

1 BRYAN WILSON (CA SBN 138842)  
BWilson@mofo.com  
2 CHELSEA CAYLIN KEHRER (CA SBN 340744)  
CKehrer@mofo.com  
3 MORRISON & FOERSTER LLP  
755 Page Mill Road,  
4 Palo Alto, California 94304-1018  
Telephone: 650.813.5600  
5 Facsimile: 650.494.07927

6 ADAM F. KEATS (CA SBN 191157)  
adam@keatslaw.org  
7 LAW OFFICE OF ADAM KEATS PC  
2489 Mission St., Suite 16  
8 San Francisco, California 94110  
Telephone: 415.964.0070

9 Attorneys for Plaintiffs  
10 BRING BACK THE KERN  
*(Additional counsel listed on next page)*  
11

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 COUNTY OF KERN

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

17 Plaintiffs and Petitioners,

18 v.

19 CITY OF BAKERSFIELD, AND DOES 1-  
20 500,

21 Defendants and Respondents,

22 BUENA VISTA WATER STORAGE  
DISTRICT, KERN DELTA WATER  
DISTRICT, NORTH KERN WATER  
23 STORAGE DISTRICT, ROSEDALE-RIO  
BRAVO WATER STORAGE DISTRICT,  
24 KERN COUNTY WATER AGENCY; J.G.  
BOSWELL COMPANY, and DOES 501 – 999,  
25 inclusive,

26 Real Parties in Interest.  
27  
28

Case No. BCV-22-103220

**PLAINTIFF BRING BACK THE  
KERN'S OPPOSITION TO KERN  
COUNTY WATER AGENCY'S  
MOTION FOR PEREMPTORY  
CHALLENGE**

Judge: Hon. John W. Lua  
Hon. Gregory A. Pulskamp

Action Filed: November 30, 2022  
Trial Date: December 8, 2025

1 WILLIAM FRENTZEN (CA SBN 343918)  
WFrentzen@mofo.com  
2 ANISSA CHITOUR (CA SBN 341926)  
AChitour@mofo.com  
3 MORRISON & FOERSTER LLP  
425 Market Street  
4 San Francisco, California 94105-2482  
Telephone: 415.268.7000  
5 Facsimile: 415.268.7522

6 MEHRAN ARJOMAND (CA SBN 180961)  
MArjomand@mofo.com  
7 MATT ROBINSON (CA SBN 333652)  
MRobinson@mofo.com  
8 MORRISON & FOERSTER LLP  
12531 High Bluff Drive, Suite 100  
9 San Diego, California 92130-2040  
Telephone: 858.720.5100  
10 Facsimile: 858.720.5125

11 Attorneys for Plaintiffs and Petitioners  
12 BRING BACK THE KERN  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
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1 Plaintiff Bring Back the Kern (“BBTK”) objects to, and opposes, Real Party in Interest Kern  
2 County Water Agency’s (“KCWA’s”) Motion for Peremptory Challenge [C.C.P. § 170.6]  
3 (“Motion”) on the grounds that it is untimely and improper.

#### 4 **I. INTRODUCTION**

5 KCWA’s Motion is ill-conceived and untimely. Section 170.6 motions must be made  
6 within a narrow, clearly-defined time frame. KCWA attempts to avoid the obvious time bar by  
7 invoking language in the Civil Procedure Code that allows a party to make a Section 170.6  
8 challenge after a new trial has been ordered. But there has been no trial in this case, much less an  
9 order for a new trial. What happened here was the Kern County Superior Court (“Trial Court”)  
10 entered a preliminary injunction order. The Fifth District Court of Appeal (“Appellate Court”)  
11 overruled the order, holding that the Trial Court expressly refused to consider factors the Appellate  
12 Court found it should have considered. The Appellate Court remanded for further proceedings in  
13 accordance with its opinion. It directed the Trial Court to determine, for the first time, the  
14 reasonableness of water use in any further preliminary injunction proceedings. The Appellate Court  
15 did not, and could not, order a new trial or for that matter any trial. The date for the first trial in  
16 this case, which was set by the Trial Court months ago, is December 8, 2025.

17 The cases on which KCWA relies do not support its motion. Instead, they explain why  
18 KCWA cannot invoke Section 170.6. KCWA’s Motion is entirely meritless and must be denied.

