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Civil No. S290840 [Fee Exemption, Gov. Code § 6103]

In the Supreme Court
OF THE
State of California

BRING BACK THE KERN, et al.,
Plaintiffs and Respondents,

vs.

CITY OF BAKERSFIELD
Defendant and Respondent

BUENA VISTA WATER STORAGE DISTRICT, et al.,
Real Parties in Interest and Appellants.

ANSWER BRIEF ON THE MERITS OF DEFENDANT AND RESPONDENT CITY OF BAKERSFIELD

After a Decision by the Court of Appeal, Fifth Appellate District
Case No. F087487 (and consolidated cases)

Appeal from Orders Granting a Preliminary Injunction in Favor of Plaintiffs
Superior Court for the County of Kern
Case No. BCV-22-103220; Hon. Gregory Pulskamp, Judge Presiding

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I. INTRODUCTION

Defendant and Respondent City of Bakersfield ("Bakersfield" or "City") supports and agrees with the need to increase flows of water in the Kern River. For decades, Bakersfield has strived to increase instream flows in the Kern River and has made efforts and undertaken projects to accomplish the goal of increasing the flow of water in the Kern River, for the benefit of Bakersfield residents and the environment in and around the Kern River. Increased, substantial and sustainable Kern River flows is the foundation of and primary goal of Bakersfield's water use policy and principles. Bakersfield's policy is to run any of its water supplies not needed for delivery to domestic water treatment plants down the Kern River channel.

Bakersfield, unfortunately, has only had limited success with its efforts to increase flows of Kern River water. Bakersfield only holds rights to and diverts approximately 25 percent of the water in the Kern River and must divert and use a substantial portion of its water to provide a water supply for Bakersfield residents. More significantly, the Kern County water districts that divert and use the remaining 75 percent of Kern River water supplies (Real Parties in Interest North Kern Water Storage District, Kern Delta Water District, Kern County Water Agency, Buena Vista Water Storage District, and Rosedale-Rio Bravo Water Storage District, collectively herein "Real Parties in Interest," or "RPIs") have opposed, challenged, and stymied Bakersfield's efforts to increase Kern River flows. The RPIs have

filed lawsuits against Bakersfield to challenge almost every effort and attempt Bakersfield has made to limit diversions of Kern River water by the RPIs, and have consistently opposed Bakersfield's efforts to prioritize instream flows over diversions of water for agricultural use by the RPIs.

As a result of Bakersfield's lack of success in increasing Kern River flows, a collection of local, state and national environmental groups (Plaintiffs and Respondents Bring Back the Kern, Kern River Parkway Foundation, Kern Audubon Society, Sierra Club, Center for Biological Diversity, and Water Audit California, collectively, "Plaintiffs") filed this action in 2022 to increase Kern River flows through claims based on the Public Trust, and Fish and Game Code Section 5937 ("Section 5937"). Plaintiffs, however, pursued a questionable strategy of naming only Bakersfield as the sole defendant, and not naming any of the RPIs as defendants, based on their contention that Section 5937 is an absolute, strict liability statute which requires Bakersfield, as the operator of diversion weirs in the Kern River, to release sufficient water below the weirs to keep fish populations in "good condition."

The RPI water districts are now in the case as real parties in interest, but Plaintiffs have not asserted any claims against the RPIs, and have not directly sought to compel them to limit their diversions or increase releases of water from Isabella Dam to increase Kern River flows. Plaintiffs have instead not deviated from their position that Section 5937 creates a strict liability obligation on the part of Bakersfield, as the operator of the

diversion weirs in the Kern River, to release water below the weirs for the benefit of fish populations.

Before the Court of Appeal, Plaintiffs argued that courts must strictly and rigidly apply and enforce Section 5937 in a vacuum, without any consideration, or "balancing," of competing uses and demands, and without considering whether the requested use of water for fish flows was "reasonable," as required by Article X, Section 2, of the California Constitution (hereinafter "Section 2"). The Fifth Appellate District disagreed with Plaintiffs, and found, in *Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322 ("Opinion"),[1] that courts must apply Section 2, and consider and balance all reasonable and beneficial uses, when applying and enforcing Section 5937. Plaintiffs thereafter filed their Petition with this Court to challenge the application of Section 2 to a court's consideration and enforcement of Section 5937.

