

**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

J. G. BOSWELL COMPANY'S REPLY BRIEF

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INTRODUCTION

Plaintiffs Bring Back the Kern, Water Audit California, and Defendant City of Bakersfield's¹ briefs are fundamentally flawed in three ways.

First, Plaintiffs cannot justify the trial court's legal error of failing to conduct the constitutionally-mandated balancing of competing beneficial uses of water before issuing the November 9th preliminary injunction. The Legislature could not have "pre-balanced" competing uses of water when enacting section 5937 because it enacted section 5937 before voters approved the mandate of reasonable water use in article X, section 2 of the Constitution. Plaintiffs do not suggest otherwise—because they cannot refute these facts. Thus, because the trial court was constitutionally-mandated to conduct the balancing, and because the balancing provision of the Constitution has no preliminary injunction exception, the trial court had no discretion to avoid the

¹ Due to the limited nature of its arguments, Bakersfield's brief is discussed only where it departs from Plaintiffs' briefs.

balancing.

Second, Plaintiffs and Bakersfield are wrong that ignoring how a preliminary injunction's terms will flood downstream properties is not an abuse of the trial court's discretion. Any injunction must consider and protect against all relevant circumstances. And in requiring that more water flow downstream, a preliminary injunction must consider whether more flow risks flooding downstream interests. The trial court thus abused its discretion by granting a preliminary injunction and implementing order without considering these downstream interests and flooding risk.

Third, Plaintiffs reiterate their dismissal motion by suggesting that Boswell's appeal is untimely, which argument this Court's August 27, 2024 order already rejected. As Boswell explained in opposing that failed motion to dismiss, Boswell timely appealed the preliminary injunction and implementing orders. Both orders are properly before this Court.

At bottom, Plaintiffs and Bakersfield have not—and

cannot—explain away the trial court’s failure to conduct the constitutionally-mandated balancing of beneficial uses of water, and failure to consider the substantial harm to Boswell’s downstream properties, before issuing a preliminary injunction. For these reasons, Boswell requests that this Court vacate the preliminary injunction so the trial court may perform this required analysis.

ARGUMENT

I. **THOUGH IT IS AN AS-APPLIED CHALLENGE, PLAINTIFFS MISCONSTRUE BOSWELL’S APPEAL AS A FACIAL CHALLENGE TO SECTION 5937.**

Plaintiffs appear to misunderstand why Boswell has appealed the trial court’s preliminary injunction. As Boswell’s Opening Brief explained, the *Cal Trout* cases analyze a different and irrelevant Fish and Game Code provision, section 5946, that does not apply to the Kern River. Yet the trial court relied on section 5946 case law to excuse its constitutional duty to balance competing beneficial uses of water before granting the preliminary injunction. Rather than address the distinction

between sections 5946 (not relevant here) and 5937 (relevant here), Plaintiffs conflate the two statutes as one. And they misconstrue Boswell’s argument that article X, section 2, of the California Constitution required the trial court to balance competing uses before granting a preliminary injunction under Fish and Game Code section 5937.

Bring Back the Kern et. al. (“BBK”) introduces its brief with the incorrect premise that the “appeal tests the continued validity” and “challenge[s] the constitutionality” of section 5937. (BBK RB pp. 8, 30 [“Appellants ask this Court to declare this law unconstitutional”].) Boswell does neither. Boswell challenges the constitutionality of the trial court’s application of section 5937 without first balancing other beneficial uses of water. Under article X, section 2, of the California Constitution, beneficial use cannot be equated with reasonable use. (*Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 143 (“*Joslin*”).) “Beneficial 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*”), quotations omitted.)² And when there are competing beneficial uses, the court must balance. So this appeal is straightforward. On three separate grounds, it is an as-applied challenge to section 5937, not a facial challenge.

First, this case involves the Kern River located in Kern County and section 5937 of the Fish and Game Code. This appeal does not involve section 5946, which applies only in Mono and Inyo Counties (section 11009). While the Legislature has balanced competing water uses based on the specific conditions in those counties, it has not done so for Kern River. Therefore, the primary cases interpreting only section 5946 that the trial court relied on—*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 (“*Cal Trout I*”) and *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 (“*Cal Trout II*”)—are misplaced. The *Cal Trout* cases provide no

² While Boswell agrees that dedicating water flows to fishery preservation is a beneficial use of water (Wat. Code, § 1243; *Bowell AOB* p. 17), it is not the only beneficial use.

support for the court's determination that Plaintiffs have very high likelihood of success on the merits.

Second, section 5937 was enacted before the voters added the mandate of reasonable use of water in article X, section 2 of the Constitution. Unlike section 5946, the Legislature could not have considered or balanced competing public interest beneficial uses of water when it enacted section 5937. At the time it enacted the law, there was simply no need to do so.

