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.

J. G. BOSWELL COMPANY, et al.

Real Parties in Interest and Appellants.

On Appeal from the Superior Court for the State of California, County of Kern, Case No. BCV-22-103220, Hon. Gregory Pulskamp Presiding

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J. G. BOSWELL COMPANY'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FIFTH **APPELLATE DISTRICT, DIVISION**	COURT OF APPEAL CASE NUMBER: F087487
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APPELLANT/ PETITIONER: J. G. Boswell Company, et al. RESPONDENT/ REAL PARTY IN INTEREST: Bring Back the Kern, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party *(name*): J. G. Boswell Company

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1) James W. Boswell	Shareholder with more than 10% interest.
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 1, 2024

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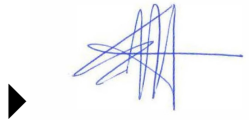
(TYPE OR PRINT NAME)



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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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I. INTRODUCTION

Plaintiffs and Respondents Bring Back the Kern et al. (collectively, "Plaintiffs") seek a preliminary injunction that would significantly change historic Kern River operations. That injunction would infringe on water and property rights, including those of real party and appellant J. G. Boswell Company ("Boswell"). It would rewrite California law governing the Kern River. And it would flood downstream properties, including Boswell's properties. Yet the trial court granted the preliminary injunction under Fish and Game Code section 5937[1] to increase Kern River flows through the City of Bakersfield ("Bakersfield") to "keep in good condition any fish" below certain weirs that Bakersfield operates. This preliminary injunction must be vacated for two reasons.

First, while improving habitat for certain fish is laudable, increasing flows to keep fish in good condition necessarily means

[1] Unless stated otherwise, all statutory citations reference the California Fish and Game Code.

less water for other beneficial uses, including uses by the Real Parties in Interest ("RPIs").[2] Article X, section 2, of the California Constitution requires that the trial court balance those other beneficial uses with the need under section 5937 for increasing flows for fish. Yet the trial court never balanced those uses. Rather than perform this necessary balancing, it instead relied on cases holding that courts need not balance when a different section of the Fish and Game Code applies, section 5946. But section 5946 applies only to dams constructed in a specific region of California that *does not* include the Kern River. Since section 5946 does not apply, the authority on which the trial court relied does not apply. Thus, the trial court was constitutionally required to balance beneficial uses before granting the preliminary injunction. Having failed to perform that requirement, however,

[2] The Real Parties in Interest include the following parties: North Kern Water Storage District, Kern Delta Water District, Buena Vista Water Storage District, Kern County Water Agency and Rosedale Rio-Bravo Water Storage District. As further explained in Section II below, J. G. Boswell Company is also an RPI in this case, but is referred to separately in this brief as "Boswell."

the trial court impermissibly granted the preliminary injunction and wrongly infringed on water rights and property rights.

Second, the trial court also erred by not considering the risk of flooding that its preliminary injunction will cause. In short, requiring more Kern River water to flow downstream will substantially and unreasonably increase the risk of flooding downstream properties in the Buena Vista and Tulare Lakebeds (the terminus of the Kern River). Boswell is the only party in this case with farmland in Buena Vista and Tulare Lakebeds. And Boswell's downstream properties will be flooded if the preliminary injunction is implemented. The trial court, however, issued the preliminary injunction before Boswell could intervene in this case. So it did not consider how the preliminary injunction will affect, including flooding, downstream properties and the damage that would cause.

Because it enjoys water rights associated with those downstream properties, Boswell joins in the arguments raised in

the RPIs' Opening Brief.[3] But Boswell writes separately to request that this Court promptly vacate the preliminary injunction because it did not consider the risk of flooding to downstream properties like Boswell's before granting the preliminary injunction.

For these reasons, Boswell respectfully requests that the Court vacate the preliminary injunction.

II. PROCEDURAL HISTORY

Boswell fully joins and incorporates herein the Procedural History of this case as presented in Section II of the RPIs' Opening Brief. Boswell adds below further procedural context relevant to Boswell.

Boswell moved to intervene on January 19, 2024, after learning of the October 30th ruling, November 9, 2023 preliminary injunction, and November 14, 2023 implementing order. As Boswell's motion explained, both the preliminary

[3] Boswell fully joins and incorporates herein the arguments raised in the RPIs' Opening Brief.

injunction and implementing order would adversely affect Boswell's rights to Kern River water and would flood Boswell's downstream properties. (J. G. Boswell Company's Request for Judicial Notice ("RJN"), Ex. 6 [Memorandum of Points and Authorities in Support of Motion for Leave to Intervene].) On February 14th, Plaintiffs and Boswell stipulated to Boswell intervening as an RPI. (RJN, Ex. 7 [Joint Stipulation for Boswell to Join as Real Party in Interest and Order].) The trial court granted the parties' stipulation and Boswell intervened as an RPI on February 15th. (*Id.*)

Boswell appealed the same orders on March 5th, after the trial court granted it intervenor status. This Court consolidated the appeals on February 26th and added Boswell's appeal under the consolidated case number on April 9th.