Again, Bakersfield agrees with and supports Plaintiffs' goal of increasing Kern River flows. Bakersfield, however, does not agree with Plaintiffs' contention that courts must prioritize water for fish flows over all other uses of water, and that courts cannot consider and balance competing reasonable and beneficial uses of water, including water for domestic uses, when considering an injunction seeking to increase flows of water to keep fish in "good condition" in a river. Bakersfield has made it clear throughout this case that it must balance any obligation to increase flows for

[1] Citations to the "Opinion" are to the version published at 110 Cal.App.5th 322.

fish populations with its obligation to provide a safe, clean and reliable water supply to its now more than 450,000 residents.

Bakersfield has also made it very clear that the trial court must consider all uses of water on the Kern River, including, primarily, the diversion and use of water by the RPI water districts, when imposing relief under Section 5937. Notwithstanding Plaintiffs' focus on Bakersfield, it is apparent that the lack of water and flows in the Kern River is primarily a result of diversions by the RPIs for agricultural use as well as decisions by the RPIs to hold substantial portions of their water supplies in storage behind Isabella Dam, located far from Bakersfield in the Sierra Nevada mountains, instead of releasing the water to create regular, sustainable and environmentally beneficial flows in the Kern River channel.

This case therefore raises important questions regarding the need to consider and balance the reasonableness of competing uses and demands on California's limited water supplies when applying and enforcing California's environmental laws. Plaintiffs' Petition to this Court presents the question whether Section 2 of the California Constitution requires a court to consider whether a proposed water use is "reasonable" and "beneficial" whenever it would direct or adjudicate a particular use of water, including when applying a statute that does not expressly incorporate the reasonable and beneficial determination.

The answer to that question must be "yes," because the California Constitution is the supreme "law of the land," and

necessarily takes precedence over and limits laws and statutes adopted by the Legislature. Courts must consider whether application and enforcement of a legislatively authorized reasonable use of water, in this case Section 5937, is reasonable under the specific and unique circumstances, conditions, and facts presented to the court, and based on other competing reasonable uses and demands on a water system.

This case sharply illustrates the need to consider and balance all reasonable and beneficial uses of water, including on the Kern River, when applying and enforcing a generally applicable statute involving the use of water. On a regular basis, Bakersfield considers and balances the sometimes competing needs and demand on its limited water supplies for increased Kern River flows with its obligation to provide a water supply for its residents. The Court of Appeal properly and correctly affirmed a court's obligation to consider and balance such competing reasonable uses of water, as required by Section 2. In contrast, Plaintiffs' strategy of seeking relief only against Bakersfield under Section 5937 does not promote reasonable and beneficial use of all Kern River water since the RPIs have rights to and divert the majority of lower Kern River flows. It is additionally not reasonable that Plaintiffs have attempted to increase Kern River flows by challenging Bakersfield's operation and use of diversion weirs in the Kern River channel, while ignoring the only dam on the Kern River, Isabella Dam, which actually controls, limits and affects the quantity of water flowing in the lower Kern River. Kern River flows have primarily

diminished and disappeared due to decisions made by the RPIs to hold water in storage behind Isabella Dam, and to release water only for immediate diversion. Bakersfield's use and operation of "by-pass" diversion structures, or weirs, in the Kern River, primarily at the direction of the RPIs, only has a minimal, secondary, impact on Kern River flows, and supplies.

Bakersfield maintains that Plaintiffs' position, though laudable in its goal of increasing Kern River flows, is directly contrary to Section 2, substantial authority interpreting and applying the Constitution, and prior decisions of this Court and other California courts involving Section 2. Substantial authority establishes that Section 2, as an express "self-executing" constitutional provision, applies to and limits all uses of water throughout the State, including uses authorized and recognized as "reasonable" by the Legislature. Trial courts are bound to apply the Constitution and cannot invalidate, ignore or refuse to enforce constitutional provisions, including Section 2, when applying and interpreting statutes.

