No. F087487

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BRING BACK THE KERN, ET AL.,
Plaintiffs and Respondents,

v.

CITY OF BAKERSFIELD,
Defendant and Respondent.

BUENA VISTA WATER STORAGE DISTRICT, ET AL.,
Real Parties in Interest and Appellants.

On Appeal from the Superior Court of Kern County
Hon. Gregory Pulskamp, Case No. BCV-21-101310

AMICUS BRIEF OF THE CALIFORNIA ATTORNEY GENERAL and [PROPOSED] AMICUS BRIEF OF THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE IN SUPPORT OF ENVIRONMENTAL RESPONDENTS

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Case Name: *BRING BACK THE KERN, et al. v. CITY OF BAKERSFIELD*

Court of Appeal No.: F087487

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October 14, 2024
(Date)

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae respectfully submit this brief in support of the environmental organization respondents (Environmental Respondents).[1] This Court should uphold the trial court's issuance of the preliminary injunction against Respondent City of Bakersfield (City) for its ongoing violations of Section 5937 by routinely dewatering an approximately twenty-mile stretch of the Kern River downstream of the City's six weirs.[2]

Section 5937 requires all dam owners or operators, such as the City, to allow sufficient water to pass over, around or through the dam to keep fish downstream in "good condition." The Legislature first enacted this statute, in largely its current form, in 1915 as Penal Code section 637, and then re-codified the statute as Fish and Game Code section 525 in 1933, and re-codified it again in its current form as Section 5937 in 1957.

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[1] The Environmental Respondents are Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, Center for Biological Diversity, and Water Audit California. The Appellants—North Kern Water Storage District, et al. (North Kern) and J.G. Boswell Company (Boswell), real parties in interest in the trial court—are water districts serving agricultural customers and agricultural landowners who use water diverted by several Kern River dams operated by the City.

[2] In fact, recent news articles report that, starting on August 30, 2024, the Kern River once again was entirely or almost entirely dewatered below the Calloway Weir, causing a large fish kill. (See https://www.latimes.com/environment/story/2024-09-19/thousands-of-fish-die-as-kern-river-dries-up-in-bakersfield; https://sjvwater.org/students-scramble-to-study-the-kern-river-as-bakersfield-cuts-off-flows-leaving-fish-to-die-en-masse/.)

The trial court properly issued the injunction in this case, for several reasons. First, the trial court appropriately held that Environmental Respondents had established a "very high" likelihood of success on the merits of their Section 5937 claim based on the plain meaning of the statute. (12 AA 2781.) It is undisputed that the City's operations routinely dewater the stretch of the Kern River downstream of the City's six weirs, which are dams within the meaning of Sections 5900 and 5937. Appellants do not—and reasonably could not—contend that the fish below these dams are in "good condition." Well-established, on point case law demonstrates that the City's conduct violates Section 5937 as a matter of law, as fish cannot exist in "good condition" without water. (*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d. 585, 592, 599, 605-606 (*Cal Trout I*); *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 195, 210-213 (*Cal Trout II*); *Natural Resources Defense Council v. Patterson* (E.D. Cal. 1992) 791 F.Supp. 1425, 1435 (*Patterson I*) and *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 924-925 (*Patterson II*).)

Second, article X, section 2 of the California Constitution, enacted in 1928, does not require courts to consider the relative priority and reasonableness of all beneficial uses of the water *prior* to finding a violation of Section 5937.[3] Section 5937 is

[3] Appellants do not dispute that use of water to preserve and enhance fish is a "beneficial use" of water within the meaning of article X, section 2. (See, e.g., Wat. Code, §§ 1243, (continued…)

consistent with the reasonable water use directives in article X, section 2 because it represents a general legislative determination of both the priority and reasonableness of water use to maintain fisheries in "good condition" downstream of a dam. Article X, section 2 expressly delegates authority to the Legislature to make such determinations. (Cal. Const., art. X, § 2.) Thus, in re-enacting the substance of Section 5937 in 1933 and 1957, the Legislature exercised the express authority granted to it by the Constitution to determine the appropriate balance between instream fishery needs downstream of a dam and other uses of water.

While Appellants claim in their reply briefs that they are not asserting a facial constitutional challenge to Section 5937, their argument that Section 5937 would be unconstitutional if not construed to require reasonable use analysis prior to determining whether the statute has been violated is in essence a facial challenge to the statute. Appellants' proposed construction of Section 5937 would effectively read the statute out of existence. But Section 5937 is presumed constitutional. (*Voters for Resp. Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 780.) Appellants bear the burden of establishing that the statute, based solely on its plain language, is clearly unconstitutional in all, or at least the vast majority, of its applications. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1969, 1084; *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197,

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subd. (a), 1257; *National Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 443-444; Boswell ARB at p. 12, fn. 2.)

218; *Calif. School Boards Assn. v. State of Calif.* (2019) 8 Cal.5th 713, 723-724.) Appellants have not met this burden.

If, as Appellants claim in their reply briefs, they are only arguing that the specific *application* of Section 5937 to provide instream flows for fish in the Kern River would be contrary to article X, section 2, such challenge is premature and improperly reverses the burden of proof. Appellants—not Environmental Respondents—will bear the burden of raising and proving this claim on remand, at the interim remedy phase of the preliminary injunction proceedings, when the trial court will determine what amount of water is necessary to remedy the violation of Section 5937 pending entry of final judgment.

Third, the trial court performed all the balancing that was necessary at this initial stage of the injunction proceedings in concluding that the balance of harms weighed in favor of issuing the injunction. The trial court's balancing is supported by several factors: (1) the Environmental Respondents demonstrated a very high likelihood of success on their Section 5937 claim; (2) Section 5937 is a legislative determination that preventing harm to public trust resources from dewatering a stream is consistent with article X, section 2, and is in the public interest; and (3) case law has long recognized that activities that kill fish constitute a public nuisance. (See, e.g., *People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 399-402; *People v. Glenn-Colusa Irrig. Dist.* (1932) 127 Cal.App. 30, 34-35, 38.) The trial court also properly considered the prospect of interim harm to the City and Appellants based on the record evidence.

Fundamentally, Appellants' argument regarding the need for balancing of all water uses under article X, section 2 is directed to the wrong stage of the preliminary injunction proceedings and inappropriately seeks to place the burden of proof on the Environmental Respondents. Because Section 5937 is facially valid, Appellants may only challenge its constitutionality *as applied*, as Appellants' reply briefs implicitly concede. Such an as-applied constitutional challenge is premature, however, because the trial court has not yet imposed any specific flow regime necessary to comply with the injunction, and has indicated in its January 9, 2024, Order on Reconsideration (Reconsidered Injunction) that it is poised to do so. (16 AA 3735-3743.) Appellants will bear the burden of proof as to any as-applied challenge to Section 5937 on remand.