Third, all uses of water, including public trust uses, are subject to balancing under the California Constitution. (*Natl. Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 443 (“*National Audubon*”).) Therefore, the trial court abused its discretion when it determined that legislative balancing occurred before section 5937's enactment:

Case law therefore 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. For the foregoing reasons, this Court must conclude that Plaintiffs have a very high likelihood of succeeding on the merits.

(12 AA 2779–2781.) The trial court did not provide adequate

support that conclusion. Nor have Plaintiffs shown why section 5946 applies here. This abuse of discretion requires vacating the preliminary injunction.

A. Boswell Does Not Facially Challenge the Constitutionality of Section 5937, But Instead Challenges Whether the Trial Court Applied It Constitutionally.

BBK argues that article X, section 2, of the California Constitution authorizes the Legislature to enact laws to carry out its provisions. (BBK RB pp. 18–19.) Although disjoined, Water Audit also appears to argue that the Legislature is free to make laws to preserve fish. (Water Audit RB pp. 26–27, 41–42.) While Boswell agrees, these unremarkable observations do not excuse trial courts from doing what the *Constitution* requires: balancing competing uses of water when applying section 5937.

“[A] court may apply a facially sufficient statute in an unconstitutional manner.” (*Punsly v. Ho* (2001) 87 Cal.App.4th 1099, 1104.) “The practical effect of holding a statute unconstitutional “as applied” is to prevent its future application

in a similar context, but not to render it utterly inoperative.”

(*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 167, citation omitted.) Here, the trial court was required to properly apply article X, section 2, rather than just acknowledge its facial validity:

[Courts have] an obligation, however, to look beyond the facial validity of a statute that is subject to possible unconstitutional administration since a law though fair on its face and impartial in appearance may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceeding.

(*In re Rodriguez* (1975) 14 Cal.3d 639, 648 [superseded by statute on different grounds by *In re Palmer* (2021) 10 Cal 5th 959], internal quotations omitted.) The trial court’s failure to perform the constitutionally required balancing was such a “serious abuse[]” affecting substantial rights of Boswell and others.

Missing the point of this appeal, BBK tries reframing the appeal instead as Boswell quarreling with legislative choice:

The question here is thus not whether *applying section 5937 to the Kern River* would be manifestly unreasonable, but rather whether the Legislature’s policy choice expressed in section 5937—that forbids the complete drying

up of fishing streams throughout the state—is manifestly unreasonable or a transgression of the Constitution.

(BBK RB pp. 27–28.) Of course, section 5937 can and does apply to the Kern River. But how the trial court applies the statute must be constitutional.

Tellingly, neither BBK nor Water Audit argue that the California Constitution does not require balancing. There is no doubt it does.

Water Audit appears instead to believe that standard preliminary injunction balancing of the equities is a proxy for the very different, very specific balancing of beneficial uses under article X, section 2. Thus, so goes Water Audit’s argument, the trial court “balanced” when determining to apply section 5937. (Water Audit RB pp. 11; 39; 40 [“Further, Boswell falsely asserts that the Court failed to balance its interests in issuing the Injunction and Implementation Orders.”]) That belief conflates separate legal requirements. While the trial court balanced in weighing the potential harms (excluding the potential flooding of Boswell’s property) in issuing the preliminary injunction, it

clearly did not attempt to balance beneficial uses in its section

5937 analysis:

It is important to note that the Court weighed the potential harms to the respective parties in this case only on the procedural issue of deciding whether a preliminary injunction should issue. This discretionary analysis was not done as part of the process to determine the applicability of Section 5937 as an appropriate use of water.

(12 AA 2786.) And there is an obvious reason that the trial court *failed* to conduct the beneficial use balancing: it erroneously concluded the Legislature had already done it. The order it seeks to defend flouts Water Audit’s balancing argument.

Though the parties agree that balancing is required here, the trial court erroneously concluded that the *Cal Trout* cases found that the Legislature already conducted that required balancing. (12 AA 2779–2781; 12 AA 2786 [“Therefore, this Court has no jurisdiction to override the State Legislature and re-weigh the competing interests when it comes to addressing the underlying, substantive issue.”].) Rather than acknowledge the trial court’s error, Plaintiffs support it.

But Plaintiffs’ arguments also seem to go further.

Plaintiffs appear to argue that section 5937 mandates a fish-first flow regime no matter how it impacts other reasonable beneficial uses of water. That argument is internally inconsistent given that it implies that the balancing (which, again, never occurred) somehow resulted in a fish-first statute immune from article X, section 2. But if accepted, that argument also would open the door to countless circumstances when a fish-first use of water would be unreasonable. And “[i]f a statute sanctioned a manifestly unreasonable use of water, it would transgress the [C]onstitution [Art 10, sec. 2].” (*Cal Trout I, supra*, 207 Cal.App.3d at p. 625.)