#### 19 **II. STATEMENT OF FACTS**

20 Defendant City of Bakersfield (“City”) operates multiple weirs on the Kern River used to  
21 divert water for its own use and the use of several other entities, including the Real Parties in Interest  
22 (“RPIs”). KCWA is one of the RPIs. (*See Verified Third Amended Complaint for Injunctive Relief*  
23 *and Petition for Writ of Mandate, December 1, 2023 ¶¶ 2, 18-23.*) Judge Gregory A. Pulskamp  
24 (“Judge Pulskamp”) was assigned to the case for all purposes on December 13, 2022. (*See Notice*  
25 *of Assignment to Judge for All Purposes.*) On May 3, 2023 KCWA along with the other RPIs filed  
26 a motion for leave to file an answer in intervention. (*See Motion for Leave to File Answer in*  
27 *Intervention.*) On September 18, 2023, the Court ordered Plaintiffs to file, within 10 days, an  
28 amended complaint that included the RPIs. (*See Ruling on Defendant’s Demurrer, September 18,*

1 2023; Ruling on RPI’s Motion to Intervene, September 18, 2023.) Plaintiffs filed a Second  
2 Amended Complaint on October 4, 2023, naming KCWA and the other RPIs. (*See* Second  
3 Amended Complaint.) On November 17, 2023, KCWA filed a notice of appearance of its attorneys  
4 of record. (*See* Notice of Appearance.)

5 On November 9, 2023, Plaintiffs BBTK and other environmental groups obtained a  
6 preliminary injunction in the Trial Court. (*See* Ruling on Plaintiffs’ Motion for Preliminary  
7 Injunction, October 30, 2023; Order Granting Plaintiffs’ Motion for Preliminary Injunction,  
8 November 9, 2023 (“PI”).)

9 The PI prohibited the City from operating the weirs in question “in any manner that reduces  
10 Kern River flows below the volume sufficient to keep fish downstream of said weirs in good  
11 condition.” (*Id.* at p. 2; *see* Fish & G. Code, § 5937 (“The owner of any dam shall . . . allow  
12 sufficient water to pass over, around or through the dam, to keep in ‘good condition’ any fish that  
13 may be planted or exist below the dam.”).) On November 14, 2023, the Trial Court established an  
14 interim flow regime pursuant to a stipulation offered by BBTK and the City. (*See* Notice of Entry  
15 of Order for Implementation of Preliminary Injunction (“Implementation Order”).) On December  
16 27, 2023, after the RPIs filed motions for reconsideration, the Trial Court stayed the  
17 Implementation Order and modified the PI. (*See* Ruling on Motions and Objections.) In this ruling,  
18 “in an effort to reach a global resolution satisfactory to all the parties,” the Trial Court modified the  
19 PI to require, *inter alia*, that the RPIs participate in the discussions concerning interim flow rates.  
20 (*See id.* at p. 2.)

21 The RPIs appealed the modified PI and the Implementation Order to the Appellate Court,  
22 which issued an opinion on April 2, 2025. (*See Bring Back the Kern v. City of Bakersfield* (2025)  
23 110 Cal.App.5th 322.) The Appellate Court reversed the modified PI and the Implementation Order  
24 and “remanded for proceedings consistent with the views expressed in [its] opinion.” (*Id.* at p. 368-  
25 69.) The Appellate Court explained that:

26 In its ruling, the trial court expressly refused to weigh the potential harm to the City  
27 of Bakersfield or the water agencies in determining whether applying section 5937  
28 to the Kern River would result in “an appropriate use of water.”

...

1 The court's failure to directly consider the reasonableness of the water use it was  
2 ordering in the injunction was constitutional error.

3 Consequently, we reverse the injunction and the order setting a flow rate, and  
4 remand for further proceedings.

5 (*Id.* at pp. 334-335.) Thus, the Appellate Court reversed the preliminary injunction because it found  
6 the Trial Court had not conducted an examination of a necessary issue in connection with its  
7 consideration of a preliminary injunction motion. There was no mention anywhere of a trial or a  
8 judgment. The first and only trial in this case is scheduled for December 8, 2025. (*See* Notice of  
9 Mandatory Settlement Conference/Final Case Management Conference/Trial, November 21,  
10 2024.)