III. FACTUAL BACKGROUND

Boswell joins in fully and incorporates herein the Factual Background of this case as presented in Section I of the RPIs' Opening Brief. Boswell adds the following factual background

relevant to the danger of flooding.

The Buena Vista and Tulare Lakebeds are located downstream from Bakersfield, and can flood in high flow years. (RJN, Ex. 6 at p. 13.) In addition to owning a portion of the Second Point right originating from the Miller-Haggin Agreement,[4] Boswell owns farmland located in the Buena Vista and Tulare Lakebeds. (RJN, Ex. 6 at p.10.)

IV. STANDARD OF REVIEW

Courts review rulings on motions for preliminary injunctions under the abuse of discretion standard. (*Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29, 49.) "The general purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits." (*Tulare Lake Canal Company v. Stratford Public Utility District* (2023) 92 Cal.App.5th 380, 396.) In deciding whether to issue a preliminary injunction, a court weighs two

[4] Boswell owns 87.25% of the Carmel Water Right, or 3.452% of the Second Point Water Right. (RJN, Ex. 6.)

interrelated factors: (1) the likelihood the moving party will ultimately prevail on the merits, and (2) the relative interim harm to the parties from the issuance or non-issuance of the injunction. (*Iloh v. Regents of University of California* (2023) 87 Cal.App.5th 513, 522.) An injunction that fails to adequately consider all relevant harms is otherwise unenforceable. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1472-1473 ("*O'Connell*") [vacating preliminary injunction that failed to consider evidence that a preliminary injunction would cause substantial harm to others and the public interest].)

V. LEGAL DISCUSSION

A. The Trial Court Abused Its Discretion in Granting the Preliminary Injunction Without Balancing the Reasonable Use of Water Under the California Constitution.

1. Article X, section 2, of the California Constitution requires balancing when committing water to keep fish "in good condition" under section 5937.

Plaintiffs rooted their motion for preliminary injunction in Fish and Game Code section 5937, which provides in relevant

part, that:

> [t]he 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.

Using water for the "preservation and enhancement of fish," as section 5937 aims to do, is a beneficial use of water. (Wat. Code, § 1243, subd. (a).) As with other uses of water, however, using water to keep fish "in good condition" must be balanced under the "rule of reasonableness" provided under article X, section 2 of the California Constitution. (See *Natl. Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446 ("*National Audubon*") [requiring balancing when allocating water for public trust uses].)

The rule of reasonableness limits all water use in California. Article X, section 2, of the California Constitution codifies this rule, which provides:

> It is hereby declared that … 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] 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.

(See also Wat. Code, § 100 [requiring water resources of the State be put to beneficial use and prevent unreasonable use of such waters].) Under the California Constitution, "[b]eneficial use and reasonable use are two separate requirements, both of which must be met." (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1185 ("*Channelkeeper*"), internal quotations omitted.)

The rule of reasonableness requires a fact-specific process of balancing that applies to the use of all waters of the state, potentially limiting every water right. (See *Peabody v. Vallejo* (1935) 2 Cal.2d 351, 371-372 [finding that all uses of water must yield to doctrine of reasonable use].) Whether a particular water use is reasonable requires balancing and considering all interests. A "determination of reasonable use depends upon the totality of the circumstances presented." (*United States v. State Water Res. Control Bd.* (1986) 182 Cal.App.3d 82, 129

("*Racanelli*")[5]; see also Wat. Code §100.5 [the reasonableness rule itself requires considering all circumstances].) Given the rule's case-specific nature, "California courts have never defined what constitutes an unreasonable use of water, perhaps because the reasonableness of any particular use depends largely on the circumstances." (*Channelkeeper*, *supra*, 19 Cal.App.5th at p. 1185, internal quotations and citations omitted.) "What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need." (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567.)

So whether any use of water—including using water to keep fish "in good condition" under section 5937—is reasonable requires that courts consider (1) all needs of the parties that use water from a particular area, (2) all uses made of that water, and (3) all factors involved. (*Id.*, at pp. 524-525.) In granting a

[5] This case is colloquially known as "the *Racanelli* decision," named after its author, Justice Racanelli.

preliminary injunction under section 5937, the trial court erred by failing to balance these needs, uses, and factors.

2. Waters committed to public trust uses, which uses include section 5937 flows, also require balancing under article X, section 2, of the California Constitution.