During this interim remedy stage of the proceedings, the trial court will determine, based on expert testimony, the amount of instream flows that are biologically necessary to maintain fish in good condition in the Kern River, pending entry of final judgment in the case. At this stage of the proceedings, Appellants will have an opportunity to offer their own expert evidence as to the particular amount of flows they believe are necessary to comply with Section 5937. Appellants also will be able to argue that the amount of water that otherwise is biologically necessary to keep fish in good condition would be "manifestly unreasonable" under article X, section 2 in light of other reasonable water uses, and therefore should be reduced to

some lesser amount to be consistent with this constitutional provision. (*Cal Trout I, supra,* 207 Cal.App.3d. at p. 625.)

Accordingly, this Court should affirm the trial court's issuance of the preliminary injunction and remand the case for further proceedings in which all relevant evidence can be considered in determining an appropriate interim instream flow remedy.

STANDARD OF REVIEW

Appeals seeking reversal of a preliminary injunction are subject to an abuse of discretion standard of review. (*People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 282.) Under this standard, "[a] trial court will be found to have abused its discretion only when it has exceeded the bounds of reason or contravened the uncontradicted evidence." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69, internal quotation marks omitted.) The burden is on Appellants, as the parties challenging the injunction, "to make a clear showing of an abuse of discretion." (*Ibid.*)

The issuance of a preliminary injunction turns on two "interrelated" factors: (1) the likelihood that the plaintiff will prevail on the merits at trial; and (2) the "interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*IT Corp., supra*, 35 Cal.3d at pp. 69-70.) However, "the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they

allege will occur if the injunction does not issue." (*King v. Meese* (1987) 43 Cal.3d 1217, 1227.)[4]

The appellate court independently reviews the trial court's determination of legal principles and reviews its factual findings under the substantial evidence standard. (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 408-409; *People v. Uber, supra*, 56 Cal.App.5th at pp. 282-283.)

ARGUMENT

I. THE TRIAL COURT'S ISSUANCE OF THE PRELIMINARY INJUNCTION WAS FULLY CONSISTENT WITH GOVERNING LAW AND SHOULD BE AFFIRMED

Contrary to Appellants' assertions, the trial court reasonably exercised its discretion when it enjoined the City from continuing to violate Section 5937 by routinely dewatering a twenty-mile segment of the Kern River downstream of the City's six weirs. (North Kern et al. Appellant's Opening Brief (Joint AOB) at pp. 27-39; Boswell AOB at pp. 16-45; Joint Appellants' Reply Brief (ARB) at pp. 12-19, 23-27; Boswell ARB at pp. 10-24.) The trial court correctly found that the Environmental Respondents "have a very high likelihood of succeeding on the merits." (12 AA 2781.) Further, the trial court properly balanced the relative harms. (12 AA 2781-2786.)

[4] Amici take no position on whether the injunction issued in this case preserved or altered the status quo. Regardless of how the injunction is characterized, the trial court properly interpreted and applied Section 5937.

A. Environmental Respondents are highly likely to succeed on the merits of their Section 5937 claim

The plain language of Section 5937 and well-established case law confirm that completely dewatering a fish-bearing river or stream violates the statute as a matter of law. (*Skidgel v. Calif. Unemployment Ins. Appeals Bd.* (2021) 12 Cal.5th 1, 14 ["[i]f the statutory language is unambiguous, then its plain meaning controls"].) Nothing in the law, including article X, section 2, of the California Constitution, required the Environmental Respondents to make any additional showing on this question.

Section 5937, enacted in largely its current form in 1915 as former Penal Code section 637, and re-codified in the Fish and Game Code in 1933 and 1957, provides in pertinent 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.

(Fish & G. Code, § 5937, italics added.) Fish and Game Code section 5900, subdivision (a) defines "dam" to include "all artificial obstructions," such as weirs. (*Id.*, § 5900, subd. (a).) Section 5900, subdivision (c) further provides that "owner" includes any "person, political subdivision, or district (other than a fish and game district) owning, *controlling or operating* a dam or pipe." (*Id.*, § 5900, subd. (c), italics added.)

Importantly, the plain language of this statute applies to all dam owners and operators regardless of what entity possesses the water rights or contractual rights to the water in question. (See, e.g., *San Luis & Delta-Mendota Water Auth. v. Haugrud*

(9th Cir. 2017) 848 F.3d 1216, 1234 [Section 5937 "not only allows, but requires [a dam owner or operator] to allow sufficient water to pass" over, around or through a dam "to maintain the fish below the [d]am. *The use of the unconditional 'shall' indicates that such required releases are not dependent on having a proper water permit*"], italics added.) Here, it is undisputed that the City is responsible for operating and diverting water from all six weirs on the Kern River below Lake Isabella.

Appellants do not address whether the City violated the plain language of Section 5937. Instead, Appellants contend that, prior to finding that the City was likely in violation of the statute and issuing the preliminary injunction, the trial court was required to consider the priority and relative reasonableness of all uses of Kern River water pursuant to article X, section 2, of the California Constitution. (See Joint AOB at pp. 28-39; Boswell AOB at pp. 16-24.) Appellants assert that, absent such consideration of all water uses, Section 5937 is unconstitutional under article X, section 2. (See, e.g., Joint ARB at p. 13, 15-19; Boswell ARB at pp. 14-20.) Appellants are mistaken.

Article X, section 2, adopted by constitutional amendment in 1928, provides in pertinent part that:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the

> public welfare. *The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served*, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. . . . *This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained*.

(Cal. Const., art. X, § 2, italics added.) This amendment applied the "rule of reasonable use" to all water rights in the State, including riparian and appropriative water rights. (See *Joslin v. Marin Muni. Water Dist.* (1967) 67 Cal.2d 132, 137-138, quoting *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 383; see also *National Audubon, supra,* 33 Cal.3d at p. 443 ["[a]ll uses of water, including public trust uses, must now conform to the standard of reasonable use"].)

Appellants' argument that the trial court must perform an article X, section 2 reasonable use analysis *prior to* determining a violation of Section 5937 would render the statute a nullity and is based on a fundamental misunderstanding of both this constitutional provision and Section 5937. As discussed further below, no constitutional balancing of beneficial uses is required in order for a trial court to find liability and issue a preliminary injunction for dewatering a river under Section 5937, because the Legislature has already determined the appropriate balance of uses in enacting Section 5937 pursuant to its authority under article X, section 2.

Appellants' argument also improperly conflates the test for determining a *violation* of Section 5937 with the requirements for determining the amount of flows necessary to *remedy* that violation. Appellants' real concern appears to be that the interim flow remedy the trial court might ultimately impose on remand will not meet the constitutional reasonable use test. (See Joint ARB at pp. 14-16, 18-19; Boswell ARB at pp. 18-20.) But this concern is premature. As discussed in Part II below, any such argument should be raised in the interim remedy and water-allocation phase of the injunctive proceedings on remand, not the violation phase.

1. The trial court was not required to consider the priority and reasonableness of all water uses under article X, section 2 in order to find a violation of Section 5937

a. The plain language of Section 5937 is mandatory and does not require a reasonable use analysis in order to establish a violation of the statute

The trial court correctly concluded that no reasonable use analysis is required in order to determine whether a dam owner or operator is in violation of Section 5937. (12 AA 2779-2781, 2786.) "[I]n any case involving statutory interpretation," the court's "fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose," beginning "with the plain language of the statute, affording the words of the provision their ordinary and usual meaning." (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198.) The plain language of the statute "generally is the most reliable indicator of legislative intent" (*ibid.*), and where, as here, "the plain, commonsense

meaning of a statute's words is unambiguous, the plain meaning controls." (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818).