11 Despite this, KCWA filed its Motion on May 30, 2025, contending that it was entitled to  
12 disqualify Trial Court Judge Pulskamp under the portion of Section 170.6 relating to new trials.  
13 (*See* Motion at p. 2:3-11.)

### 14 **III. ARGUMENT**

#### 15 **A. KCWA's Motion Is Untimely.**

16 Section 170.6 allows peremptory challenges but imposes strict deadlines. It provides that  
17 "[i]f directed to the trial of a civil cause that has been assigned to a judge for all purposes, the  
18 motion shall be made . . . within 15 days after notice of the all purpose assignment, or if the party  
19 has not yet appeared in the action, then within 15 days after the appearance." (Cal. Civ. Proc. Code  
20 § 170.6(a)(2).) Judge Pulskamp was assigned for all purposes on December 13, 2022. (*See* Notice  
21 of Assignment to Judge for All Purposes at 1.) KCWA had appeared in this action by at least  
22 November 17, 2023 when its attorneys filed a notice of appearance. (*See* Notice of Appearance.)  
23 Thus, the window for KCWA to move to disqualify Judge Pulskamp closed no later than a year and  
24 a half ago.

25 To circumvent this time bar, KCWA argues that it is entitled to disqualify Judge Pulskamp  
26 under the portion of Section 170.6 which applies "following reversal on appeal of a trial court's  
27 decision, or following reversal on appeal of a trial court's final judgment, *if the trial judge in the*  
28 *prior proceeding is assigned to conduct a new trial on the matter.*" (*See* Motion at p. 2:6-9 (citing

1 Cal. Civ. Proc. Code § 170.6(a)(2)) (emphasis added).) But this code provision means what it says:  
2 “a peremptory challenge is permitted under section 170.6(a)(2) where (1) a trial court’s decision or  
3 final judgment is made in conjunction with a ‘trial’ and (2) a subsequent reversal of that decision  
4 results in a ‘new trial.’” (*State Farm Mut. Auto. Ins. Co. v. Super. Ct.* (2004) 121 Cal.App.4th 490,  
5 499.) *State Farm* also explained, as part of a thorough review of Section 170.6:

6 That is not to say that section 170.6(a)(2) should be liberally  
7 construed. As the Supreme Court recently stated: “[W]ith respect to  
8 the assertion that section 170.6 must be given a liberal construction,  
9 our own cases have observed that because of the dangers presented  
10 by judge-shopping—by either party—the limits on the number and  
11 timing of challenges pursuant to this statute are vigorously  
12 enforced . . . . We do not believe that the 1985 amendment of section  
170.6, subdivision (2) was intended to eliminate all restrictions on  
the challenge or to counter every possible situation in which it might  
be speculated that a court could react negatively to a reversal on  
appeal.” (*Peracchi v. Superior Court, supra*, 30 Cal.4th at p. 1263,  
135 Cal.Rptr.2d 639, 70 P.3d 1054, citation omitted.)  
(*Id.* at p. 498.)

13 In *State Farm*, a party filed a Section 170.6 motion after an appellate court issued a writ  
14 reversing the trial court’s ruling on a choice of law issue. (*Id.* at p. 494.) There was no final ruling  
15 in the case, and no reopening of the case upon its return to the trial court. Instead, the court noted  
16 that “the case will resume its course in the trial court and move toward *trial* (the first trial) or some  
17 other disposition.” (*Id.* at p. 503 (emphasis in original).)

18 Likewise, here the Appellate Court reversed the Trial Court’s preliminary injunction and  
19 remanded for further proceedings. (*See Bring Back the Kern, supra*, 110 Cal.App.5th at p. 334-  
20 35.) Upon its return to the Trial Court the case will resume its course and move toward trial.  
21 KCWA’s Motion must be denied, therefore, just as the Section 170.6 motion was denied in *State*  
22 *Farm*.

23 **B. KCWA’s Own Cited Cases Require that the Motion Be Denied.**

24 KCWA does not acknowledge *State Farm* and does not cite any contrary authority. Instead,  
25 KCWA relies on out of context quotes from cases that rejected Section 170.6 motions. KCWA  
26 does not cite any case that allows a Section 170.6 motion to be made after a preliminary injunction  
27 order is overruled.