The trial court also granted the preliminary injunction under the public trust doctrine, but without any required balancing. The public trust doctrine also limits water rights in California. (*Natl. Audubon Society*, *supra*, 33 Cal.3d at p. 425.) Under the public trust doctrine, the state "holds all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people." (*Colberg, Inc. v. State of California ex rel. Dept. of Public Works* (1967) 67 Cal.2d 408, 416.) "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." (*National Audubon*, *supra*, 33 Cal.3d at p. 446.)

But "[a]ll uses of water, including public trust uses, must

now conform to the standard of reasonable use." (*Id.* at p. 443.) And while Fish and Game Code section 5937 "is a legislative expression of the public trust protecting fish as trust resources when found below dams," that expression does not eliminate the need for balancing beneficial uses of water. (*California Trout v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 626 ("*Cal Trout I*"); see also 12 AA 2779.)

Like other interests in water use in California, public trust interests are not absolute. (*National Audubon*, *supra*, 33 Cal.3d at p. 443.) Public trust uses, including fish flows under section 5937, do not categorically trump other beneficial uses of water. *National Audubon*, the seminal public trust case, requires balancing these public interests. Put otherwise, state courts and agencies should "attempt, so far as feasible, to avoid or minimize any harm to [public trust] interests." (*Id.* at p. 426.)

When determining whether protecting public trust values like fish and wildlife is "feasible," courts must consider whether—and to what extent—protecting those values is "consistent with

the public interest." (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 778; *see also* Wat. Code § 1253 [State Water Resources Control Board ("State Board" or "SWRCB") shall allow appropriation of water for beneficial purposes that best support the public interest].) "Public interest requires that there be the greatest number of beneficial uses which the supply can yield, and water may be appropriated for beneficial uses subject to the rights of those who have a lawful priority." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1244, quoting *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925.)

Because public trust interests are not absolute, "[t]he state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses." (*National Audubon*, *supra*, 33 Cal.3d at p. 426.) The California Supreme Court explained that "[t]he population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values," and that

water may be appropriated and taken "from flowing streams and use[d] … in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust uses at the source stream." (*Id*. at p. 446.) "The public trust resources therefore need not be protected under every conceivable circumstance, but only in those where protection or harm minimization is feasible." (*Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, 21.)

This balancing must be done before adjudicating any rights concerning public trust resources. So when neither the Legislature nor any agency has resolved "the competing claims for the beneficial use of water in favor of preservation of their fisheries" (*California Trout, Inc. v. Superior Cour*t (1990) 218 Cal.App.3d 187, 195 ("*Cal Trout II*"), a court must balance the public trust interests with the other interests and beneficial uses (Cal. Const., art. X, § 2; *see also* Wat. Code § 100.5 [the reasonableness rule itself requires a consideration of all

circumstances]; *Racanelli.*, *supra*, 182 Cal.App.3d at p. 129 [a "determination of reasonable use depends upon the totality of the circumstances presented"]). Yet none of that happened here. When considering the preliminary injunction motion, the trial court did not consider other interests and beneficial uses. (See 12 AA 2779-2781 [October 30th ruling explaining that Section 5937 "was deliberately adopted by the State Legislature after balancing the competing uses of water," thus the court need not consider other beneficial uses of water in determining whether Plaintiffs were likely to succeed on the merits].)

3. Because the trial court erroneously applied section 5946 and the *Cal Trout* cases, it failed to perform the required balancing.

Though the California Constitution required balancing, the trial court abused its discretion by granting the preliminary injunction without balancing the interests of keeping fish "in good condition" with all other interests and beneficial uses in Kern River water. This error is manifest in the trial court's

analysis of whether Plaintiffs would likely succeed on the merits.

The trial court assumed that "[c]ase law … very clearly confirms 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 2779-2781.) But the case law on which the trial court relied for that erroneous conclusion focused on the Legislature's balancing under Fish and Game Code section 5946, not section 5937. (12 AA 2780-2781.) Section 5946 is not relevant to and cannot apply here. So in relying on cases interpreting section 5946's relationship with section 5937, the trial court misapplied the law and thereby erroneously avoided its duty to balance water uses under the California Constitution.

a. Fish and Game Code Section 5946 does not apply to Kern County.

The crux of the trial court's error is that it conflated sections 5937 and 5946 of the Fish and Game Code.

Section 5946 applies only within the jurisdictions of Mono

and Inyo Counties by requiring, in relevant part, that "[n]o permit or license to appropriate water in District 41/2 shall be issued by the State Water Rights Board after September 9, 1953, unless conditioned upon full compliance with Section 5937." While water appropriated in District 41/2 must be conditioned on full compliance with section 5937, Fish and Game District 41/2 is exclusive to portions of the Counties of Mono and Inyo. (§ 11012.)

