WL 167560 (D. Ariz. Jan. 18, 2006)). The ESA provides that the findings and other data contained in recovery plans are held to a lower scientific standard than those contained in an agency's listing decisions, for example. *See* 16 U.S.C. § 1533(b). In light of the lower scientific standard for recovery plan findings, their non-binding nature, and the fact that agencies are not required to update published recovery plans, judicial decisions that rely on the findings contained in recovery plans may be vulnerable to challenge as being outdated. *See Bernhardt*, 509 F. Supp. 3d at 1268; s*ee also Humane Soc'y of the United States v. Jewell*, 76 F. Supp. 3d 69, 135 (D.D.C. 2014) ("reliance on findings in the Recovery Plan, without a separate finding that the recommendations in the twenty-two-year-old Recovery Plan are still based on the 'best available biological and commercial data' is not consistent with the ESA's statutory requirements."). Accordingly, such findings should be given little weight in determining the outcome of litigation brought pursuant to the ESA.

Despite this wealth of authority, the district court repeatedly equates the

County's alleged failures to meet targets in the Recovery Plan with a taking of a protected species or some other violation of the ESA justifying injunctive relief. This was plain error. *See Cascadia Wildlands*, 801 F.3d at 1114 n.8 ("The Endangered Species Act does not mandate compliance with recovery plans for endangered species."). Particularly concerning is the fact that the district court took enforcement of the Recovery Plan upon itself in crafting and issuing the preliminary injunction,[8] arguably usurping the statutory prerogatives of NMFS, which was not a party and which did not request injunctive relief to enforce the ESA. Notably, the only factual support cited by the district court in support of the injunction being narrowly tailored is the Recovery Plan or documents citing the Recovery Plan. (Order Granting Preliminary Injunction, at 25–28.) A casual reading of the Orders reveals that the two are entirely intertwined, and the Recovery Plan was the primary basis of the district court's mandatory injunction.

By building its preliminary injunction around the contents and goals of the Recovery Plan, the district court elevated the Recovery Plan from an advisory document to the equivalent of a mandatory regulatory standard for determining when and whether take of listed species has occurred, a finding that can have

[8] *See* Order Granting Preliminary Injunction, at 28 ("The Court therefore deems it appropriate to propel this process in a timely manner, so the appropriate agencies–in collaboration with the parties–may determine next steps to secure Steelhead viability.").

criminal consequences under the ESA.[9] *See* 16 U.S.C. §§ 1538(a)(1)(B), 1540(b)(1). It was a task for Congress (or perhaps NMFS) to identify actions or omissions that constitute "take," particularly given the tie to criminal liability. It was clearly not a proper role for the district court.

II. California Fish & Game Code § 5937 Does not Support the Mandatory Injunction

In addition to the ESA, the district court also found its preliminary injunction was warranted on Plaintiffs' FGC § 5937 claims. In reaching this conclusion, the district court opined "whether Section 5937, alone, prioritizes the preservation of fish above other competing interests—generally remains unanswered." (Order Granting Injunction, at 24.) Amici submit the answer is no. Under California law, a court must balance the needs of the fishery with other beneficial uses before enjoining the flow of water through a dam. *Nat'l Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 728–29 (Cal. 1983) (holding allocations of water require balancing of the need to protect public trust resources with the needs of those who rely on the resources); *City of Lodi v. E. Bay Mun. Util. Dist*., 60 P.2d 439, 448 (Cal. 1936) (holding that the court's failure to consider other beneficial uses was "error of a most serious nature…."). Thus, in addition to considering the

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[9] The district court also circumvented the APA's rulemaking procedures by elevating the Recovery Plan to a legally binding document. *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'"[citations omitted].).

impact on other fish (which might have very different needs than Steelhead), the district court was required to ensure that its decision does not impinge on other beneficial uses of water. As a California statute, FGC § 5937 is subject to California's Constitutional prohibition against "waste or unreasonable use or unreasonable method of use of water." Cal. Const. art, X, § 2.