This Court should therefore deny Plaintiffs' Petition, uphold the Opinion, and confirm that the trial court must consider all reasonable and beneficial uses on the Kern River and must include all Kern River water users and right holders in its allocation of water supplies for increased Kern River flows.

II. STATEMENT OF THE CASE

Bakersfield responds to Plaintiffs' Statement of the Case and Introduction primarily to correct errors, omissions and

misstatements in Plaintiffs' Opening Brief regarding Bakersfield, and the Kern River.

First, Plaintiffs erroneously claim throughout their Opening Brief that Bakersfield owns and operates "several dams" within the Kern River. (See e.g., OB, pp. 12, 16-18.) Bakersfield does not own and operate any dams in the Kern River. Bakersfield instead operates six diversion weirs on the lower Kern River and diverts water for its own use, and also on behalf of the RPIs. (11 AA 2395-2396; see also 10 AA 2304; 11 AA 2316, 2329, 2348, 2358-2359.)[2] The weirs do not store water, but only bypass or divert water after it has been released from Isabella Dam. (11 AA 2396.) The volume of flows reaching the weirs in the lower Kern River is dependent on releases far upstream from the weirs, at Isabella Dam. (*Ibid.*; see also 10 AA 2304; 11 AA 2329, 2348.) Plaintiffs have not sought to apply Section 5937 to Isabella Dam in this proceeding to increase the amount of flows reaching the weirs. (See OB, pp. 16, 18-19.)

The diversion weirs in the Kern River may fall within the definition of dams under the Fish and Game Code because they qualify as "structures" in a river (Fish and Game Code § 5900(a)), but they are certainly not dams in the ordinary and practical sense of the word. The weirs do not store water and cannot create additional water supplies. (11 AA 2395-2396.) The frequent lack of water in the lower Kern River, and within Bakersfield city limits, is primarily a direct result of decisions

[2] Citations to the Appellants' Appendix are denoted "[Vol.] AA [Page]."

made by the RPIs to store water in Isabella Reservoir. (11 AA 2394-2396; see also 11 AA 2304-2305, 2316, 2348.) Releases of water from Isabella Dam, primarily dictated by the RPIs, and subsequent diversions of the water released from storage in Isabella Reservoir by the RPIs, control and limit downstream flows. (11 AA 2394-2396*;* see also 11 AA 2304-2305, 2316, 2348, 2358-2359; 13 AA 2939; 14 AA 3084-3085.)

Second, Plaintiffs' contentions that Bakersfield "typically diverts *all* of the Kern River's flow, leaving the river dry for much of its run through the City" (OB, pp. 16-17) and that Bakersfield's operation of the diversion weirs leaves the Kern River "entirely dry and devoid of fish life almost all of the time" (OB, p 12) are also not accurate. Instead, diversions by the RPIs have significantly reduced and sometimes eliminated Kern River flows through Bakersfield. (11 AA 2395-2937; 2357, 2362.) Again, Bakersfield's annual Kern River water supply represents only 25 percent of total Kern River flows, whereas the RPIs collectively divert the remaining Kern River flows and water supplies. (See generally 10 AA 2299-2306; 11 AA 2312-2335, 2341-2363, 2391-2400; see also 13 AA 2929, 2935-2936, 2939, 3084-3085.) Bakersfield's municipal surface water supply alone cannot maintain enough water in the Kern River to keep it from drying up or to provide sufficient water for fish flows. (*Ibid.*) In many years, and particularly in times of drought, Bakersfield's water rights yield less water than the City's overall annual water demand (currently approximately 130,000 acre-feet of water). (11 AA 2397-2398.) Bakersfield has an obligation to make surface

water deliveries to water treatment plants and to ensure there is sufficient groundwater recharge within the Kern River channel and elsewhere within Bakersfield to offset the groundwater pumping necessary to supply water to City residents. (11 AA 2396-2397.) Deliveries to Bakersfield's residents via the treatment plants are critically important to ensure adequate drinking water supplies for residents throughout Bakersfield, since not all Bakersfield residents can be served by groundwater. (11 AA 2396-2398.)