Here, by its plain and unambiguous language, Section 5937, in conjunction with the definition of "owner" in Section 5900, subdivision (c), forbids any dam owner or operator from completely dewatering a river to the detriment of fish. As stated, this duty applies to each dam owner or operator regardless of the status of the underlying water rights or contract rights to water in question.[5]

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[5] It is important to note, however, that possession of a water right does not create immunity from reasonable regulation. (See *People v. Murrison* (2002) 101 Cal.App.4th 349, 360-361 ["water rights have been the subject of pervasive regulation in California" and "[a] water right, whether it predates or postdates 1914 is not exempt from reasonable regulation"]; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106 (*U.S. v. SWRCB*) ["no water rights are inviolable; all water rights are subject to governmental regulation"].) The same is true for holders of contract rights to receive water. (*U.S. v. SWRCB, supra*, 182 Cal.App.3d at pp. 147 ["[c]ontract rights, like other property rights, may be altered by the exercise of the state's inherent police power to safeguard the public welfare" and "neither the project *nor* the contractors could have any reasonable expectation of certainty that the agreed quantity of water will be delivered"], italics in original.)

Accordingly, both holders of water rights and contract rights must comply with environmental statutes, including Section 5937. (*People v. Murrison, supra*, 101 Cal.App.4th at pp. 360-362 [holding that water right holder was required to obtain authorization from the Department under Fish and Game Code section 1602 [former section 1603] to substantially alter or divert a stream]; accord *Siskiyou County Farm Bureau v. Dept. of Fish and Wildlife* (2015) 237 Cal.App.4th 411, 445-446 [water rights

(continued…)

Both state and federal courts have so construed Section 5937. In *Cal Trout I*, for example, the Third District Court of Appeal held that *Section 5937* (and not just Fish and Game Code Section 5946) is a clear and unambiguous legislative mandate requiring all dam owners and operators to release sufficient flows to maintain fish below a dam in "good condition."[6] (*Cal Trout I, supra*, 207 Cal.App.3d at pp. 592, 599, 605-606 & fn. 11; accord *San Luis & Delta Mendota, supra*, 848 F.3d at p. 1234.) Further, in *Cal Trout II*, the Third District held that the "good condition" standard of Section 5937, as incorporated by reference into Section 5946, means maintaining the downstream fishery in its "historic" condition. (*Cal Trout II, supra*, 218 Cal.App.3d at pp. 200-201, 210-211, 213.) Finally, in *Patterson II*, a California federal district court cited *Cal Trout I* and *Cal Trout II* in holding that Section 5937 (not Section 5946) imposes an unambiguous mandate on all dam owners and operators, and that dewatering a river to the detriment of historic fisheries violates that statute. (*Patterson II, supra*, 333 F.Supp.2d at pp. 916-920 & fn. 8, 924-925 & fn. 12, citing *Cal Trout I, supra*, 207 Cal.App.3d at p. 599 and *Cal Trout II, supra*, 218 Cal.App.3d at pp. 201, 210, 213.)

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holders are subject to Section 1602] and *id*. at p. 450 [water rights holders are subject to Section 5937].)

[6] Section 5946 provides in part that: "No permit or license to appropriate water in District 4 1/2 [portions of Mono and Inyo Counties—see Section 11012] shall be issued by the State Water Rights Resources Control Board after September 9, 1953, *unless conditioned upon full compliance with Section 5937*." (Italics added.)

Appellants do not dispute that the City regularly dewaters the Kern River below its six weirs, and particularly below the Calloway Weir, nor do (or could) they argue that the fish in these stretches of the river are in "good condition." (See, e.g., Joint AOB at pp. 45-46; Joint ARB at pp. 23-24.) Instead, Appellants assert that the trial court could not appropriately find a violation of Section 5937 without first evaluating the priority and relative reasonableness of all other water uses pursuant to article X, section 2. This is incorrect for the reasons discussed below.

b. No reasonable use analysis is required because Section 5937 was enacted pursuant to the Legislature's delegated authority under article X, section 2

The trial court properly concluded that Section 5937 represents a legislative expression of both the priority and reasonableness of water use for instream fish flows pursuant to article X, section 2. (12 AA 2779-2781, 2786.) The last sentence of article X, section 2 delegates authority to the Legislature to "enact laws in the furtherance of the policy in this section contained." (Cal. Const., art. X, § 2; see *Cal Trout I, supra*, 207 Cal.App.3d at p. 625 ["Article X, section 2, explicitly assigns to the Legislature the right and obligation to enact laws in furtherance of its policy"].)

A long line of cases "have interpreted this authority to allow the Legislature 'to enact statutes which determine the reasonable uses of water.'" (*Los Angeles Waterkeeper v. State Water Res. Control Bd.* (2023) 92 Cal.App.5th 230, 268, quoting *Cal Trout I, supra*, 207 Cal.App.3d at p. 625 ["[a]rticle X, section 2 explicitly assigns to the Legislature the right and obligation to enact laws

in furtherance of its policy"]; see, e.g., *Stanford Vina Ranch Irrig. Co. v. State of Calif.* (2020) 50 Cal.App.5th 976, 1001-1002; *Light v. State Water Res. Control Bd.* (2014) 226 Cal.App.4th 1463, 1483-1484; see also *Fullerton v. State Water Res. Control Bd.* (1979) 90 Cal.App.3d 590, 597 ["the last sentence [of art. X, § 2] clearly and expressly delegates to the Legislature the task of ascertaining how this constitutional goal should be carried out"].) In light of that constitutional delegation of authority to the Legislature, "[w]here various alternative policy views reasonably might be held whether use of water is reasonable within the meaning of article X, section 2, the view enacted by the Legislature is entitled to deference by the judiciary." (*Cal Trout I, supra*, 207 Cal.App.3d at pp. 624-625.) Section 5937 is a legislative expression of this explicit constitutional authority to enact statutes "in furtherance of" the reasonable use policy in article X, section 2.

In their reply briefs, Appellants argue that Section 5937 could not have been enacted pursuant to this delegated legislative authority because the statute's enactment in its original form pre-dated the adoption of article X, section 2 in 1928. (See Joint ARB at pp. 13-14, 18; Boswell ARB at pp. 8, 13, 20-25.) Appellants are correct that the original legislative mandate to keep fish in good condition below dams and other artificial obstructions was enacted as Penal Code section 637 in 1915, and that other versions of this statutory mandate existed even as early as 1872. (See Stats. 1915, ch. 491, p. 820.) But this fact does not aid Appellants' argument.