FGC § 5937 provides that "[t]he owner of any dam shall at all times allow sufficient water to pass . . . to keep in good condition any fish that may be planted or exist below the dam."[10] Based on this language and the fact that FGC § 5937 was enacted decades before the ESA, it is clear that the requirements of FGC § 5937 are not the same as those prescribed by the ESA. Rejecting the argument that FGC § 5937 imposed the same limitations on a dam operator as a biological opinion issued under the ESA, the U.S. Court of Federal Claims explained:

> Section 5937 provides no quantifiable standard that would allow this court to determine whether requirements of the biological opinion and Section 5937 are one and the same. Section 5937 does not define "good condition," nor does it indicate how far below the dam fish must be kept in good condition. Given such a lack of specificity, we have no way to assess whether the requirements set forth in the biological opinion are

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[10] Federal courts must take great care in attempting to apply state law on a matter of great public importance to the state, particularly where the state's highest court has not clearly addressed the issue. *Accord Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943) ("Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts.").

> indeed requirements to which Casitas was already subject under either Section 5937 or its streambed alteration agreement.[] We thus conclude that this defense too must fail.

Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 462, n.20 (2011).

Unlike the ESA, FGC § 5937 is not concerned with listed or unlisted species. Instead, FGC § 5937 requires a court to consider all fish in the waterway, not just Steelhead. *See* Fish & Game Code § 5937 ("keep in good condition *any fish* that that may be planted or exist below the dam.") (emphasis added). Here, the district court's single-species focus on Steelhead fails to account for other fish currently existing below Lopez Dam such as threatened frogs[11] or endangered Tidewater Goby. *See* Jennings Decl. ¶¶ 18–23. Despite being presented with evidence of negative impacts on other fish below the dam, the district court only considered the impact increased flow would have on Steelhead. (*See* Order Granting Preliminary Injunction, at 22–25.) As result, the district court's single-species analysis necessarily ignored the requirement in FGC § 5937 that all fish below a dam be kept in good condition—some of which may suffer under the injunction.

Admittedly, caselaw on FGC § 5937, and its predecessors, is sparse. The California State Water Resources Control Board has explained that:

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[11] FGC § 45 includes amphibians in the definition of fish.

> No appellate law exists construing Section 5937 alone; however, *California Trout, Inc.* can be read as indicating that Section 5937 legislatively establishes that it is reasonable to release enough water below any dam to keep any fish that exist below the dam in good condition. Nevertheless, a release of water that is much in excess of that needed to keep fish in good condition could be unreasonable under California Constitution Article X, Section 2, if there would be adverse effects on other beneficial users of water.

Matter of Permits 11308 and 11310, State Water Res. Control Bd., 1995 WL 59086, at *4 (Feb. 1, 1995).

In two *California Trout* decisions, the California Court of Appeal interpreted a statute requiring the State Water Board to add a condition to the Mono Lake water permits to require full compliance with FGC § 5937. *California Trout, Inc. v. State Water Resources Control Board*, 207 Cal. App. 3d 585 (Cal. App. 1989) (Cal Trout I); *California Trout, Inc. v. Superior Ct.*, 218 Cal. App. 3d 187 (Ct. App. 1990) (Cal Trout II). In these cases, the City of Los Angeles argued that the court's order requiring additional releases of water conflicted with the California Supreme Court's decision in *Nat'l Audubon Soc'y v. Superior Ct.* requirement that instream uses be balanced against other beneficial uses. *Cal. Trout II*, 218 Cal. App. 3d at 199–200. Unlike most cases, Mono Lake is specifically covered by another provision in the FGC – Section 5946 – that explicitly requires "full compliance with FGC § 5937." As a result, the court found 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." *Cal Trout II*, 218 Cal. App. 3d at 201. While the court found it unnecessary to decide just what FGC § 5937 alone required, the decision clearly implies that balancing of competing beneficial uses is required. *Id.* ("We need not reach the question of the application of section 5937 alone as a rule affecting the appropriation of water."); *cf. City of Lodi*, 60 P.2d at 448.

Interpreting those *Cal Trout* decisions, one federal court observed that the decision only requires release of enough water to "keep fish alive," as opposed to the amount of water necessary to "recover" an entire species:

> *Cal Trout* does not explicitly hold that § 5937 mandates placing the preservation of fish above the irrigation purposes of a dam, but reserves the question of the statute's application alone as a rule affecting appropriation of water, separate from § 5946. The court simply interprets the statute, based on its plain meaning and context, as "requiring the release of sufficient water to keep fish alive," without addressing the issue whether that requirement might somehow be limited or conditioned in the context of a larger federal statutory regime.