The RPIs also divert and use water in their own name and pursuant to their own water and contract rights. (See 10 AA 2304; 11 AA 2316, 2322, 2328-2329, 2347-2348; 13 AA 2939, 3084; 14 AA 3096-3097.) Bakersfield operates the diversion structures as an "agent" of the RPIs and "pursuant to contractual obligations." (See 11 AA 2304, 2348, 2395, 2358-2359; see also RPIs' Joint Opening Court of Appeal Brief, pp. 15, 17.) Bakersfield does not have discretion or the ability to reject orders from the RPIs for the diversion of water unless insufficient supplies of water are available to satisfy an order. (See 11 AA 2304, 2348, 2358-2359, 2395-2396; 14 AA 3096-3097.) Bakersfield has no control over the RPIs' decisions regarding water held in or released from storage. (*Ibid*.)

Finally, the trial court did not find that Bakersfield's "operation" of the weirs "clearly violates" Section 5937. (OB, p. 12.) The trial court made no rulings or determinations regarding "liability" or "violations" of Section 5937 on the part of Bakersfield. The trial court did not expressly find that

Bakersfield's actions had caused the Kern River to dry up or that any of Bakersfield's actions had an adverse impact on fish populations in the Kern River, presumably because at the time the court issued the order on the motion for preliminary injunction the Kern River was experiencing "high flow" conditions, with sufficient water supplies for both diversions and "fish flows." (See 11 AA 2358.) The trial court instead found that Section 5937 "applies to the weirs owned or operated by [Bakersfield] on the Kern River," and ordered the City to comply with Section 5937 prospectively, going forward. (12 AA 2779, 2789.)

III. LEGAL ARGUMENT

A. Pursuant to the California Constitution, the Trial Court Must Consider the Reasonableness of All Demands and Uses on the Kern River

As the Court of Appeal recognized, the trial court in this case was required to consider all "competing water uses" on the Kern River, including the water supplies and demands of the RPI water districts, and determine whether such uses were reasonable and beneficial. (Opinion, p. 353.) The trial court can only accomplish the goal of increased, regular and sustainable Kern River flows if all water users and right holders are "at the table" and are required to undergo a reasonable and beneficial use determination in order to establish each party's contribution to increased Kern River flows. Bakersfield therefore supports the Court of Appeal's holding that pursuant to Section 2, "a court must always consider reasonableness whenever it would direct or adjudicate a particular use of water, even when applying statutes

that do not expressly incorporate a reasonableness determination." (Opinion, p. 351.)

The federal and state constitutions broadly apply to all people in the state and necessarily limit, restrict and apply to all California statutes. The California Constitution "is the paramount authority to which even sovereignty of the state and its agencies must yield." (*City and County of San Francisco v. Regents of University of California* (2019) 7 Cal.5th 536, 558.) "It is also basic that if there is a conflict between the California Constitution and a law adopted by the Legislature, the California Constitution prevails." (*Ibid.*) Courts therefore cannot ignore or selectively decline to apply Section 2 when applying Section 5937. Courts can interpret and apply the Constitution but cannot ignore or act contrary to the Constitution. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 468-469.)

The Court of Appeal properly determined that Section 2's express "self executing clause" mandates broad application of the constitutional provision, even when not expressly referenced in a statute. (Opinion, p. 351.) Courts in other cases have consistently recognized the importance and impact of the self-executing nature of Section 2. (See *Los Angeles Waterkeeper v. State Water Resources Control Bd.* (2023) 92 Cal.App.5th 230, 267-268 [finding that because the "proscriptions against unreasonable uses and unreasonable methods of diverting water" are self-executing "courts are empowered to enforce them even in the absence of implementing legislation"].) Where a constitutional provision is self-executing, "it is not within the

legislative power, either by its silence or by direct enactment, to modify, curtail, or abridge this constitutional grant." (*Western Association of Short Line Railroads v. Railroad Commission of California* (1916) 173 Cal. 802, 804.)