The Kern River, however, is in Kern County, which is within District 3 1/2. (§ 11009.) Because the Kern River is *not* in District 4 1/2, section 5946 does not apply.[6]

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[6] Legislative history reinforces that section 5946 applies only to Inyo and Mono Counties. Senate Bill 78—which added section 5946—contained an urgency clause to address proposed "diversions of water in District 4 1/2" that "will destroy all of the fish life in large sections of the streams in that district and interfere with the economy in area which is dependent to a large extent on recreation." (*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 601.) The Legislature explained that "[i]t is necessary that this act take effect immediately to prevent further destruction of the fish life in District 4 ½." (*Ibid.*) The Bill's author, Senator Charles Brown from the 28th District (Inyo, Mono and Alpine Counties), explained that the "bill was proposed as a solution of a problem which threatens to destroy the economy of both Mono and Inyo Counties," because most of the water originating there "is being exported for use in the City of Los Angeles." (RJN, Ex. 4 [Senate

b. The trial court erroneously applied the *Cal Trout* cases.

Because Fish and Game Code section 5946 does not apply to the Kern River, cases involving section 5946 that interpret and apply section 5937 also do not apply. The trial court, however, relied on two cases—*Cal Trout I* and *Cal Trout II*—that each involved only District 4 1/2 and only section 5946. Neither case applies to Plaintiffs' claims in Kern County.

The *Cal Trout* cases applied section 5946 to address a specific problem: the Department of Water & Power of the City of Los Angeles ("L.A. Water and Power") over appropriating and exporting water from Mono and Inyo Counties. (*Cal Trout II*, *supra*, 218 Cal.App.3d at p. 194.) Whatever reasoning the courts provided in the *Cal Trout* cases, and however they applied section 5946 in Mono County, has no relationship to how the trial court should have applied an entirely different section, 5937, on the Kern River.

Bill No. 78] at p. 75.)

Because section 5946 applied, the *Cal Trout* cases did not apply section 5937—which *does* apply to dams on the Kern River in Kern County. *Cal Trout I* found that it "need not reach the question of the application of section 5937 alone as a rule affecting the appropriation of water," which was consistent given that section 5946 applied instead. (*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 601.)

To be sure, as the *Cal Trout* cases acknowledged, "section 5946 operates as a legislative choice among competing uses of water" in Mono and Inyo counties. (*Cal Trout I*, *supra*, 207 Cal.App.3d at pp. 600-601.) As an express legislative approach to a *specific* emergency situation (RJN, Ex. 6 at pp. 1, 75), "by the enactment of section 5946, the Legislature had resolved the competing claims for the beneficial use of water in these streams in favor of preservation of their fisheries" (*Cal Trout II*, *supra*, 218 Cal.App.3d at p. 195). So for Mono and Inyo counties, "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." (*Id*. at pp. 201, 203.) And in those two counties, but only those two counties, "section 5946 takes this case outside the purview of statutes which may allow the Water Board to balance competing beneficial uses of water and to determine the priority of use." (*Ibid*.) But that same legislative determination was not made for section 5937.

Though section 5946 does not apply to Kern River waters, the trial court primarily relies on the *Cal Trout* cases to wrongly conclude that, for section 5937, the Legislature has already balanced competing uses on the Kern River. (12 AA 2780-2781.) Through its analysis of whether Plaintiffs will likely prevail on the merits, the trial court includes and repeats a parenthetical—"[5937 via 5946]"—that implies the section 5946 analysis on Mono County waters in the *Cal Trout* cases applies with equal force to a section 5937 analysis on Kern County waters. That is reversible legal error. Because section 5946 does not apply to Kern River waters, it does not apply to this dispute. And because

section 5946 does not apply to this dispute, the analysis of constitutional balancing in the *Cal Trout* cases cannot apply either.

While the *Cal Trout* cases are not controlling on section 5937, the courts' analyses reinforce the trial court's duty to balance. Consider that *Cal Trout I* explained that restriction on legislative determinations remain:

> the Legislature's broad authority is not unlimited. If a statute sanctioned a manifestly unreasonable use of water, it would transgress the [C]onstitution [Art 10, sec. 2]. That is not the case here. 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.