Nat. Res. Def. Council v. Patterson, 333 F. Supp. 2d 906, 920 (E.D. Cal. 2004).

In *Casitas v. United States*, however, the U.S. Court of Federal Claims explained that FGC § 5937 cannot be enforced "in a vacuum." 102 Fed. Cl. at 462, n. 20. While the court recognized 5937 "as a legislative expression of the public

trust doctrine," it concluded that "5937 cannot be viewed as an absolute or in isolation, but must be subject to the same considerations that underpin the other, fundamental water doctrines: the desire to balance competing needs for the good of the whole." *Id.*

Therefore, the answer to the district court's question – "whether Section 5937, alone, prioritizes the preservation of fish above other competing interests" – is no. Under California law, the district court was obligated to consider both the impacts of its decisions on other species of fish and its impact on other beneficial water uses. It did not do so. As a public trust resource, the water in Lopez Lake is subject to the balancing of interests discussed in *Audubon*, *Lodi*, and *Casitas*. By electing to consider Plaintiffs' state law claims, the district court assumed an independent duty to ensure that its preliminary injunction did not unreasonably impinge on other beneficial water uses consistent with California state law. As such, it is imperative that courts balance the desire to support fisheries with the very real impacts mandatory releases may have.

III. Courts Must Consider the Impacts to Local Water Agencies and the Public Before Issuing Injunctions that Severely Restrict Local Water Supplies

Before imposing a mandatory injunction altering operations in a way that significantly impacts a local water supply, like Lopez Lake, a court should fully understand the potential impacts of such a decision. Local water agencies across

the state rely on local water supplies to provide drinking water, irrigation, and emergency services to local residents, and the failure to account for these critical services could have catastrophic results.

If allowed to stand, the Orders would allow courts to categorically place the restoration of fisheries above all other interests. These types of decisions cannot be made in a vacuum. Instead, in determining whether to grant injunctive relief, courts must consider the importance of local water supplies in meeting the water needs of a complex society in harmony with Water Code sections 106 (domestic and agricultural preference) and 106.3 (human right to "safe, clean, affordable, and accessible water").

California water agencies operate pursuant to a robust system of constitutional and statutory mandates. The foundational element of California water law mandates that the state's limited water resources be put to their maximum reasonable and beneficial use. Cal. Const. art. X, § 2. Since 2012, it has also been the policy of the state that "every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." Cal. Water Code § 106.3. In addition to declaring a human right to water, California law provides "that the use of water for domestic purposes is the highest use of water and the next highest use is for irrigation." *Id.* at § 106.

While conservation and the preservation of instream water resources are also important components of water management, they cannot be a water agency's only consideration. Instead, as the district court should have done, water agencies must consider and balance competing demands on water when determining how to allocate these scarce and precious resources. The district court's failure to weigh these important societal interests has the potential to cause catastrophic results in the future, and courts should be extremely cautious in impairing the ability of local jurisdictions to access sufficient supplies from existing facilities to meet human needs within their service areas.

Local water supplies are paramount to ensuring water agencies can meet these mandates. While California has a robust water supply system, there is no guarantee that these supplies will be available in any given year. *See* discussion, *supra*, at notes 2-4 and accompanying text. Over the past decade, California has dealt with periods of prolonged and historic drought. The ability of local water suppliers to simply meet basic demands over the last decade has been severely strained as SWP allocations have been cut to zero in some years, while allocations from the Colorado River continue to drop. *See DWR Announces Initial State Water project Allocation, Additional Actions to Prepare for Third Dry Year*, Cal. Dept. Water Resources (Dec. 1, 2021), https://water.ca.gov/News/News-Releases/2021/Dec-21/SWP-December-Allocation. With no guarantee of imported

water in any given year, California water agencies must be able to rely on local supplies, like Lopez Lake, to provide for domestic, agricultural, conservation, and emergency needs within their communities. To illustrate this point in 2025, water agencies that receive water from the SWP can only expect to receive 15% of their total maximum annual allocation for 2025—not enough to meet even the basic needs of many communities. *See* Notice to State Water Project Contractors No. 24-08, CAL. DEPT. OF WATER RES., (Dec. 23, 2024). As a result, when water from local facilities is not available for any use other than fish recovery, there often will not be available resources to make up the shortfall.