For example, what if different fish species have different water needs throughout the year so that essentially all water is used to meet “good condition,” leaving no water for any other beneficial use and crops to wither and die? Or what if the water required for one fish species deprived the later water needs of another species? What if an extended drought requires that all available water is devoted to keep fish in good condition? What if

watershed conditions have changed so much that, no matter how much water is provided for fish, they will never be in good condition under Plaintiffs' standards due to lack of suitable habitat? What if, instead of native fish, there are invasive fish species that cause environmental damage below a dam? Must their good condition be assured before water can be used for any other beneficial use? And what if other riparian corridor owners fail to keep their portions of streams in good condition for fish?

To date, neither any party nor the trial court has analyzed which fish species are present in the river and what their "good condition" water needs are. No party has assessed if, when, or how the Kern River naturally dries. Likewise, no party has evaluated the effects of a reduced water supply on municipal, agricultural, and other beneficial uses due to increased fish flows. The trial court should have answered these questions. And in answering these questions, it would have conducted the fact specific inquiry mandated under article X, section 2, of the California Constitution. (*Peabody v. City of Vallejo* (1935) 2

Cal.2d 351, 371–372 (“*Peabody*”); *Joslin, supra*, 67 Cal.2d at p. 140; *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567; *Channelkeeper, supra*, 19 Cal.App.5th at p. 1185.) Yet despite Plaintiffs providing no evidence to the court on these details relevant to balancing beneficial uses, Plaintiffs obtained a preliminary injunction. The trial court simply did not conduct this required balancing in determining that Plaintiffs had a high likelihood of success on the merits. This abuse of discretion requires vacating the preliminary injunction.

B. The Legislature Did Not Perform the Required Balancing When Enacting Section 5937 Because Section 5937 Predates the Balancing Requirements Under Article X, Section 2 of the California Constitution.

Defying time, BBK claims that somehow the Legislature already performed the balancing required under the California Constitution when enacting section 5937. (BBK RB p. 24.) This argument is irreconcilable with BBK’s earlier acknowledgment that section 5937 “existed before the enactment of Article X, section 2” (BBK RB p. 23.) BBK affirms, as it must, that

“Section 5937 has its origins in the earliest days of California’s statehood” and its “current language first appeared in the 1915.” (BBK RB p. 22; see also Water Audit RB p. 51 [“Section 5937 ... traces its lineage to 1852”].) All this history, like section 5937 itself, preceded voter approval of the reasonable use rule under article X, section 2, of the California Constitution.

Article X, section 2 of the Constitution was originally adopted in 1928 in response to the Supreme Court’s decision in *Herminghaus v. Southern California Edison Co.* (1926) 200 Cal. 81 (*Herminghaus*).³ (*National Audubon, supra*, 33 Cal.3d at pp. 442–443.) *Herminghaus* addressed the competing riparian water rights (water rights associated with land adjacent to a water body) and appropriators (water rights associated with noncontiguous land), finding “that as between the riparian and the appropriator, the former’s use of water was not limited by the doctrine of reasonable use.” (*National Audubon, supra*, 33 Cal.3d

³ Article X, section 2 was originally adopted as article XIV, section 3.

at p. 442, citing *Herminghaus, supra*, 200 Cal. at pp. 100–101.) But article X, section 2 “does more than merely overturn *Herminghaus*—it establishes state water policy” that “[a]ll uses of water ... must now conform to the standard of reasonable use.” (*National Audubon, supra*, 33 Cal.3d at p. 443.) As the Supreme Court recognized, soon after article X, section 2, was added, the rule limiting water use to that reasonably necessary “appl[ies] to the use of all water, under whatever right the use may be enjoyed.” (*Peabody, supra*, 2 Cal.2d at p. 367.) The rule of reasonableness is now “the overriding principle governing the use of water in California.” (*People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 743, 750.)

Article X, section 2, does not define what constitutes an unreasonable use of water. Nor have the courts or the Legislature provided a definition. (See *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1479.) Rather, what is reasonable requires a fact-specific process of balancing competing beneficial uses of water. (*Peabody, supra*, 2 Cal.2d at pp. 367–

368; 371–372; see also Boswell AOB pp. 18–20 [explaining same].)

Unsurprisingly, Plaintiffs offer no support for their suggestion that the Legislature balanced under article X, section 2, (enacted in 1928) when it enacted section 5937 the century before. They provide no case law or legislative history hinting at such legislative intent, let alone any indication that the legislators knew anything about the reasonable use rule that would not come into existence until 76 years later. Given that nothing indicates that the Legislature conducted the required balancing when enacting section 5937, that constitutional duty is left to the courts to discharge.