(*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 625.) By recognizing that the rule of reasonableness under article X, section 2, limits the Legislature's broad authority, the court was recognizing that neither section 5937 nor 5946 can preempt the constitutional rule of reasonableness. (See also *Wright v. Compton Unified Sch. Dist.*

(1975) 46 Cal.App.3d 177, 183 [a state constitution is controlling and statutes which are inconsistent with and contrary to constitutional provisions cannot stand]; see also *Byers v. Board of Sup'rs of San Bernardino County* (1968) 262 Cal.App.2d 148, 157 [courts must uphold the California Constitution's supremacy].) And because the Constitution requires reasonableness, the *Cal Trout* cases recognize that courts must balance reasonable uses, including before issuing preliminary injunctions under section 5937. Because that was not done, the October 30th ruling, November 9th injunction, and November 14th implementing order must be vacated.

c. The federal *Patterson* cases also do not excuse the trial court's failure to balance.

To a lesser extent, the trial court also relied on the "*Patterson*" cases, which are two federal cases out of the Eastern District of California. (12 AA 2780-2781.) As federal cases, the *Patterson* cases are not binding precedent. (See *Nunez v. Nevell Group, Inc.* (2019) 35 Cal.App.5th 838, 847-848 ["Federal

decisional authority does not bind the California Courts of Appeal on matters of state law"].) These cases also do not support the trial court's failure to balance reasonable uses.

The *Patterson* cases did not address whether courts must balance other beneficial uses of water under section 5937. While the district court cited the *Cal Trout* cases for the erroneous proposition that the Legislature had already balanced competing claims to water under section 5937 (*Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F. Supp. 2d 906, 918-919 ("*Patterson II*")), the actual dicta concerns whether section 5937 provides alternative requirements for releasing water. The *Patterson II* court explained that section 5937 "should be read to require a dam owner to release enough water from the dam to 'keep'—that is, to maintain in good condition—either 'any fish that may be planted' or, in the alternative, 'any fish that may ... exist below the dam.'" (*Patterson II*, *supra*, 333 F.Supp.2d at p. 917.) That discussion, however, solely focused on the *amount* of water flowing below a dam. So it is not an issue relevant to

deciding Plaintiffs' preliminary injunction request by conducting the required balancing first. Thus, the *Patterson* cases did not address the issue and offers no support for excusing the trial court's failure to balance under section 5937.

Further, because the *Patterson* cases are not in Mono or Inyo Counties, section 5946 did not apply. Yet the district court acted as if section 5946 did apply in the *Patterson* cases. The district court's analysis on balancing thus is out of context and misapplies the *Cal Trout* cases. Still, as *Patterson II* acknowledged,

> *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.

(*Patterson II*, *supra*, 333 F.Supp.2d 906 at p. 920, emphasis added.) Here, the trial court did not acknowledge that sections 5937 and 5946 are separate statutes. The trial court thus abused its discretion by inferring from the *Patterson* cases that it need not balance under section 5937.

Other federal cases reveal the trial court's error. Take

Wishtoyo Found. v. United Water Conservation Dist. (C.D.Cal. Jan. 5, 2023, No. 2:22-cv-08657-DOC-PLA) 2023 U.S.Dist.LEXIS 2156), which also involved claims over whether a dam released enough water under section 5937. In *Wishtoyo*, the plaintiffs argued that "there is to be no balancing of [the defendant's] purported interests with its violations of California Fish and Game Code section 5937" because the California legislature has "already struck the balance of the equities and consideration of public interest concerns." (*Wishtoyo*, *supra*, C.D.Cal. No. 2:22-cv-08657-DOC-PLA at p. 15.) The district court disagreed. Under the public trust doctrine, as the court explained, "the state may make decisions that balance competing public trust uses but is not free to *completely* ignore or destroy trust resources in favor of non-trust uses, including potential public interests such as agricultural and municipal supply." (*Ibid.*) So the *Wishtoyo* court balanced competing beneficial uses of the water and denied the plaintiffs' request for injunctive relief. The court concluded that

> Plaintiffs' state law claims center around whether Defendant's diversion or use of water in the Santa Clara

> River offers reasonable environmental protection and *sufficiently balances competing interests. ... Because the Court's Wishtoyo I rulings weighed a number of interests*, implicated here and by state law, that Plaintiffs have not met their burden of demonstrating a likelihood of success on the merits.

(*Id*. at pp. 15-16, emphasis added.) Thus, in that section 5937 case, the court balanced uses as the California Constitution requires.

While not binding, *Wishtoyo* shows that when sections 5937 and 5946 are not conflated and when section 5946 does not apply, courts balance. This approach is more consistent with *National Audubon* and its progeny than a federal court's decision in *Patterson* that did not expressly address these issues.

In sum, neither the *Cal Trout* cases nor the *Patterson* cases apply to Plaintiffs' claims. Accordingly, the trial court was wrong when it concluded—based on its interpretation of those cases—that Plaintiffs will likely prevail on the merits because "[c]ase law … very clearly confirms that Section 5937 was deliberately adopted by the State Legislature after balancing the competing uses of water … ." (12 AA 2781.)

d. Interpreting section 5946 to apply to Kern County contradicts traditional canons of statutory interpretation.