28 Instead of identifying a first trial, KCWA appears to argue that, for purposes of a Section

1 170.6 motion, the term “new trial” should include any proceedings “in the context of a subsequent  
2 motion for preliminary injunction and a trial on the merits” regardless of whether there has already  
3 been a first trial or judgment. (Motion at p. 3:1-13.) It simply asserts, without support, that  
4 “[w]hether arising in a subsequent motion for preliminary injunction or at trial, these proceedings  
5 constitute a ‘new trial’ on the same issues.” (*Id.* at p. 3:25-26.) Neither of these are correct. The  
6 Civil Procedure Code and the cases cited by KCWA make clear that “new trial” requires “a re-  
7 examination of an issue of fact in the same court *after a trial and decision by a jury, court, or*  
8 *referee.*” (Cal. Civ. Proc. Code § 656 (emphasis added); *see also Geddes v. Superior Court* (2005)  
9 126 Cal.App.4th 417, 424 (“In the context of this statute, a retrial is a ‘reexamination’ of a factual  
10 or legal issue that was in controversy in the prior proceeding”) (citing *Paterno v. Superior Court*  
11 (2004), 123 Cal.App.4th 548).) No such “new trial” has been ordered here.

12 The cases relied upon by KCWA do not support its position. In fact, they prove that  
13 KCWA’s argument is wrong. In *Geddes*, the court did not uphold a Section 170.6 motion. Instead,  
14 the court rejected a Section 170.6 motion even after summary judgment had been granted and then  
15 reversed. (*See* 126 Cal.App.4th 417.) The appellate court held that the trial court had failed to state  
16 the facts and law upon which its decision was based, and remanded the case for a further  
17 explanation. (*Id.* at pp. 423-424 (“Section 170.6 applies only where the matter is to be retried, not  
18 where it is remanded with instructions that require the court to complete a judicial task not  
19 performed in the prior proceeding.”).) Similarly, in this case the Appellate Court remanded with  
20 instructions to consider a factor (reasonableness of water use) that the Trial Court did not consider  
21 previously. (*See Bring Back the Kern, supra*, 110 Cal.App.5th at pp. 334-335.) Also like the  
22 *Geddes* Court, the Appellate Court’s ruling will not result in “reconsideration of the merits[.]” (*See*  
23 *Geddes, supra*, 126 Cal.App.4th at p. 424.) Nothing about *Geddes* supports KCWA’s motion.

24 In *Paterno*, the trial court conducted a bench trial and found for the defendants. (*See* 123  
25 Cal.App.4th 548.) The appellate court reversed. It ordered the trial court to enter judgment in favor  
26 of the plaintiffs and to conduct further proceedings to determine the amount of damages. (*Id.* at  
27 p. 552.) Plaintiffs then filed a Section 170.6 motion. (*Ibid.*) The trial court struck the motion, and  
28 this decision was upheld by the appellate court. (*Id.* at pp. 553, 562.)

1 Here, citing *Paterno*, KCWA claims that any trial on the merits of Plaintiffs' claims would  
2 constitute a "new trial" simply because the Appellate Court directed the Trial Court to "determine  
3 whether and to what extent using the waters of the Kern River to keep fish in good condition is a  
4 reasonable and beneficial use of water.'" (Motion at p. 3:8-13, 3:25-26.) But the Trial Court  
5 expressly *has not conducted* such an inquiry to date, and thus, there can be no re-examination.  
6 Similar to the plaintiffs in *Paterno*, KCWA's Motion attempts to frame "*any* remand for resolution  
7 of *any* contested factual or legal issue [as] a 'new trial' within the meaning of section 170.6(a)(2)."  
8 (123 Cal.App.4th at p. 558.) As the *Paterno* Court rightfully pointed out, such an interpretation  
9 "would unhinge the term 'new trial' from its definitional moorings" (*ibid.*) and "jettison the  
10 reexamination requirement, thereby rendering a central element of the term 'new trial'  
11 meaningless." (*Id.* at p. 561.) *Paterno*, like *Geddes*, defeats KCWA's motion.<sup>1</sup>

#### 12 IV. CONCLUSION

13 There is no support for KCWA's Motion, even in the cases on which the Motion relied.  
14 The Motion must be denied.

15  
16 Dated: June 4, 2025

MORRISON & FOERSTER LLP

17  
18 By: /s/ Bryan Wilson

Bryan Wilson  
Chelsea Caylin Kehrer

19  
20 *Attorneys for Plaintiffs*  
21 BRING BACK THE KERN

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26  
27 <sup>1</sup> KCWA also suggests without saying explicitly that *C.C. v. Superior Court* (2008) somehow  
28 supports its position (Motion at p. 2:14-17, 19-21), but in reality *C.C.* is yet another case that  
rejects a Section 170.6 motion. (*See C.C.*, 166 Cal.App.4th 1019, 1023.)