The duty to balance beneficial uses required by article X, section 2, also dovetails with the canon of statutory interpretation that courts must construe statutes to avoid serious constitutional questions. (Cf. *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1110; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357 [“if reasonably possible, statutory provisions

should be interpreted in a manner that avoids serious constitutional questions.” [internal citation omitted].) Not only is it historically inaccurate, but inferring that the Legislature balanced beneficial uses when it enacted section 5937 also flouts this interpretive canon.

Plaintiffs ignore this constitutional requirement to argue, instead, that the Legislature discharged its duty under section 5946, as the *Cal Trout* cases address.⁴ Section 5946 was enacted in 1957 after article X, section 2, came into effect. (Stats. 1957, ch. 456, p. 1400.) As Boswell’s Opening Brief explains (pp. 24–31), neither section 5946 nor the *Cal Trout* cases have any application

⁴ Both BBK and Water Audit also cite a treatise in support of this argument: Bork et al., *The Rebirth of California Fish & Game Code Section 5937: Water for Fish* (April 26, 2018) available at SSRN: <https://ssrn.com/abstract=3169409>. (BBK RB p. 22; Water Audit RB at pp. 51–53, 55.) In fact, Water Audit’s “fish first” argument primarily relies on this treatise. But this academic treatise provides a less than objective take on this issue. Whatever its persuasive value, it is certainly not binding. (*Ammerman v. Callender* (2016) 245 Cal.App.4th 1058, 1086.) And the State Water Resources Control Board’s consistent approach to conduct balancing when applying section 5937, as discussed below, is certainly more persuasive.

or persuasiveness in this case. The trial court abused its discretion by not conducting the California Constitution’s fact-specific required balancing of beneficial uses.

C. Fish and Game Code Section 5946 and the *Cal Trout* Cases Apply Only in Mono and Inyo Counties, Not On the Kern River in Kern County, Where Section 5937 Applies.

Plaintiffs attempt to reconcile the trial court’s errant reliance on the *Cal Trout* cases to justify it foregoing any balancing of competing beneficial uses of water under section 5937. But BBK acknowledges—as it must—that “[i]t is true that the statute directly at issue in these cases is Fish and Game Code section 5946, not section 5937.” (BBK RB p. 25.) Unable to argue why *Cal Trout* applies, BBK incorrectly claims “that does not negate the cases’ persuasiveness regarding section 5937” and that there is a close relationship between sections 5964 and 5937. (*Id.* at pp. 25–26.) This statement is incorrect for two reasons.

First, BBK provides no support for its argument that the *Cal Trout* cases somehow provide persuasiveness regarding 5937.

That’s because there is none. The only discussion of section 5937 in the *Cal Trout* cases relates to section 5946’s requirement that “[n]o permit or license to appropriate water in District 4 ½ shall be issued by the State Water Rights Board after September 9, 1953, unless conditioned *upon full compliance with Section 5937.*” (See *Cal Trout I, supra*, 207 Cal.App.3d at pp. 599–603, emphasis added; *Cal Trout II, supra*, 218 Cal.App.3d at p. 195.) Regarding any independent analysis of section 5937, the *Cal Trout* court correctly found that it “need not reach the question of the application of section 5937 alone as a rule affecting the appropriation of water.” (*Cal Trout I, supra*, 207 Cal.App.3d at p. 601.) So *Cal Trout I* expressly acknowledged it was not interpreting or applying section 5937.

Water Audit takes the misapplication of the *Cal Trout* cases a step further. Unlike BBK (who at least acknowledges that it is section 5946 rather than section 5937 at issue in *Cal Trout*), Water Audit incorrectly claims that “[t]he *Cal Trout* analysis of Section 5937 addresses the obligations of all dam owners.” (Water

Audit RB p. 53.) Compounding this error, Water Audit misquotes the *Cal Trout* cases by imposing citations to section 5937 that do not exist. Page 53 of Water Audit’s brief states that

[t]he Cal Trout analysis of Section 5937 addresses the obligation of all dam owners, including but not limited to those in District 4 1/2. The subjective issues of what is “sufficient” and “good condition” underlay the dispute considered by the courts in *Cal. Trout I, supra*, 207 Cal.App.3d at p. 599 and *Cal. Trout II, supra*, 218 Cal.App.3d at p. 193.

But this analysis in *Cal Trout* is of section 5946, not 5937.

Misquoting *Cal Trout* to impose an analysis of section 5937 into those opinions that never occurred is the same error the trial court committed. (12 AA 2780–2781; Boswell AOB p. 29.)