Setting aside the case law contradicting the trial court's conclusion that it need not balance, the trial court's analysis breaks from traditional canons of statutory interpretation too.

Courts should interpret statutes to avoid redundancies. (*Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416, 1428 [avoid construction that makes some words surplusage].) The Legislature would not enact a statute like section 5946 for Mono and Inyo counties that specifically requires full compliance with section 5937 without further balancing if full compliance—meaning, prohibiting balancing of competing beneficial uses of water—was already an existing statutory requirement under section 5937.

Nor do the courts in the *Cal Trout* cases hint that section 5937 creates a mandatory duty beyond the limitation to section 5946. If "full compliance" with section 5937 were unequivocally required for all dam operators in the State then the Legislature enacting section 5946 in District 4 1/2 would be superfluous.

(*Arntz v. Sup. Ct*. (2010) 187 Cal.App.4th 1082, 1097 [providing that surplusage should be avoided], accord. *Marx v. Gen. Revenue Corp*. (2013) 568 U.S. 371, 386 ["[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."].) The trial court's statutory interpretation assumptions thus violated these fundamental canons in rendering section 5946 superfluous by erroneously concluding that the Legislature resolved the required balancing for every instream flow situation in the State by enacting section 5937. This is reversible error and deprived Boswell and the other RPIs of their rights to balancing.

e. Other authorities the trial court's October 30th ruling granting the injunction cites actually support balancing under Fish and Game Code section 5937.

The trial court's October 30th ruling granting the injunction also required that Bakersfield and Plaintiffs engage in a good faith consultation to set flow rates for keeping fish below the weirs "in good condition." (12 AA 2789.) For "guidance regarding the meaning of 'good condition,'" the trial court cites an unpublished superior court order and State Board decisions interpreting section 5937. (*Ibid*.) But these authorities either do not interpret section 5937 or they actually balance uses under section 5937. None supports the preliminary injunction.

The State Board Order—Walker River Irrigation District - SWRCB Order 90-18 (1990), WL 264521—related to Walker Creek in Mono County. This administrative action took place after *Cal Trout II*. Because the case was in Mono County, it applied section 5946 rather than section 5937. (*In the Matter of the Complaint By California Trout, Inc. v. Walker River Irrigation District License 9407* (application 1389), *Bridgeport*

Reservoir (Cal.St.Wat.Res.Bd., Dec. 10, 1990), Order No. 90-18, WL 264521, at *1.) (RJN, Ex. 1) This order thus has no significant relevance to this case.

The trial court then cites *Putah Creek v. Solano Irrigation* 7 CSPA-294 District, Sacramento Superior Court No. CV515766 (April 8, 1996). (12 AA 2789.) While Boswell could not find any April 8, 1996 ruling, decision, or order in the *Putah Creek* cases, the trial court in *Putah Creek* issued a Statement of Decision on July 19, 1996 in which the court balanced under section 5937. (RJN, Ex. 5 [July 19, 1996 Statement of Decision – Doc. No. 20852953].) At any rate, the trial court should not have cited, or relied on, the unpublished *Putah Creek* "decision," whichever order or document it actually was. (See Cal. Rules of Court, rule 8.115, subd. (a) [uncertified trial court opinions "must not be cited or relied on by a court … in any other action."].)

The October 30th ruling next cites two State Board orders—"Bear Creek – SWRCB Order 95-4 (1995), WL 418658 [and] Lagunitas Creek – SWRCB Order 95-17 (1995), WL

17907885.)"—in which the State Board balances.[7] (*In the Matter of the Diversion and Use of Water From Big Bear Lake and Bear Creek In San Bernardino County By Big Bear Municipal Water District and Bear Valley Mutual Water Company*, (Cal.St.Wat.Res.Bd., Feb. 16, 1995), Order No. WR 95-4, WL 17908291 ("*Bear Creek*") (RJN, Ex. 2); *In the Matter of Fishery Protection and Water Right Issues of Lagunitas Creek Involving Water Right Permits 5633, 9390, 2800 and 18546 of Marin Municipal Water District (applications 9892, 14278, 17317, and*

[7] The State Board has statutory authority to allocate water as a scarce resource. (Wat. Code, §§ 1253-1257.5.) It exercises the adjudicatory and regulatory functions of the state in the field of water resources (Wat. Code, §§ 174(a), 1050), and has exclusive jurisdiction over the right to appropriate post-1914 water rights and the use of such water (Wat. Code, § 1225). The Legislature has given the State Board "a 'broad,' 'open-ended,' 'expansive' authority [] to undertake comprehensive planning and allocation of water resources," including adjudication of competing water claims. (*National Audubon*, *supra*, 33 Cal. 3d at p. 449, citations omitted.) The State Board has broad authority to establish minimum flows and take other measures needed for protection of fisheries and other public trust resources. That authority is provided by article X, section 2 of the California Constitution, Water Code sections 100 and 275, the public trust doctrine as articulated by the *National Audubon*, and Water Code sections 1243 and 1253.