This Court, in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 442-443, recognized that Section 2 "established the doctrine of reasonable use as an overriding feature of California water law," and "establishes state water policy. All uses of water, including public trust uses, must now conform to the standard of reasonable use." Section 2 applies to all uses of water, and water rights, in the state, without limitation. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1241-1242 [stating that Section 2 "dictates the basic principles defining water rights: that no one can have a protectable interest in the unreasonable use of water, and that holders of water rights must use water reasonably and beneficially"].)

B. The "Rule of Reasonableness" Will Allow the Trial Court to Practically and Effectively Consider All Sources of Water in Allocating Contributions to Increased Instream Kern River Flows

Application of Section 2, and consideration of the reasonableness of competing Kern River demands, is not just legally required under the Constitution, but is also practically necessary. Plaintiffs, and Bakersfield, cannot achieve their shared goal of a flowing, healthy and vibrant Kern River if the trial court lacks the authority to consider and evaluate all uses of water on the Kern River, including the substantial agricultural

water uses of the RPIs. A rigid, strict application of Section 5937, without consideration of or limitation by Section 2, would deprive the trial court of the authority to compel the RPIs to contribute water in sufficient quantities to actually, and practically, increase and restore Kern River flows.

A court enforcing Section 5937 cannot ignore or disregard the underlying conditions on a river, including the quantity of water available, and other reasonable and beneficial uses of that water supply. Courts should not apply or consider statutes "in a vacuum." (*California State Auto. Assoc. Inter-Insurance Bureau v. Downey* (1950) 96 Cal.App.2d 876, 906-907.) Even strict liability tort claims are subject to various defenses, which a court must weigh, balance and consider through a judicial process. (See *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 65 [finding that the sophisticated user defense applies as a defense to strict liability failure to warn products liability cases].)

Plaintiffs, for example, fail to explain how a court can enforce Section 5937 solely against Bakersfield if Bakersfield only holds rights to a limited portion of Kern River water supplies. Strict and absolute imposition of injunctive relief and enforcement of Section 5937 against Bakersfield would not create sufficient water in the Kern River. Without sufficient water supplies for fish flows, it would not be reasonable, appropriate or logical for a court to enforce the statute strictly, absolutely and in a vacuum. The Court of Appeal recognized that practical reality in determining that the trial court must consider all water supplies, and demands and uses, on the Kern River, to practically

and effectively enforce Section 5937. Plaintiffs also cannot negate the due process rights of Bakersfield to raise defenses to the application of Section 5937, including defenses based on impossibility or impracticability due to a lack of water supplies, and based on other factors and natural conditions which would practically limit compliance with Section 5937.

Section 5937 is also not the only instance where the Legislature has recognized that a particular use of water is "reasonable." The Legislature has determined that domestic use of water, or water for people, is entitled to a higher priority than water for fish flows, and other uses of water. "The California Legislature has declared that '**water for domestic purposes is the highest use**.'" (*Santa Barbara Channelkeeper v. City of San Buenaventura* (2018) 19 Cal.App.5th 1176, 1185, citing Water Code § 106 [emphasis added].) Water Code Section 106.3, subdivision (a), further provides that "[i]t is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."

The decision in *Santa Barbara Channelkeeper, supra,* is directly applicable to the present situation, as the court found that in order to enforce a claim based on the Public Trust calling for water for fish flows, courts must necessarily consider other demands and uses of water in a river, and must determine whether other demands and needs on a river, and not just the defendant city's demands, were "reasonable." (19 Cal.App.5th at pp. 1192-1193.) Consistent with the Opinion in this case, the

court in *Santa Barbara Channelkeeper* recognized that the "rule of reasonableness," defined as "the overriding constitutional limitation that the water be used as reasonably required for the beneficial use to be served," was "[s]uperimposed on the dual system for defining water rights" pursuant to Section 2. (*Id*., at pp. 1184-1185.)