Second, the only relationship between sections 5937 and 5946 is section 5946’s specific direction in how section 5937 should be applied to address a specific problem in a specific location. But that’s where the similarities end. Section 5946 contains requirements that 5937 does not, such as (1) full compliance with 5937 in State Board permitting and licensing, and (2) its applicability only in District 4 1/2 in Mono and Inyo

Counties. (Fish & Game Code, § 11012 [District 4 1/2 is only in portions of Mono and Inyo Counties].) This distinction is the very reason the *Cal Trout* cases analyze section 5946 *and not section 5937*. Relying on this statute for a case in Kern County that did not turn on section 5946 was an abuse of discretion.⁵

In an apparent attempt to reconcile the obvious differences between sections 5937 and 5946, Plaintiffs point out that section 5937 is directed at dam owners while section 5946, subdivision (b), is directed at the State Water Resources Control Board (“State Board”) when issuing permits or licenses under its jurisdiction. (BBK RB pp. 31–32; Water Audit RB pp. 12, 50.) While true, this fact has no bearing on this appeal and is not a distinction that Boswell makes. Rather, important here is that

⁵ BBK cites other irrelevant Fish and Game Code sections. (BBK RB pp. 29–30.) All but one grant the Department of Fish and Wildlife, the agency with public trust responsibilities for fish, with the authority to provide fish passage. And more importantly, Plaintiffs do not allege that any of those other statutes have been violated. Those statutes are not at issue in this appeal. Likewise, Water Audit’s appended Fish and Game Code sections to its brief are irrelevant to this appeal.

section 5946 applies only in District 4 1/2, which is limited to streams in Mono and Inyo Counties. (Fish & Game Code, § 11012.) This dispute is occurring in Kern County.

If, as Plaintiffs propose, section 5937 stands on its own as a directive with the required balancing already conducted, why would section 5946 require the State Board to ensure full compliance with 5937? More importantly, why would “full compliance with Section 5937” only be required in District 4 1/2 (Mono and Inyo Counties) under section 5946? And conversely, why is the State Board’s full compliance with section 5937 not required in every other district?

The answers are clear. Section 5946 addresses a specific problem involving L.A. Power and Water dewatering and transferring water out of streams in those two counties: Mono and Inyo. To address that problem, the Legislature balanced the competing beneficial use of water when enacting section 5946 in 1957. The specific issue being addressed and the Legislature’s fact specific balancing under section 5946 could not be more clear:

The purpose that is manifest in the language of section 5946 also appears as an explicit chapter in the legislative history of its enactment. As introduced, the bill by which former section 526.5, the predecessor to section 5946, became law carried an urgency clause explaining its necessity. It said: “Proposals for diversions of water in District 4 ½ are now being considered which, if effected 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. *It is necessary that this act take effect immediately to prevent further destruction of the fish life in District 4 ½.*” (Sen. Bill No. 78 (1953–1954 Reg. Sess. as introduced Jan. 6, 1953; emphasis added.)

(*Cal. Trout I, supra*, 207 Cal.App.3d 585 at p. 601; see also Boswell AOB p. 26 fn. 6.) Plaintiffs can point to no similar expression of the Legislature’s intent when it enacted section 5937 in the late 1800s—because there is none.

Further, the State Board is required to consider compliance with section 5937 in streams in other counties under title 23, section 782, of the California Code of Regulations. And as explained below, **it does balance** when it issues licenses and permits in other counties.

D. The State Board Balances When It Considers Section 5937 in Streams Outside of Mono and Inyo Counties.

Attempting to downplay the significance of the State Board's treatment of section 5937 in its decisions, BBK states the obvious: State Board orders are not court decisions. (BBK RB p. 34.) But the State Board is the state agency with statutory authority to allocate water as a scarce resource (Wat. Code, §§ 1253–1257.5), including broad authority to establish minimum flows and to take other measures needed for protecting fisheries and other public trust resources (Wat. Code, §§ 1243, 1253). In fulfilling these statutory obligations, the State Board considers compliance with section 5937, which imposes a mandatory enforcement obligation on the State Board. (Cal. Code Regs., tit. 23, § 782.)

Given that the State Board is the state agency with expertise in water allocation and in applying section 5937, its “interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts.” (*Yamaha Corp. of Am. v. State Board of Equalization* (1998) 19 Cal.4th 1,

7.) And the State Board decisions interpreting state law are certainly more persuasive on these state water law issues than the federal cases or biased treatises relied on by the trial court and Plaintiffs. (*Qualified Patients Ass’n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 764 [Federal district court decisions have no precedential effect in California state courts].) Among these proposed interpretations, the State Board’s interpretation is the only one that could warrant this Court’s deference.

BBK next claims that the cited State Board decisions did not conclude that the State Board is required to balance. (BBK RB p. 34.) But no such conclusion was necessary because it is standard practice in fulfilling its obligations to consider section 5937 under title 23, section 782, of the California Code of Regulations for the State Board to balance when addressing stream systems outside of Mono and Inyo Counties.