26242), Water Right Permits 19724 and 19725 (applications 25062 and 35079) and Diversion of Water under Claim of Pre-1914 Appropriative Water Rights By North Marin Water District and Water Right License 4324 (application 13965) and Diversion of Water under Claim of Riparian Right by Waldo Giacomini (Cal.St.Wat.Res.Bd., Oct. 26, 1995), Order No. WR 95-17, WL 17907885 ("*Lagunitas Creek*") (RJN, Ex. 3).) In *Bear Creek*, San Bernardino County, the State Board acknowledged that Bear Creek is not in District 4 1/2 (Mono and Inyo Counties), is not subject to section 5946, and thus balancing is required. (*Bear Creek*, *supra*, 1995 WL 17908291 at pp. 9, 11, 18.) Consistent with *National Audubon*, the State Board found that diversion can outweigh instream flows:

> [n]o person can acquire a vested right to appropriate water in a manner harmful to interests protected by the public trust. But if the public interest in the diversion outweighs the harm to public trust values, water may be appropriated despite harm to public trust values.

(*Id*., at p. 9.) As part of its balancing, the State Board states that instream flows for fish could be harmful to other users:

> [a] release of water that is much in excess of the amount needed to keep the fish in good condition, however, could be unreasonable within the meaning of California Constitution Article X, section 2 *if there would be adverse effects on other beneficial uses of the water*.

(*Id*. at p. 11, emphasis added.)

Likewise in *Lagunitas Creek* in Marin County, the State Board balanced competing uses. The State Board found that "in determining the reasonableness of a particular use of water or method of diversion, *other competing water demands and beneficial uses of water must be considered*," and that section 5937 "should be taken into account ... ." (*Lagunitas Creek*, *supra,* 1995 WL 17907885, at p. 6, emphasis added.) As part of the balancing the State Board observed that protecting public trust resources does not override the duty to balance competing uses:

> [i]n view of the tremendous changes that have occurred in the Lagunitas Creek basin, it is not realistic to suggest that the requirements established in this order can restore the fishery to what existed in the unimpaired condition. The task before the SWRCB is to *regulate the major water diversions in the basin in a manner that maximizes the competing beneficial uses of water, maintains fish in good condition, and protects public trust resources when feasible*.

(*Id*., at p. 34, emphasis added.)

What these decisions have in common is that each (1) occurred outside of Mono and Inyo Counties, so section 5946 did not apply; (2) aligns with *National Audubon*; and (3) balanced competing public interest beneficial uses of water. Not performing this required balancing is reversible error. The trial court's decision on the likelihood of success on the merits should be vacated.

4. The trial court's preliminary injunction should be vacated.

The trial court abused its discretion by not balancing uses of water as the California Constitution requires. By failing to balance, the trial court necessarily erred in determining Plaintiffs' likelihood of succeeding on the merits. Had the court balanced other beneficial uses of the Kern River, its analysis of the likelihood of whether Plaintiffs would succeed on the merits would not only be different, but there is a "reasonable chance" that a ruling on the injunction would favor Boswell and the other

RPIs. (*Cassim v. Allstate Insurance Company* (2004) 33 Cal.4th 780, 800 [defining prejudicial error as present when there is a "reasonable chance" of a different result absent the trial court error].) There are two reasons why there's a reasonable chance of a different result.

First, the trial court acknowledged that a determination of flows necessary to keep fish in good condition under section 5937 is a "complex undertaking that encompasses a wide variety of topics including the physical, biological, and hydrological sciences" that "may also require deep knowledge of the local water systems." (12 AA 2787.) The court never conducted the required fact specific analysis of what fish are present and when, the current condition of the fish, what their flow and habitat needs are, or whether the system can provide sufficient water in all hydrologic conditions. Instead, it accepted Plaintiffs and Bakersfield's 40 percent flow proposal with no idea of when or where fish are present, of what positive effect this injunction would have on the fish, or of how to balance the impacts from the

loss of 40% of the water on other public interest beneficial uses. Plaintiffs presented no evidence showing how 40 percent flow is a reasonable amount of water for fish. And the trial court did not consider what evidence the parties did provide because it incorrectly thought it could not balance the uses of water.[8]

Second, as discussed in section V.B below, the trial court never considered the avoidable impacts of flooding from its ordered interim flow regime. The trial court erred in granting the preliminary injunction without balancing the reasonable use of water under the California Constitution before determining the applicability of Fish and Game Code section 5937, thereby abusing its discretion. For this reason, the preliminary injunction should be vacated.