1 **PROOF OF SERVICE**

2 I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address  
3 is 755 Page Mill Road, Palo Alto, California 94304-1018. I am not a party to the within cause,  
4 and I am over the age of eighteen years.

5 I further declare that on June 4, 2025, I served a copy of:

- 6
  - **PLAINTIFF BRING BACK THE KERN'S OPPOSITION TO KERN  
COUNTY WATER AGENCY'S MOTION FOR PEREMPTORY  
CHALLENGE**

7 ☒ **BY ELECTRONIC SERVICE [Code Civ. Proc sec. 1010.6; CRC 2.251]** by  
8 electronically mailing a true and correct copy through Morrison & Foerster LLP's  
9 electronic mail system from hsmith@mofo.com to the email address(es) set forth below,  
or as stated on the attached service list per agreement in accordance with Code of Civil  
Procedure section 1010.6 and CRC Rule 2.251.

10 William McKinnon (legal@WaterAuditCA.org)  
11 Valerie Stephan (vstephan@waterauditca.org)

*Attorney for Plaintiff/Petitioner:  
Water Audit California*

12 Colin Pearce (CLPearce@duanemorris.com)  
13 Jolie-Anne S. Ansley (jsansley@duanemorris.com)  
14 Matthew S. Collom (mcollom@bakersfieldcity.us)  
15 Blanca Herrera (baherrera@duanemorris.com)

*Attorneys for  
Defendant/Respondent: City of  
Bakersfield*

16 Robert E. Donlan (rdonlan@wjhattorneys.com)  
17 Craig Carnes (ccarnes@wjhattorneys.com)  
18 Kevin W. Bursey (kbursey@wjhattorneys.com)  
19 Shawnda Grady (sgrady@wjhattorneys.com)  
20 Deric Wittenborn (dwittenborn@wjhattorneys.com)  
21 Richard Iger (richard@kerndelta.org)

*Attorneys for Real Party in  
Interest: Kern Delta Water  
District*

22 Scott K. Kuney (skuney@youngwooldridge.com)  
23 Brett A. Stroud (bstroud@youngwooldridge.com)

*Attorneys for Real Party in  
Interest: North Kern Water  
Storage District*

24 Daniel N. Raytis (dan@bbr.law)  
25 Heather McCoy (heather@bbr.law)  
26 Jennifer L. Spalletta (Jennifer.spalletta@stoel.com)

*Attorneys for Real Party in  
Interest: Rosedale-Rio Bravo  
Water Storage District*

27 Stephanie Prince (sprince@kcwa.com)  
28 Nicholas A. Jacobs (njacobs@somachlaw.com)  
Maximilian C. Bricker (mbricker@somachlaw.com)  
Pennie MacPherson (pmacpherson@somachlaw.com)  
Jennifer Estabrook (jestabrook@somachlaw.com)

*Attorney for Real Party in  
Interest: Kern County Water  
Agency*

Isaac L. St. Lawrence (isaac@mhwslegal.com)  
Amanda M. Rodriguez (amanda@mhwslegal.com)

*Attorneys for Real Party in  
Interest, Buena Vista Water  
Storage District*

Nathan A. Metcalf (nmetcalf@hansonbridgett.com)  
Rosslyn Hummer (bhummer@hansonbridgett.com)

*Attorneys for Intervenor:  
J G. Boswell Company*

1 Sean G. Herman (sherman@hansonbridgett.com)  
2 Jillian E. Ames (james@hansonbridgett.com)  
3 Sharrol S. Singh (ssingh@hansonbridgett.com)

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

6 Executed at Palo Alto, California, this 4th day of June, 2025.

7  
8  
9 Heather Smith  
(typed)

/s/ heathersmith  
(signature)