Bear Creek (SWRCB Order 95-4 (1995), WL 418658), which Boswell’s Opening Brief discusses, is one example. That decision involved water rights located in San Bernardino County. The

State Board found that it is “not obligated to strictly enforce section 5937” and that a “release that is too high, however, could be unreasonable because of adverse effects on other beneficial uses, including other recreational, environmental, or fish and wildlife uses.” (*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, 1995 WL 17908291 (“*Bear Creek*”) at p. 18; see also Boswell RJN, Ex. 2.) The State Board then spent several pages balancing the competing beneficial uses in determining “what release rate will both achieve enough protection to maintain the fishery in Bear Creek and at the same time avoid impairing the beneficial uses of Big Bear Lake.” (*Id.* at p. 18 [seeking to minimize the impacts to recreational benefits of the lake and the local economy].) After completing its analysis, the State Board concluded that the Constitution’s balancing requirements would be met because:

these instream flows will provide both reasonable protection for the public trust uses in Bear Creek and reasonable protection of the recreational, environmental and fish and wildlife uses and other uses of Big Bear Lake and Bear Valley, within the meaning of California Constitution, Article X, section 2. These flows also are low enough so that they will not interfere with Mutual's ability to divert this water downstream for its consumptive uses.

(*Id.* at p. 19.) The State Board was concerned about flows in excess of what is required to keep fish in good condition because, as BBK's brief alludes to at page 35, "[w]hile more flow might produce more stream fishery benefits, it is uncertain how much benefit will occur; further studies and actual experience with this flow level are needed before the relative fishery benefits can be determined more accurately." (*Bear Creek, supra*, 1995 WL 418658 at p. 18.) This analysis reflects a concern over diminishing returns, which derives from the State Board's duty to ensure "that there be the greatest number of beneficial uses which the supply can yield." (*Peabody, supra*, 2 Cal.2d at p. 368.) However one looks at this analysis, there is no reasonable debate that the State Board balanced.

The State Board likewise balanced in *Lagunitas Creek*

(SWRCB Order 95-17 (1995), WL17907885). BBK recognizes that the State Board had three tasks in *Lagunitas Creek*: “to ‘maximize[] the competing beneficial uses of water, maintain[] fish in good condition, and protect[] public trust resources when feasible.’” (BBK RB p. 35, quoting *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 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, 1995 WL 17907885 (“*Lagunitas Creek*”) at p. 34; see also Boswell RJN, Ex. 3.) The only way to accomplish these tasks is to balance competing demands on a limited water supply. In quoting *Lagunitas Creek*, BBK conveniently omits the prior sentence,

where the State Board states:

[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.

(*Lagunitas Creek*, *supra*, 1995 WL17907885 at p. 34.) Stated succinctly, “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.*” (*Id.* at p. 6, emphasis added.) “Section 5937 is a legislative expression concerning the public trust doctrine which should be taken into account when the State Board acts under its public trust authority.” (*Id.*, citing *Cal Trout I*, *supra*, 207 Cal.App.3d at p. 626.) Again, there can be no doubt the State Board balances beneficial uses when it also “takes into account” section 5937.

E. The Federal *Patterson* Cases Do Not Support Legislative Balancing Under Section 5937.

BBK claims that the trial court correctly relied on the federal *Patterson* cases, which dealt with an unrelated issue of whether the court had jurisdiction under federal reclamation law

to maintain a state cause of action under section 5937. (BBK RB pp. 32–33.) As Boswell’s Opening Brief explained, BBK’s argument must be rejected.

Natural Resources Defense Council v. Patterson (E.D. Cal. 1992) 791 F. Supp. 1425 (“*Patterson I*”) involved a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) based on whether section 5937 is incorporated into section 8 of the 1902 Reclamation Act’s “saving clause,” which would have allowed the plaintiffs to maintain their section 5937 cause of action. Section 8 of the Reclamation Act states in part that “[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water” (43 U.S.C. § 383.) The defendants in *Patterson I* contended that section 5937 is not one of the state laws incorporated by section 8 and the federal Bureau of Reclamation thus was not obliged to comply with its provisions. (*Patterson I, supra*, 791 F.Supp. at p. 1431.) The only analysis of section 5937 in *Patterson I* concerns

exclusively whether it is a state law “relating to the control, appropriation, use or distribution of water used in irrigation” (*Id.* at pp. 1430, 1431, 1433, 1435). *Patterson I* did not address or interpret the scope of section 5937. Nor did it consider whether balancing is required under the California Constitution if other beneficial uses of water are impacted by increased flows for fish. The case is not relevant.