In *Casitas Municipal Water District v. United States* (Fed.Cl. 2011) 102 Fed.Cl. 443, 459, a federal court similarly recognized that "[i]n determining whether a particular water use is reasonable, the California Constitution requires a balancing and consideration of all interests." The court further explained: "[o]ur analysis of the public trust and reasonable use doctrines therefore must take into account not only the relevant environmental concerns, but also the beneficial uses served by Casitas' operations, the longevity and history of those operations, and the state policy favoring delivery and use of domestic water." (*Ibid*.)

Plaintiffs' attempted reliance on *Water Audit California v. Merced Irrigation Dist.* (2025) 111 Cal.App.5th 1147 ("*Water Audit*") is misplaced, as the decision does not support Plaintiffs' claim that Section 5937 "imposes a clear, present, and mandatory duty with which all dam owners and operators must actively comply." (OB, p. 40.) The court in *Water Audit* only found that the plaintiff had sufficiently alleged a duty to comply with provisions of the Fish and Game Code, but whether the defendant had the ability and obligation to comply with the statute and to fulfill that duty were still questions of fact to be

later determined by the trial court, and subject to various defenses. (111 Cal.App.5th at pp. 1184-1185, 1187.) The court in *Water Audit* recognized that the plaintiff would, in the future, still have to establish the requirement that the defendant had the "ability to perform" its duties under the Fish and Game Code. (*Id.*, at p. 1180.)

Bakersfield also agrees with the Court of Appeal's conclusion that *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585 ("*Cal Trout I*") is not determinative or directly applicable to this proceeding. (Opinion, pp. 354-355.) Bakersfield agrees that *Cal Trout I* only addresses the State Water Resources Control Board's application and enforcement of Fish and Game Code Section 5946 in Inyo and Mono Counties, and that *Cal Trout I* did not involve or consider a motion for a preliminary or permanent injunction, including one pursuant to Section 5937. (*Ibid.*) Cal *Trout I* also does not establish that Section 5937 is exempt from Section 2, or that Section 5937 creates a "super priority" for fish flows over other reasonable uses of water. (*Ibid.*)

The fact that the Legislature has, in effect, generally designated water for fish flows as reasonable through Section 5937 does not bar or preclude application of Section 2, and a subsequent judicial determination whether it is reasonable, proper and appropriate to apply the statute. The court in *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, 994-995, explained that it is not inconsistent or incompatible for the Legislature to adopt legislation

designating a reasonable use of water, and for courts to still apply the legislation to the facts of a particular case to determine if the legislatively designated use of water is reasonable in that situation. The *Stanford Vina* court stated: "[h]ence, it is often asserted that '[w]hat constitutes a reasonable use or method of diversion is ordinarily a question of fact.' [Citation.]." (*Id.*, at pp. 1001-1002.)

Plaintiffs also attempt to rely on *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463 by stating that the court in that case "affirmed that both the Legislature and the Water Board can adopt rules governing the reasonable use of water without additional judicial balancing." (OB, p. 57.) The Court of Appeal, however, did not question or challenge "the Legislature's power to determine reasonable uses of water by statute" or that "the Legislature may delegate its authority to develop rules of reasonable use to the Water Board." (See OB, pp. 56-67.) The Court of Appeal instead found, based on *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673 and numerous other cases, that a trial court must still consider and determine whether application of a statute was reasonable, "depending upon the facts of each case." (Opinion at pp. 353, 359.)

The courts in *Light* and *Stanford Vina* also did not adopt a blanket or broad rule of reasonableness, but considered regulations adopted by the State Water Resources Control Board as to particular streams under conditions specific to those streams. (See *Stanford Vina*, *supra,* 50 Cal.App.5th at p. 1002; *Light*, *supra,* 226 Cal.App.4th at pp. 1472-1473.)

In addition, the Court of Appeal in this proceeding recognized, with regard to *Cal Trout I* and *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187 ("*Cal Trout II*"), that although pursuant to Fish and Game Code Section 5946 "the Legislature 'already balanced the competing claims for water from the streams affected by section 5946 [within Mono and Inyo counties] and determined to give priority to the preservation of their fisheries'," that "does not mean the Legislature engaged in a similar determination as to all waterways statewide under section 5937." (Opinion, pp. 355-356.)