The Legislature re-codified and re-enacted the 1915 instream flow mandate as Section 525 of the Fish and Game Code in 1933, and then again as the current version of Section 5937 in 1957. (Stats. 1933, ch. 73, p. 443; Stats. 1957, ch. 456, p. 1399.) These subsequent legislative acts remove any doubt that the instream flow mandate of Section 5937 and its 1933 predecessor statute were codified in furtherance of the 1928 reasonable use policy of article X, section 2. (*Apple, Inc. v. Superior Court* (2013) 56 Cal.4th 128, 146 ["the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes" in light of them]; see, e.g., *People ex rel. Dept. of Conservation v. County of El Dorado* (2005) 36 Cal.4th 971, 994 ["The Legislature is deemed to have been aware of" laws in effect as of the date of enactment of an environmental statute, "and to have enacted [that statute] in light of them"].)

When it re-codified the text that ultimately became Section 5937 in 1933 and 1957, the Legislature could have revised it in response to article X, section 2, but it did not do so. Instead, even though the Legislature was presumed to be aware of that constitutional amendment, including its reasonable use mandate and delegation of authority to the Legislature to implement that mandate, the Legislature re-enacted the same mandatory requirement for all dam owners and operators to prioritize downstream fish flows that had formerly existed as Penal Code section 637.

Appellants North Kern et al. also argue that Section 5937 could not be deemed in furtherance of article X, section 2 because such an interpretation would conflict with the priorities established in Water Code section 106. (Joint ARB at pp. 15-16.) Section 106 declares state policy "that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." (Wat. Code, § 106.) There is no conflict. Unlike Water Code section 106, Section 5937 is not a water rights appropriation statute, but rather a mandate requiring all dam owners and operators to pass minimum instream flows necessary to support downstream fish life, as a first order of priority. Water Code section 106, by contrast, declares principles of priority as between appropriative water users and other uses of the remaining available water supply. (See *National Audubon, supra*, 33 Cal.3d at p. 448, fn. 30.)[7]

c. The reasoning of *Cal Trout I* and *Cal Trout II* that Section 5946 is not facially unconstitutional applies equally to Section 5937

The reasoning of *Cal Trout I* and *Cal Trout II* that Section 5946 is not facially unconstitutional under article X, section 2 applies equally to Section 5937. (Joint AOB at pp. 31-37; Boswell AOB at pp. 24-31; Joint ARB at pp. 14-15; Boswell ARB at 12-13, 24-30.) In *Cal Trout I* and *Cal Trout II*, the Third District Court

[7] However, as discussed further in Part II below, this does not mean that domestic and irrigation uses are not considered at all in Section 5937 cases. Rather, these uses can be considered during the remedy phase of the proceedings when the court establishes the amount of flows necessary to comply with Section 5937.

of Appeal held that Section 5946, which incorporates Section 5937 by reference, constitutes a legislative determination of both the priority and reasonableness of use for downstream fisheries under article X, section 2 and is not unconstitutional on its face. (*Cal Trout I, supra*, 207 Cal.App.3d at pp. 622-625; *Cal Trout II, supra*, 218 Cal.App.3d at pp. 201, 203, 208-209, 211; see *Siskiyou County Farm Bureau, supra,* 237 Cal.App.4th at p. 450 ["[w]e have previously rejected a claim that a different statute, which we construed to require a minimum in-stream flow to preserve fish, would be unconstitutional"], citing *Cal Trout I, supra*, 207 Cal.App.3d at pp. 622–625.)

The *Cal Trout* court reasoned that "[t]he Legislature's policy choice of the values served by a rule forbidding the complete drying up of fishing streams . . . is manifestly *not* unreasonable." (*Cal Trout I, supra,* 207 Cal.App.3d at p. 625, italics added.) The court observed that the real party in interest water district in that case (the Los Angeles Department of Water and Power—LADWP) "cite[d] no case holding a statute unconstitutional as inconsistent with article X, section 2 for promulgating a rule concerning the reasonableness of water use." (*Cal Trout I, supra*, 207 Cal.App.3d at p. 624, citing *Joslin, supra*, 67 Cal.2d at pp. 139-141.) Moreover, the Legislature's policy choice was entitled to judicial deference. (*Id*. at pp. 624-625.)

Appellants contend that the trial court's evaluation of an alleged violation of Section 5937 first must consider the priority and reasonableness of maintaining water for fish versus other consumptive uses of the water—despite a clear legislative

mandate to keep fish in "good condition" and no statutory reference to any other water uses. As previously stated, this argument essentially boils down to an assertion that Section 5937 is facially unconstitutional unless interpreted to require an article X, section 2 analysis prior to finding liability under the statute. (See, e.g., Joint ARB at p. 13 [because "the Legislature's broad authority is not unlimited," a literal interpretation of Section 5937 "without regard to varying and changing conditions and circumstances would be unconstitutional"]; *id*. at p. 17 [Environmental Respondents' interpretation of Section 5937 "would render the statute unconstitutional" and "therefore must be rejected"]; see also *id*. at p. 19 and Boswell ARB at pp. 14-15.)

But like any statute, Section 5937 is presumed constitutional on its face and Appellants bear the burden of establishing that the statute is "clearly, positively, and unmistakably" unconstitutional. (*Voters for Resp. Retirement, supra*, 8 Cal.4th at p. 780, quoting *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814; accord *Tobe, supra*, 9 Cal.4th at p. 1084 [to succeed on a facial challenge, litigant must show that the statute "inevitably" presents a "total and fatal conflict" with the applicable constitutional provision], citations omitted.) Furthermore, Appellants must establish the statute's unconstitutionality in all, or at least a vast majority, of circumstances. (*Today's Fresh Start, supra,* 57 Cal.4th at p. 218; *Calif. School Boards, supra,* 8 Cal.5th at pp. 723-724.) "To support a determination of facial unconstitutionality," a litigant "cannot prevail by suggesting that in some future hypothetical

situation constitutional problems may possibly arise as to the particular *application* of the statute." (*Tobe, supra*, 9 Cal.4th at p. 1084, italics in original, citations omitted.)

Consistent with the foregoing authority, a court may only hold Section 5937 unconstitutional under article X, section 2, if the "statute sanction[s] a manifestly unreasonable use of water." (*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 625.) Similar to LADWP in *Cal Trout I*, Appellants here have not made any showing that Section 5937 "sanction[s] a manifestly unreasonable use of water" on its face. (*Ibid*.)

Appellants argue that the *Cal Trout* cases are distinguishable because they were only construing Section 5946 and did not directly involve Section 5937. (Joint AOB at pp. 31-37; Boswell AOB at pp. 24-31; Joint ARB at pp. 14-15, 27-28; Boswell ARB at pp. 10-14, 24-30.) Not so. As discussed in Part I.A.1.a above, both *Cal Trout* cases do in fact directly construe the plain language of Section 5937. (See, e.g., *Cal Trout I, supra*, 207 Cal.App.3d at pp. 592, 599, 605-606 & fn. 11; see also *Cal Trout II, supra*, 218 Cal.App.3d at p. 195 ["Section 5937 directs that a dam owner 'shall allow sufficient water at all times . . . to pass over, around or through the dam, to keep in good condition any fish . . . below the dam'"], quoting Fish & G. Code, § 5937.)[8]

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[8] *Patterson I* and *Patterson II* likewise directly construe Section 5937. (See *Patterson I, supra*, 791 F.Supp. at p. 1435, citing *Cal Trout I, supra*, 207 Cal.App.3d at p. 601; *Patterson II, supra*, 333 F.Supp.2d at pp. 916-920, 924-925, citing *Cal Trout I, supra*, 207 Cal.App.3d at p. 599 and *Cal Trout II, supra*, 218 Cal.App.3d at pp. 201, 210, 213.) The Ninth Circuit Court of

(continued…)

Further, because Section 5946 incorporates Section 5937 by reference, the holding and reasoning of the *Cal Trout* cases (that Section 5946 constitutes a legislative determination of the priority and reasonableness of instream uses under article X, section 2 that is "manifestly not unreasonable") applies equally to Section 5937. (*Cal Trout I, supra*, 207 Cal.App.3d at pp. 622-625; *Cal Trout II, supra*, 218 Cal.App.3d at pp. 201, 203, 208-209, 211.)