In *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906 (“*Patterson II*”) the court’s jurisdiction was at issue again in a motion for summary adjudication with a claim of federal preemption based on the Central Valley Project Improvement Act. As discussed in Boswell’s Opening Brief, the issue in *Patterson II* was whether section 5937 should be read disjunctively so as to designate alternative or separate categories of fish for protection. (*Patterson II, supra*, 333 F.Supp.2d at pp. 917–919; Boswell AOB pp. 31–33.) BBK does not address this point. And, importantly, it does not address how the *Patterson II* court acknowledged the limitations

of the *Cal Trout* cases:

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.) This acknowledgment cannot be reconciled with Plaintiffs' claim that section 5937 requires protecting fish without consider any other beneficial uses. If section 5937 does not mandate placing the preservation of fish above the irrigation purposes of a dam, then trial courts must conduct the constitutionally required balancing to determine the appropriate flows for fish. To the extent that the *Patterson* cases have any relevancy in this appeal, they support Boswell and not Plaintiffs.

F. The *Wishtoyo* Court Balanced Competing Beneficial Uses of Water.

Misunderstanding the procedural history of *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

(“*Wishtoyo*”), BBK incorrectly claims the court did not balance competing beneficial uses. (BBK RB p. 33.)⁶ Although the plaintiffs in *Wishtoyo* used findings from a prior case to support its failed request for preliminary injunctive relief based on section 5937 (*Wishtoyo, supra*, 2023 U.S.Dist.LEXIS 2156 at pp. 14–15), the court specifically found that balancing is required when alleging violations of section 5937. With striking similarity to this case, in *Wishtoyo*, the

Plaintiffs argue[d] that, in considering the elements of a TRO, ‘the case law is clear that there is to be no balancing of [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.’

(*Id.* at p. 15.) The *Wishtoyo* court “disagree[d],” and as a result found that the plaintiffs “have not meet their burden of demonstrating a likelihood of success on the merits.” (*Id.* at pp. 15–16; Boswell AOB pp. 34–35.) Similarly, the trial court here

⁶ BBK also claims that *Wishtoyo* does not show that section 5937 is unconstitutional. (BBK RB p. 34) But Boswell never claimed or argued that section 5937 is unconstitutional.

erred when it found it was precluded from balancing when it determined the “Plaintiffs have a very high likelihood of success on the merits.” (12 AA 2781.) This abuse of discretion requires vacating the preliminary injunction.

II. PLAINTIFFS AND BAKERSFIELD CONTINUE TO IGNORE THE TRIAL COURT’S ABUSE OF DISCRETION BY FAILING TO CONSIDER THE RISK OF FLOODING DOWNSTREAM INTERESTS.

BBK does not deny that the trial court failed to consider the risk of flooding downstream properties when it issued the preliminary injunction and implementing order. BBK argues instead that the trial court’s failure to consider this substantial flooding risk was not an abuse of discretion. (BBK RB pp. 49–50.) But as BBK acknowledges, the trial court must consider “all the particular circumstances of each individual case.” (BBK RB p. 49, quoting *Salazar v. Eastin* (1995) 9 Cal.4th 836, 850.) And Plaintiffs prevented that consideration from happening by naming only Bakersfield in its lawsuit for an injunction. (See *Channelkeeper, supra*, 19 Cal.App.5th at p. 1188 [holding that a

plaintiff's public trust claims against a city allow a cross-complaint against all other water users because "the court cannot completely ignore the activities of competing water users"].)

Without any downstream interest represented, the trial court thus only contemplated the upstream interests. So the trial court gave no thought to how the injunction would affect downstream interests. The trial court's failure to consider "all the particular circumstances" renders its decision arbitrary and an abuse of discretion.

Bakersfield similarly ignores how the orders on appeal will harm and damage Boswell. Bakersfield never mentions Boswell's intervention in its four pages of "relevant procedural history." (Bakersfield RB. pp. 12–15.) Nor does it mention Boswell's reasons for intervening and how those reasons are unique to Boswell: Boswell is the only party with downstream property that the preliminary injunction and implementing order can flood. Thus, given Bakersfield's refusal to acknowledge Boswell, it is no surprise that when summarizing arguments on the impropriety

of the preliminary injunction (Bakersfield RB 13–14), Bakersfield fails to acknowledge that the trial court did not consider the risk of flooding Boswell’s properties. Nor does Bakersfield acknowledge that Boswell did not have an opportunity to be heard on its concerns over the implementing order. Instead, Bakersfield argues that the trial court correctly bound the Plaintiffs and Bakersfield to the November 14th implementing order because they “were and still are the only actual parties to this case.” (Bakersfield RB p. 18.) As Bakersfield explains it, Boswell is not “restricted, limited or bound by the Implementation Order.” (*Ibid.*) Even if the orders do not restrict, limit, or bind Boswell (which they may), they unquestionably risk harming Boswell’s property and crops. Bakersfield’s myopic approach to the preliminary injunction and implementing order must be rejected.