Federal courts applying and interpreting California law have also expressly declined to give *Cal Trout I* broad application. In *Natural Resources Defense Council v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 920, in a case determining whether the U.S. Bureau of Reclamation had violated Section 5937, the court recognized that the court in *Cal Trout I* had not addressed, but also had not rejected, the need to balance or consider other uses of water.

In *Casitas Municipal Water District, supra,* 102 Fed.Cl. at p. 461, the court explained: "Defendant's position presumes that the needs of the fish trump all other uses. But what is in the best interest of a single public trust resource is not necessarily what is in the best interest of the public as a whole," noting that California had explicitly identified domestic use as one of the highest uses of water. "Defendant must therefore show that the balance between Casitas' various uses and the uses identified in the biological opinion weighs in favor of the fish." (*Ibid*.)

The court then provided a further assessment of Section 5937, as follows: "To be sure, the SWRCB must enforce Section 5937. **But it cannot do so in a vacuum**. Section 5937 does not operate outside the larger water scheme in California which includes the constitutional requirements of beneficial and reasonable use, the appropriative water rights system, and the public trust doctrine." (*Id*., at p. 462, fn. 20 [emphasis added].) The court further explained: "As a consequence, Section 5937 cannot be viewed as an absolute or in isolation, but must be subject to the same considerations that underpin the other, fundamental water doctrines: the desire to balance competing needs for the good of the whole." (*Ibid*.)

Finally, another federal court very recently adopted the same position as the Court of Appeal in this case, and expressly rejected the application of the *Cal Trout* cases to Section 5937. In *San Luis Obispo Coastkeeper v. County of San Luis Obispo* (9th Cir. 2025) 161 F.4th 590, 594, a federal court reversed the grant of a preliminary injunction pursuant to Section 5937 intended to improve the habitat of threatened steelhead trout in a river below a dam because the preliminary injunction, although beneficial to the steelhead, would endanger "other protected species" in the river. In considering Section 5937, the federal court rejected the plaintiffs' attempted reliance on language from *Cal Trout II*, because "that statement was about [Fish and Game Code] section 5946, not section 5937. And [Fish and Game Code] section 5946 incorporates section 5937—not the other way around. The state court's interpretation of [Fish and Game Code] section 5946

cannot be mapped onto section 5937 based on the *California Trout* cases." (*Id.,* at p. 602.)

IV. CONCLUSION

As indicated, Bakersfield strongly supports increased flows of water in the Kern River. For the trial court to achieve the goal of increased Kern River flows, whether through interim or permanent injunctive relief, it must have the ability to consider, balance and compare all reasonable and beneficial uses of water and all demands on the Kern River, including the demands of the RPIs, to determine the source, and quantity, of water necessary to increase and restore Kern River flows. This Court should recognize that a trial court is bound to comply with Section 2 and consider the reasonableness of all demands and uses on the Kern River when it allocates water for fish flows or increased Kern River flows in general. For that reason, Bakersfield respectfully requests that this Court affirm and uphold the Court of Appeal Opinion.

Dated: February 11, 2026 **DUANE MORRIS LLP**

By: */s/ Colin L. Pearce*
Colin L. Pearce
Jolie-Anne S. Ansley
Attorneys for Defendant and Respondent
City of Bakersfield

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rules 8.204(c)(1) and 8.520(b)(1), I certify that this **ANSWER BRIEF ON THE MERITS OF DEFENDANT AND RESPONDENT CITY OF BAKERSFIELD** contains approximately 4,963 words, not including the Tables of Contents and Authorities, the caption page, signature blocks, any attachments or this certification page.

Dated: February 11, 2026

/s/ Colin L. Pearce
Colin L. Pearce

DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is Spear Tower, One Market Plaza, Suite 2200, San Francisco, CA 94105-1127. I am a citizen of the United States and am employed in the City and County of San Francisco.

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1215 Truxtun Avenue
Bakersfield, CA 93001

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/s/ Blanca A. Herrera
Blanca A. Herrera

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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 2/11/2026 by M. Chang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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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.

2/11/2026

Date

/s/Colin Pearce

Signature

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