Citing the legislative history of Section 5946, Appellants assert that the *Cal Trout I* court found Section 5946 to be facially constitutional under article X, section 2 in part based on "extensive evidence that the details of [the] specific stream systems" subject to Section 5946 "were considered" by the Legislature. (Joint ARB at p. 14, citing *Cal Trout I, supra*, 207 Cal.App.3d at pp. 601-603; see also and Boswell ARB at pp. 29-30 [same].) Not so. The cited pages of the *Cal Trout I* opinion discuss whether the language of Section 5946 applied to the water right licenses at issue in that case, not whether Section 5946 was constitutional. The discussion of whether Section 5946

Appeals similarly has directly construed Section 5937, holding that this statute "not only allows, but *requires* [the U.S. Bureau of Reclamation] to allow sufficient water to pass the Lewiston Dam to maintain the fish below the Dam." (*San Luis & Delta-Mendota Water Auth, supra,* 848 F.3d at p. 1234, italics added.)

Appellant Boswell attempts to dismiss the *Patterson* court's construction of Section 5937 as non-binding and irrelevant dicta, and it mischaracterizes the holdings and reasoning of those cases. (Boswell AOB at pp. 31-33; Boswell ARB at pp. 36-39.) While Boswell is correct that federal district court opinions do not bind California courts, the reasoning of *Patterson II* in particular is persuasive and directly on point.

was constitutional under article X, section 2 appears much later in the opinion at pages 622-625. That portion of the opinion does not mention the legislative history of Section 5946, but rather focuses on the Legislature's delegated authority to make priority and reasonable use determinations under article X, section 2, and the courts' duty to defer to such determinations unless the statute on its face "sanction[s] a manifestly unreasonable use of water." (*Id*. at pp. 624-625.)

Moreover, as the *Cal Trout I* court recognized in the text cited by Appellants, a statute's plain language—not its legislative history—is the best indicator of the Legislature's intent. (*Fluor Corp. v. Superior Court*, *supra*, 61 Cal.4th at p. 1198 [a statute's "plain meaning controls if there is no ambiguity in the statutory language"]; see *Cal Trout I, supra*, 207 Cal.App.3d at pp. 601-602 [the statute's "purpose . . . is manifest in the language of section 5946," and the legislative history "emphasizes *what the language of the section tells us*"], italics added.) The language of Section 5937 similarly unambiguously prioritizes flows to keep fish in good condition, which necessarily implies that the Legislature determined that this constitutes a reasonable use of water. This Court need not rely on any legislative history—for a statute re-codified 67 years ago—to so hold.

d. The trial court's application of Section 5937 does not render Section 5946 superfluous and is consistent with the State's regulatory practice

Properly recognizing that Section 5937 constitutes a legislative determination of both the priority and reasonableness of water uses for instream fisheries does not, as Appellants

contend, render Section 5946 superfluous. (Joint AOB at pp. 36-37; Boswell AOB at pp. 36-37; Boswell ARB at pp. 28-30.) Sections 5937 and 5946 are complementary and serve different purposes. Section 5937 is a mandate that all dam owners and operators in California release sufficient flows to maintain downstream fisheries. Section 5946, by contrast, is a mandate that the State Water Resources Control Board (Water Board) include minimum instream flow conditions in its water right permits and licenses issued for appropriations within Fish and Game district 4 1/2. Section 5946 complements Section 5937 by providing a regulatory and enforcement mechanism for including Section 5937 flows in permit and license conditions for appropriative water rights issued in a specific district.[9] There is no superfluity.

Appellant Boswell also misconstrues the Water Board's water right orders WR 95-4 (relating to Big Bear Lake and Bear Creek in San Bernardino County), and WR 95-17 (relating to Lagunitas Creek in Marin County). Boswell argues that under these orders, the Water Board conducted both article X, section 2,

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[9] In 1975, the Water Board adopted a regulation mandating that *all* appropriative water rights permits issued after that date (not just those issued in Fish and Game district 4 1/2) "require the permittee" to comply with Section 5937 unless the permit otherwise "contain[s] a more specific provision for the protection of fish." (See Cal. Code Regs., tit. 23, § 782; *Cal Trout I, supra*, 207 Cal.App.3d at p. 600, fn. 4 ["[s]ince 1975 the board has by regulation recognized *that section 5937 alone* conditions the issuance of permits for the appropriation of water"], italics added; see also *id*. at p. 606, fn. 13.)

and public trust balancing of uses prior to establishing the priority of fish flows necessary to comply with Section 5937. (Boswell AOB at pp. 39-43; Boswell ARB at pp. 31-36.) Not true.

WR 95-4 involved the Water Board's adjudication of an administrative complaint filed by Cal Trout against the Big Bear Municipal Water District, alleging that the district was violating Section 5937 and engaging in an unreasonable use of water by failing to release sufficient water from Big Bear Dam to keep downstream fish in good condition. (Boswell RJN at p. 44 [Exh. 2, p. *1].) The Water Board's order states that *Cal Trout I* "can be read as indicating that section 5937 legislatively establishes that it is reasonable to release enough water below any dam to keep fish that exist below the dam in good condition," but that a release "much *in excess*" of that amount could be unreasonable. (*Id*. at p. 52, italics added; see also *id*. at p. 58 [*California Trout I* "suggests that maintaining fish in good condition as required by section 5937 is reasonable as a matter of law," but "[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"], italics added.) The Water Board ultimately found that "[t]he current releases are not adequate to maintain the trout in Bear Creek in good condition, particularly in drier years," and adopted a modified flow regime for that creek that, in the Water Board's

judgment, would meet the "good condition" standard. (*Id.* at pp. 58-59.)[10]

The other water rights order Boswell cites, WR 95-17, involved the Water Board's resolution of ongoing issues regarding the Marin Municipal Water District's failure to release sufficient flows from Kent Lake Dam into Lagunitas Creek. (Boswell RJN at p. 109 [Exh. 3, p. *1].) The decision was issued pursuant to the Water Board's authority to ensure that all water diversions in the State comply with article X, section 2, and the public trust doctrine, and did not directly involve Section 5937. (*Id.* at p. 110.) Nevertheless, the Water Board did state that Section 5937 "is a legislative expression concerning the public trust doctrine" and that the Water Board's task is to maintain fish in good condition while also maximizing other beneficial uses and protecting other public trust resources where feasible. (*Id.* at pp. 115, 137.)