Water Audit (yet again) takes these errors one step further. It provides a conclusory statement that “the Court did not order the implementation of a flow regime that could possibly cause

injury to Boswell.” (Water Audit RB p. 29.) Water Audit supposition is untethered to any evidence in the record. As Boswell’s Opening Brief explains, the preliminary injunction and the implementing order’s 40 percent flow regime risks flooding Boswell’s properties in wet years. (Boswell AOB pp. 46–48.) Even if the trial court’s orders do not mention Boswell by name, they certainly “restrict, limit, and otherwise bind” Boswell by imposing on it a disproportionate burden for increasing flows for fish—which would risk destroying Boswell’s crops and property.

Water Audit’s apparent misunderstanding of the Kern River belies its misunderstanding of how the flow regime will cause injury to Boswell. For instance, Water Audit describes the Kern River system as ending at the McClung Weir (Water Audit RB p. 29), with a focus on water released into the Kern River by the Army Corps of Engineers (*ibid.*). But the Kern River continues past the McClung Weir. And Boswell’s properties are located downstream of the McClung Weir. And upstream releases from the Isabella Dam are not part of the preliminary injunction

and implementing order. Nor are these releases a concern to Boswell. Rather, the preliminary injunction seeks to limit diversions *downstream* of Isabella Dam. And without diversions, more water in high flow years will not only reach Boswell's properties located downstream of the McClung Weir, but will flood the property and damage the crops.

The orders also restrict, limit, and otherwise bind Boswell in another way. Boswell's Opening Brief discusses its Second Point water rights, which the preliminary injunction and implementation order will affect. (Boswell AOB pp. 10, 12–14, 15.) By curtailing the water available to Boswell under its Second Point rights, the preliminary injunction and implementing order restricts, limits, and otherwise binds Boswell's water rights as well but without any of the required balancing determinations first.

Thus, the trial court's orders involve and adversely affect Boswell's property interests. Boswell intervened to protect those interests. (RJN, Ex. 7 [Joint Stipulation for Boswell to Joint as

Real Party in Interest and Order].) And the parties acknowledged those interests when they stipulated to Boswell intervening. The common thread between BBK's, Water Audit's, and Bakersfield's errors is that instead of grappling with Boswell, they ignore how the orders on appeal will harm and damage Boswell. And while BBK, Water Audit, and Bakersfield might wish that Boswell had not intervened, and while they might believe that the trial court's orders may not ultimately harm Boswell, such wishes and beliefs do not make Boswell's legitimate standing and legal arguments irrelevant. This Court, therefore, should not do what they do: ignore how the preliminary injunction failed to consider, and implementing order will harm, Boswell.

III. BOSWELL TIMELY AND PROPERLY APPEALED THE PRELIMINARY INJUNCTION AND IMPLEMENTING ORDER.

Without meritorious substantive arguments, BBK and Water Audit resort to similarly meritless procedural arguments. Each attempt to relitigate their failed motion to dismiss by arguing that Boswell's appeal is untimely and that the January

9th order on the motion for reconsideration affects whether the appeal is ripe for this Court’s consideration. But as Boswell’s Opposition to the Motion to Dismiss explains, Boswell timely appealed the preliminary injunction and implementing orders, both of which are properly before the Court on appeal. As was explained there, because Boswell did not intervene in this lawsuit until February 15, 2024, neither the trial court nor any party served Boswell with notices of entry for either the November 9th preliminary injunction or the November 14th implementing order. (Boswell Opp. to Mot. to Dismiss pp. 6–7.) Since it was never served with either notice of entry, Boswell had “180 days after entry of judgment”—or until May 7, 2024—to appeal. (Cal. Rules of Court, rule 8.104(a)(1)(C).) Boswell appealed on March 5, 2024—more than two months earlier than the jurisdictional deadline. (See Declaration of Sean Herman in Support of J. G. Boswell Company’s Opposition to Water Audit California’s Motion to Dismiss.) Boswell’s appeal is thus timely.

This Court already denied the Plaintiffs’ Motion to Dismiss,

including any procedural argument that the January 9th order on the motion for reconsideration vacated the implementation order. Likewise, it should not entertain these repeated arguments in Plaintiffs' briefs that, at this point, border on frivolous.

CONCLUSION

For the reasons raised in Boswell's Opening Brief, and here, this Court should vacate the preliminary injunction and implementing order. The Plaintiffs' and Bakersfield's arguments to the contrary are not relevant to those concerns and are otherwise wrong, and thus, should be disregarded.

DATED: September 30, 2024 HANSON BRIDGETT LLP

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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 7,483 words, including footnotes (and excluding caption, tables, signature block, and this certification).

DATED: September 30, 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 September 30, 2024, I served true copies of the following document(s) described as: **J. G. BOSWELL COMPANY'S REPLY 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 September 30, 2024, at San Bruno, California.

/s/ Sharrol S. Singh

Sharrol S. Singh