[8] Boswell joins in Argument Section V of the RPIs' Opening Brief arguing that the implementing order was completely unfounded as a matter of law and as a matter of substantial evidence.

B. The Trial Court Did Not Account For Downstream Interests And Thus Prevent Flooding When Deciding Whether to Issue the Preliminary Injunction.

Even had the trial court balanced uses of water, the preliminary injunction should be vacated because the court overlooked the risk of flooding from increased flows.

A trial court must consider all relative harms before it may issue a preliminary injunction. A failure to do so warrants reversal. (See, e.g., *White v. Davis* (2003) 30 Cal.4th 528, 560 [preliminary injunction reversed for failure to properly balance relevant harms]; *O'Connell*, *supra*, 141 Cal.App.4th at p. 1472 [failure to consider and balance the harms in granting preliminary injunction is "sufficient error" requiring vacation].) The trial court erred because it never considered whether its preliminary injunction will flood and thus harm Boswell's properties downstream of the McClung Weir.

Boswell could not intervene and become a party in the trial court proceedings until February 2024, well after the October 30th ruling and November 9th implementing order. (12 AA 2768-

2822; RJN, Ex. 6.) Until then, no other party in the lawsuit owned land in the Buena Vista and Tulare Lakebeds. Nor would any party have any concern over flooding of downstream properties. So, perhaps understandably, the trial court did not weigh the potential harm from flooding that the preliminary injunction would cause. While understandable, it means the preliminary injunction fails to adequately consider all relevant harms, including the obvious danger of downstream flooding.

An interim flow regime similar to the 40 percent regime originally set forth in the preliminary injunction will lead to flooding under certain conditions. As Boswell's Motion to Intervene explained, a 40 percent flow regime could trigger Buena Vista Water Storage District to exercise its right to flood Boswell's lands in the Buena Vista Lakebed. (RJN, Ex. 6 at pp. 11-13.) Boswell intervened to protect against the risk of the injunction flooding Boswell's properties in wet years.

While these arguments require that the trial court revisit the preliminary injunction, Boswell appreciates that the trial

court has not yet taken these harms into account. Trial courts ordinarily can modify or vacate a preliminary injunction "when it is shown that there has been a change in the controlling facts upon which the injunction rested." (*M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. of Culinary etc. Union* (1981) 124 Cal.App.3d 666, 674, internal citations omitted.) But the unique procedural history eliminates that option. Boswell became a party to the trial court proceedings after the RPIs had appealed. (16 AA 3766-3859; 17 AA 3864-3964; RJN, Ex. 7.) And in May, this Court stayed the November 9th preliminary injunction and November 14th implementing order.

Boswell thus finds itself in a Catch 22 in which its interests are not adequately represented under the current preliminary injunction, yet the trial court cannot modify its terms pending appeal. While the stay of the injunction lessens Boswell's fear of any immediate flooding pending this appeal, any flooding would be devastating. Accordingly, Boswell requests that this Court vacate the preliminary injunction.

VI. CONCLUSION

For all these reasons, the trial court abused its discretion in granting the preliminary injunction. The trial court failed to balance the reasonable uses of water under the California Constitution before applying Fish and Game Code section 5937. And it did not consider the risk of flooding Boswell's properties. Boswell respectfully requests that the Court vacate the preliminary injunction.

DATED: July 1, 2024 HANSON BRIDGETT LLP

By: 

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CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, Rules 8.204(c), 8.486(a)(6))

I, Jillian Ames, counsel for Appellant J. G. Boswell Company, hereby certify, in reliance on a word count by Microsoft Word, the program used to prepare the foregoing brief, that it contains 6,902 words, including footnotes (and excluding caption, certificate of interested entities or persons, tables, signature block, and this certification.

Dated: July 1, 2024

By: */s/ Jillian E. Ames*
Jillian E. Ames

PROOF OF SERVICE

Bring Back the Kern v. City of Bakersfield,
Superior Court for the State of California, County of Kern
Superior Court Case No. BCV-22-103220
Court of Appeals 5th Appellate District Court Case No.: F087487

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 425 Market Street, 26th Floor, San Francisco, CA 94105.

On July 1, 2024, I served true copies of the following document(s) described as: **J.G. BOSWELL COMPANY'S OPENING BRIEF**

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

Executed on July 1, 2024, at San Bruno, California.

/s/ *Sharrol S. Singh*
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