In short, nothing in either Water Board decision Boswell cites suggests the Board believes it may prioritize other uses over the mandate of Section 5937.

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[10] In WR 95-4, footnote 13, the Water Board noted that it "does not need to decide whether section 5937 is a legislative determination of reasonableness in this case; nor does the [Water Board] need to decide whether the reasonableness doctrine would allow the [Water Board] to authorize flows under the public trust doctrine that do not fully satisfy section 5937. *The flows ordered in this case are reasonable and they also fully satisfy section 5937.*" (Boswell RJN at pp. 101-102, italics added.)

e. In summary, failure to pass sufficient water to keep fish in good condition is the only element necessary to prove a violation of Section 5937

In sum, no "balancing" or other consideration of all water uses under article X, section 2 is required to determine whether a dam owner or operator is in violation of Section 5937 because the Legislature has already determined the priority and reasonableness of flows to maintain instream fisheries in good condition. Similar to Section 5946, the Legislature's determination is "manifestly not unreasonable" on its face, and Appellants do not meet their high burden of establishing otherwise. (*Cal Trout I, supra*, 207 Cal.App.3d at p. 625; *Voters for Resp. Retirement, supra*, 8 Cal.4th at p. 780.)

Therefore, as Appellants North Kern et al.'s reply brief implicitly concedes, the sole question in determining liability under Section 5937 is whether insufficient water is being released over, around or through the dam in question to maintain downstream fisheries in "good condition." (Joint ARB at p. 37.) If, as here, the stream is entirely dry below the dam, then, by definition, the fish are not in "good condition." (*Cal Trout II, supra*, 218 Cal.App.3d at pp. 200-201, 210-211, 213; *Patterson II, supra*, 333 F.Supp.2d at pp. 918-919, 924-925.) The question that follows is what *amount* of flows are necessary to maintain them in good condition and, if raised by an opposing party, whether that amount is "manifestly unreasonable" under article X, section

2. That is a question for the interim remedy phase of the injunction proceedings, as discussed in Part II below.[11]

2. The trial court also was not required to consider alternative water uses under the public trust doctrine in order to find a violation of Section 5937

Lastly, contrary to Appellant Boswell's argument, in evaluating whether the defendants violated Section 5937, the trial court also was not required to determine whether maintaining fish in good condition is a priority use of the water under the common law public trust doctrine. (Boswell AOB at pp. 20-24.) Just as Section 5937 expresses a legislative determination of reasonable use under article X, section 2, Section 5937 likewise constitutes a legislative expression of, and specific rule concerning, the public trust. (*Cal Trout I, supra*, 207 Cal.App.3d at 626, 629-631 ["[S]ection 5937 is a legislative expression of the public trust protecting fish as trust resources when found below dams"]; accord *Cal Trout II, supra*, 218 Cal.App.3d at p. 204, fn. 3.)

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[11] This interim remedy process also defeats Appellants' suggestion that "[e]ven if the facts were such that the entire flow of the river had to be devoted to fish flow in order to preserve one fish, at the expense of all human use of water," that outcome would be required under Environmental Respondents' interpretation of Section 5937. (Joint ARB at p. 18; Boswell ARB at pp. 18-19 [identifying a laundry list of potential future hypotheticals].) The trial court's application of the "manifestly unreasonable" standard on remand, in determining the amount of flows needed to comply with Section 5937, will obviate the potential for any absurd results.

Thus, the Legislature has already balanced public trust uses relative to other reasonable beneficial uses by enacting Section 5937. Boswell itself acknowledges that public trust uses only need be considered relative to other reasonable beneficial uses "when *neither* the Legislature nor any agency has resolved 'the competing claims for the beneficial use of water in favor of preservation of . . . fisheries.'" (Boswell AOB at p. 23, quoting *Cal Trout II*, *supra*, 218 Cal.App.3d at p. 195, italics added.) But that is precisely what the Legislature has done in Section 5937, in language that could not be any plainer.

B. The trial court properly balanced the relative harms

The trial court also did not abuse its discretion in its balancing of the relative harms to the parties under the second prong of the preliminary injunction standard. (See *IT Corp., supra*, 35 Cal.3d at pp. 69-70.) The trial court balanced the relative harms and concluded, based on existing record evidence, that there generally was sufficient water flow in the Kern River in all or most water years to accommodate all reasonable water uses, including fish flows, on an interim basis. (12 AA 2774, 2783-2786.)[12] There are three reasons why the trial court acted

[12] Importantly, and contrary to Appellants' assertions (Joint AOB at pp. 55-63; Boswell AOB at pp. 43-45; Joint ARB at pp. 35-49), the trial court's Implementation Order setting the amount of interim flows (13 AA 2863-2866) has been superseded and stayed by the trial court's Reconsidered Injunction. Under this latest, operative order, the trial court has not yet established the amount of flows necessary to comply with the injunction, which it will do following an evidentiary hearing on remand if the (continued…)

well within its discretion in conducting this standard preliminary injunction balancing analysis.

First, "the more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue." (*King, supra,* 43 Cal.3d at p. 1227; 12 AA 2776, 2786.) Here, for the reasons discussed in Part I.A above, the trial court properly found that Environmental Respondents were "highly likely" to prevail on the merits. (12 AA 2781.)

Second, by effectively prohibiting dam owners and operators from dewatering a stream, Section 5937 represents a legislative determination "that such activity is contrary to the public interest." (*IT Corp, supra*, 35 Cal.3d at p. 70; see also *People v. FXS Mgmt., Inc.* (2016) 2 Cal.App.5th 1154, 1162, quoting *IT Corp., supra*, 35 Cal.3d at p. 70.) Therefore, the trial court appropriately concluded that "significant harm would result to the general population and the environment if the injunction is not issued." (12 AA 2785-2786.)[13]

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parties cannot stipulate to a proposed flow order. (See 16 AA 3735-3743.)

[13] Amici do not contend that *IT Corp.* and *People v. FXS Mgmt.* establish a *rebuttable presumption* of public harm for violations of Section 5937. Unlike the municipal ordinances at issue in those cases, the Legislature did not provide for an injunctive remedy specifically tailored to violations of Section 5937. (*IT Corp., supra*, 35 Cal.3d at p. 68, fn. 3; *People v. FXS Mgmt., supra,* 2 Cal.App.5th at pp. 1157-1158.) But that distinction does not diminish the Legislature's implicit determination that a violation of Section 5937 is contrary to the public interest.

In similar circumstances, California appellate courts have recognized that there should be a heavy thumb on the scale in favor of issuing injunctive relief. For example, in *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, the Supreme Court held that "[w]here the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant." (*Id*. at p. 100; see also *People ex rel. San Francisco Bay Conservation etc. Com. v. Smith* (1994) 26 Cal.App.4th 113, 124 125 [similar]; *People v. Uber, supra*, 56 Cal.App.5th at p. 306 ["a party suffers no grave or irreparable harm by being prohibited from violating the law"].)