Decisions that fail to meaningfully balance the competing needs of society with the preservation of fish, place local water agencies in an impossible bind. As the district court acknowledged, it issued this sweeping injunction without an understanding of how this remedy could impact local water suppliers and the local communities that rely on them. (Order Granting Preliminary Injunction, at 25 ["the Court is left without evidence to adequately assess Defendant's purported hardships. Nor can the Court determine whether Plaintiffs' proposed relief could, perhaps, be tailored in a manner that balances both the Steelhead's sustainability and Defendant's water supply."]). The district court's finding is not supported by the record, and it was made without any consideration of how its decision would impact tens of thousands of citizens within the County that rely on Lopez Lake as

their primary water supply.

However, declarations provided to the district court described the potentially severe impacts to those who rely on water from Lopez Lake. For example, Public Works Director for the City of Grover Beach testified it relies on Lopez Lake for approximately 62% of its total water supply. Ray Decl., ¶ 5. Mr. Ray testified that during times of drought, the district court's remedy would reduce the available water supply to Grover Beach by approximately 500 acre-feet per year with no available means to make up for this loss. *Id.* This necessarily severely limits the amount of water that would be available to the city's 12,547 customers. *Id.* at ¶ 2. These impacts are similarly memorialized in other declarations provided to the district court. *See* Fine Decl., ¶ 3 (water from Lopez Lake accounts for approximately 36% of the Pismo Beach's water supply); Hagemann Decl., ¶ 3 (approximately 80% of Avila Beach Community Service District's water supply); Brown Decl., ¶ 3 (approximately 15% of the Oceano Community Service District's water supply).

The severe impacts described in the declarations are further evidenced by the San Luis Obispo County Multi-Jurisdictional Hazard Mitigation Plan ("Hazard Mitigation Plan"), adopted by the County in 2019. The Hazard Mitigation Plan is designed to assess natural and human-caused hazards facing the County and to implement mitigations measures making the County more resilient against future

disasters like wildfire and drought. Hazard Mitigation Plan, at 2-3 (Oct. 2019). Unsurprisingly, drought and wildfire risks are identified as critical across the County. *Id.* at 5-4.

Relatedly, five municipalities or special districts identified Lopez Lake as a necessary component of their water supply and drought resilience plan. *Id.* at Annex A.17 (City of Arroyo Grande relies on water supplies held behind Lopez Dam for approximately 60% of its water supplies), Annex C.17 (approximately 36% of Grover Beach's projected water supply comes from the Lopez Project)[12], Annex F.20 (Pismo Beach's project water supply accounts for approximately 25% of its projected water supply), Annex H.16 (Avila Beach Community Services District relies on Lopez Lake for approximately 51% of its projected water supply and specifically identifies wildfire protection as a significant impact associated with drought conditions and strains on the water supply), and Annex M, p. 499 of 756 (Oceano Community Services District identified Lopez Lake as a "critical water resource" for drought resilience).

There can be no dispute that there is a push and pull reaction to any decision which unilaterally allocates more water to downstream uses. The limited nature of water resources means that favoring one use may result in less water for another—

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[12] Grover Beach's reliance on Lopez Lake has increased since the Hazard Plan was prepared in 2019.

often impinging on critical human needs. In this case, the preliminary injunction will significantly decrease the water supply in Lopez Lake available for local needs. The district court's decision has the potential to severely impact the public health and safety (e.g., people cannot live without clean water, fires cannot be extinguished without water) of the local communities deprived of water from Lopez Lake. Local water supplies matter, indeed they are the life blood of many communities, and courts must be extremely cautious about impairing them through mandatory injunctive relief that is not narrowly tailored to achieve its objective.

CONCLUSION

For the reasons set forth above, the Court should reverse the district court's Order Granting In Part Plaintiffs' Motion for Preliminary Injunction and accompanying Preliminary Injunction Order.

Dated: January 31, 2025 Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: *San Luis Obispo Coastkeeper, et al. v. County of San Luis Obispo*

No. 24-7807.

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 31, 2025.

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 31, 2025, at Irvine, California.

Dated: January 31, 2025

/s/ Jeremy N. Jungreis
Jeremy N. Jungreis

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