Third, as a related point, activities that destroy fisheries are a well-recognized public nuisance—which reinforces the trial court's determination that the public interest is served by issuance of a preliminary injunction in this case. Fish are a public resource held in trust by the State for the benefit of the people of the State. (See, e.g., *Cal Trout I*, *supra*, 207 Cal.App.3d at p. 630 [for over 125 years, "[w]ild fish have . . . been recognized as a species of property the general right and ownership of which is in the people of the state"]; *People v. Murrison, supra,* 101 Cal.App.4th at p. 360 ["the State owns the fish in its streams in trust for the public"].) "[T]he right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign." (*People v. Truckee Lumber, supra,* 116 Cal. at pp. 399-400.) Numerous cases have

upheld injunctions against activities that kill fish, reasoning that activities that adversely impact fisheries—which are the property of the People—constitute a public nuisance. (See, e.g., *id*. at pp. 400-402 [enjoining sawmill from depositing sawdust and other substances that killed fish in the Truckee River]; *People v. Glenn-Colusa, supra*, 127 Cal.App. at pp. 34-35, 38 [enjoining unscreened diversion of water from Sacramento River which killed numerous fish]; *People v. Stafford Packing Co.* (1924) 193 Cal. 719, 725-728 [enjoining certain operations of fish cannery resulting in waste of fish].)

In their reply, Appellants North Kern et al. wrongly assert that, in order to find irreparable harm to the fish, the trial court was required to find that the periodic "dryback" of the Kern River would permanently or otherwise irreparably harm the fish populations *as a whole*. (Joint ARB at pp. 23-26.) In support of this argument, Appellants cite five inapposite federal cases involving preliminary injunctions under federal wildlife management regulations, the National Environmental Policy Act and/or the Endangered Species Act. (*Ibid*.)[14] These cases have no application to the dewatering of a stream and killing of fish under Section 5937 in California. As just discussed, California courts have repeatedly held that fish are a resource held in trust

[14] Specifically, Appellants cite *Fund for Animals v. Frizzell* (D.C. Cir. 1975) 530 F.2d 982, 986-987; *Fund for Animals, Inc. v. Lujan* (9th Cir. 1992) 962 F.2d 1391, no pin cite; *Pac. Coast Fed'n of Fishermen's Associations v. Gutierrez*, (E.D. Cal. 2008) 606 F.Supp.2d 1195, 1207; *Defenders of Wildlife v. Salazar* (D. Mont. 2009) 812 F.Supp.2d 1205, 1210 and *Water Keeper Alliance v. U.S. Dept. of Defense* (1st Cir. 2001) 271 F.3d 21, 34.

by the State for the benefit of all the people of the State, and that activities which kill fish interfere with this public property interest and may be enjoined as public nuisances. Again, Appellants do not (and cannot) dispute that the City's dewatering kills the fish in the Kern River. (See Joint ARB at pp. 23-24, 26.) The trial court therefore was not required to conduct a population-level analysis in order to find irreparable harm. Nor should this Court accept Appellants' invitation to analogize to inapplicable federal standards to fill a non-existent gap in California law.

In sum, the trial court properly balanced the relative harms under the basic standards for issuing a preliminary injunction, and no separate constitutional balancing under article X section 2 was required in order to issue the injunction. Because Environmental Respondents established a highly likely violation of Section 5937, and Appellants cannot establish that the statute is unconstitutional on its face, the constitutionality of Section 5937 as applied is appropriately addressed at the interim remedy phase of the case, as discussed in Part II below.

II. APPELLANTS' CONSTITUTIONAL ARGUMENTS ARE PROPERLY DIRECTED TO THE INTERIM REMEDY PHASE OF THE PROCEEDINGS ON REMAND

Because the trial court appropriately issued the injunction based on a likely violation of Section 5937, this Court should affirm and remand for further proceedings. On remand, the trial court's next task will be to determine the amount of flows necessary to keep fish in the Kern River in "good condition" pending a final decision on the merits of this case. (*Cal Trout II,*

supra, 218 Cal.App.3d at pp. 200-201, 210-211, 213; *Patterson II, supra*, 333 F.Supp.2d at pp. 918-920, 924-925.) As discussed further below, this interim remedy procedure is the same approach applied by the Court of Appeal in *Cal Trout II*, as well as the federal district court in *Patterson II*. (See *Cal Trout II, supra*, 218 Cal.App.3d at pp. 200, 209-213; *Patterson II, supra*, 333 F.Supp.2d at pp. 924-925 & fn. 13.)

As mentioned, the trial court has not yet determined the amount of flows necessary to keep fish in good condition, as the operative order (the Reconsidered Injunction, which is currently stayed by this Court's writ of supersedeas) requires Environmental Respondents, the City, and Appellants to meet and confer on a proposed flow regime "necessary for compliance" with the injunction. (16 AA 3738-3739, 3742-3743.) If the parties "are not successful in agreeing to flow rates necessary for compliance, *any party* may file a request for this Court to make a determination regarding compliance, impose specific flow rates, or make any other legal determination pertinent to the order, after reasonable notice to *all the parties*." (16 AA 3738, italics in original.)[15]

If the parties cannot agree on flow rates necessary to comply with Section 5937, at this interim remedy stage of the preliminary injunction proceedings, Environmental Respondents will have the initial burden of showing what flow regime is

[15] Appellants focus on the prior, stipulated Implementation Order. (13 AA 2863-2866.) But, as mentioned, that prior order has been superseded and stayed by the trial court's January 9, 2024, Reconsidered Injunction. (16 AA 3738-3739.)

biologically necessary to keep fish in "good condition" in the Kern River. In response to that showing, Appellants and the City will then be free to present their own expert biological evidence challenging the Environmental Respondents' proposed flow regime. They also will be able to present their arguments and evidence as to why they believe that any biologically warranted flow regime would be unconstitutional as applied because it would be "manifestly unreasonable" in light of other reasonable consumptive uses of water. (*Cal Trout I*, *supra*, 207 Cal.App.3d at p. 625.)

A. On remand, the trial court will consider evidence from all parties regarding reasonable interim flows necessary to comply with Section 5937

Given that the trial court properly issued the injunction, as discussed in Part I above, the next question on remand will be *how much* water is necessary to keep fish in "good condition" downstream of the City's six weirs. (See *Cal Trout I, supra*, 207 Cal.App.3d at p. 632 ["[w]e agree that application of the rule [in Sections 5946 and 5937] *will require* reduced diversions of water from the Mono Lake tributary creeks, *albeit in an amount that cannot be precisely calculated on the record before us*"], italics added).)

In *Cal Trout II*, the Court of Appeal held that sufficient flows must be provided to comply with the command of Sections 5937 and 5946 to maintain fisheries in their "historic" condition on an interim basis, pending completion of more detailed instream flow studies. (See *Cal Trout II, supra*, 218 Cal.App.3d at pp. 200-201, 206-213.) The Court acknowledged that "[s]ince

the issue of the amount of water was not previously adjudicated, a hearing limited to the amount of water that must be released to attain compliance with the statute" was appropriate. (*Id*. at p. 209.) The court thus remanded the case to the trial court to "determine and impose interim release rates, taking into consideration the recommendations of" the Department of Fish and Wildlife, pending completion of longer-term instream flow studies by the Water Board. (*Id.* at pp. 211; see also *id*. at pp. 212-213.) Likewise, in *Patterson II, supra*, 333 F.Supp.2d at pp. 924-925 & fn. 13, the federal district court granted plaintiffs' motion for summary judgment on liability under Section 5937 for completely dewatering the San Joaquin River below Friant Dam, and indicated its intent to conduct a remedy phase to address the specific amount of flows necessary to comply with the statute. (The case subsequently settled.)

The amount of water necessary to keep fish in "good condition," and thereby remedy a violation of Section 5937, is a scientific and biological question, as to which the trial court retains considerable discretion based on the expert evidence presented. (See *Cal Trout II, supra*, 218 Cal.App.3d at p. 204 & fn. 3 ["[t]he courts may employ any appropriate judicial remedies" to "protect the fisheries" under Sections 5946 and 5937 and to "fashion a judicial remedy for enforcement of the statutory mandate" which is "appropriate to the circumstances"]; accord *Patterson II, supra*, 333 F.Supp.2d at p. 923 [courts have jurisdiction to fashion a Section 5937 remedy], citing *Cal Trout II, supra*, 218 Cal.App.3d 187.)

At the interim remedy stage of the preliminary injunction proceedings on remand, Environmental Respondents will offer expert evidence as to the amount of flows that are biologically necessary to keep fish in good condition. Appellants (as well as the City) will be free to contest Environmental Respondents' evidence and offer their own expert evidence on this issue. Appellants also will have an opportunity to produce evidence in support of any argument that the amount of flows necessary to satisfy the "good condition" standard of Section 5937 would be "manifestly unreasonable" under article X, section 2, in light of the facts and circumstances of this case. (See *Cal Trout I supra*, 207 Cal.App.3d at p. 625.) This includes an offer of proof as to the hypotheticals Boswell poses on pages 18-19 of its reply brief.

Appellants' arguments in this Court are similar to the constitutional challenge the court rejected in *Cal Trout I*, and essentially constitute a premature as-applied constitutional challenge to the amount of flows that would otherwise be required to comply with Section 5937. *Appellants*—not Environmental Respondents—bear the burden of proof as to these arguments. (See *Tobe, supra*, 9 Cal.4th at pp. 1084-1085 [burden of proof for as-applied constitutional challenge to statute]; *Jacobs v. Tenneco West, Inc.* (1986) 186 Cal.App.3d 1413, 1419 [defendant has the burden of proof on an affirmative defense].)

Specifically, in the context of Section 5937, Appellants bear the burden of establishing that the scientifically and biologically recommended amount of flows that are necessary to keep fish in

good condition would be "manifestly unreasonable" under article X, section 2, due to the unreasonable impact of such flows on other reasonable and beneficial water uses, and that some lesser amount of fish flows should be required in order to accommodate these other uses.[16] On appeal, Appellants do not even attempt to meet their heavy burden of establishing that the statute is unconstitutional, either on its face as discussed in Part I.A above, or as-applied, and they point to nothing in the record at this phase of the proceedings that could support such a conclusion.

B. It is not appropriate to delay issuance of the injunction pending a determination of the amount of flows necessary to comply with Section 5937

Finally, Appellants' argument that the trial court was required to conduct a reasonableness analysis under article X, section 2 prior to issuing the preliminary injunction instead of at the interim remedy phase also runs afoul of established precedent that a court may not delay imposition of an interim flow remedy where, as here, a plaintiff has otherwise established a violation of the instream flow requirements of Section 5937 (and Section 5946).

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[16] However, even assuming Appellants are able to meet their burden of establishing that the amount of flows necessary to keep fish in good condition under Section 5937 is unconstitutional as applied and should therefore be reduced to some lesser amount, given the clear command of Section 5937, the trial court still would not be permitted to find that a dam owner or operator could release *no flows* for fish and that the Kern River can continue to be *entirely* dewatered on a regular basis. (*Cal Trout II, supra*, 218 Cal.App.3d at pp. 200-201, 210-211, 213; *Patterson II, supra*, 333 F.Supp.2d at pp. 918-920, 924-925.)

In *Cal Trout II*, the court rejected a similar argument by LADWP that the desire "to study in detail the question of the precise amount of water needed to comply with our decision" in *Cal Trout I* justified indefinitely delayed compliance with Section 5946 pending completion of such studies. (*Cal Trout II, supra*, 218 Cal.App.3d at pp. 206-207.) As the Court aptly put it:

> [i]t is undeniable that a well-balanced diet is preferable to an unbalanced diet. But starvation is hardly justified by a delayed feeding, however nutritious. No water means no compliance with section 5946; imprecise compliance is immeasurably superior to no compliance.

(*Id*. at p. 207.) The *Cal Trout II* court also rejected LADWP's related argument that "imposing conditions without specifying flow rates would unfairly imperil its rights because it could not readily determine the release rates needed to comply with such a condition." (*Id*. at p. 209.) The court stated that "[t]his reason cannot justify the protracted delay proposed in this case." (*Ibid*.; see also *id*. at p. 205 ["[t]he harm resulting from the delay . . . is that the purpose served by section 5946, the economic and ecological benefit of the stream fisheries, will be lost for several more years"].)

The same reasoning applies to the injunction issued in the instant case: Section 5937 does not contemplate that a trial court can decline to enjoin an ongoing violation of the statute simply because it cannot determine the *precise* amount of flows necessary to remedy that violation at that stage in the proceedings.

CONCLUSION

For all the foregoing reasons, amici respectfully request that this Court affirm the trial court's preliminary injunction prohibiting the City from violating Section 5937, and remand to the trial court for further proceedings regarding the amount of interim flows necessary to meet the statute's "good condition" standard.

October 14, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached "Amicus Brief of the California Attorney General and [Proposed] Amicus Brief of the California Department of Fish And Wildlife in Support of Environmental Respondents" uses a 13-point Century Schoolbook and contains 10,251 words.

October 14, 2024

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***Bring Back the Kern, et al. v. City of Bakersfield, J.G. Boswell Company, et al***
Case Number: **California Court of Appeal, 5th District F087487**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1515 Clay Street, 20th Floor, P.O. Box 70550, Oakland, CA 94612-0550.

I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system.

On October 14, 2024, I electronically served the attached **AMICUS BRIEF OF THE CALIFORNIA ATTORNEY GENERAL and [PROPOSED] AMICUS BRIEF OF THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE IN SUPPORT OF ENVIRONMENTAL RESPONDENTS** by transmitting a true copy via this Court's TrueFiling system.

Please see attached service list for e-service

In addition, on October 14, 2024, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1515 Clay Street, 20th Floor, P.O. Box 70550, Oakland, CA 94612-0550, addressed as follows:

Hon. Gregory Pulskamp, Division J
Metropolitan Division Justice Building
1215 Truxtun Ave
Bakersfield, CA 93301

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct, and that this declaration was executed on October 14, 2024, at San Leandro, California.

Erica Panoringan
Declarant

Signature

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