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Supreme Court of California
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IN THE SUPREME COURT OF CALIFORNIA

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

v.

CITY OF BAKERSFIELD,
Defendant and Respondent.

NORTH KERN WATER STORAGE DISTRICT, et al.,
Real Parties in Interest and Appellants.

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

Appeals from Orders Granting Preliminary
Injunctions in Favor of Plaintiffs

Kern County Superior Court Case No. BCV-22-103220
The Honorable Gregory A. Pulskamp, Judge Presiding

SAN JOAQUIN TRIBUTARIES AUTHORITY'S

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF and

AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST AND APPELLANTS NORTH KERN WATER STORAGE DISTRICT, ET AL.

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Initial Certificate)

This form is being submitted on behalf of *Amicus Curiae* San Joaquin Tributaries Authority.

The undersigned certifies that there are no interested persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) with either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Dated: April 30, 2026

PARIS KINCAID WASIEWSKI, LLP

By: */s/ Timothy J. Wasiewski*
TIMOTHY J. WASIEWSKI

Attorneys for *Amicus Curiae*
San Joaquin Tributaries Authority

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rules of Court, rule 8.520(f), the San Joaquin Tributaries Authority respectfully requests leave to file an *amicus curiae* brief in support of Real Parties in Interest North Kern Water Storage District, et al.

APPLICANT'S INTEREST

The San Joaquin Tributaries Authority (SJTA) is a joint powers authority existing and operating under Government Code section 6500, *et seq*., comprised of Turlock Irrigation District, Modesto Irrigation District, South San Joaquin Irrigation District, and the City and County of San Francisco. SJTA's members hold numerous water rights and own and operate several dams in the Stanislaus and Tuolumne River watersheds. Collectively, SJTA's members provide drinking water to nearly 3 million Californians, and irrigation water for nearly 380,000 acres (594 sq. mi.) of the state's most prime, productive farmland. All SJTA members share a common interest in protecting their water rights and responsibly operating their respective dams and reservoirs.

The SJTA has a direct interest in this appeal because it implicates the ability of private citizens to enforce the Fish and Game Code against dam owners such as its members. The Legislature has granted the California Department of Fish and Wildlife (DFW) the authority to enforce the Fish and Game Code, including section 5937 which requires dam owners to allow sufficient water to pass over, around or through a dam to keep fish below it in good condition. Given the complexities of water policy, dam operations, and fisheries needs, private citizens and courts cannot be permitted to supplant DFW's role under the Fish and Game Code. To do so would bypass agency expertise in favor of court resolution of policy conflicts, scientific disputes, water management, and other technical issues. Courts must retain oversight authority over DFW's administrative processes and decisions made under the Fish and Game Code, but to directly subject dam owners like the SJTA members to private litigation of their operations on issues specifically entrusted to DFW would be unduly burdensome and would risk duplication of efforts and inconsistent results.

SJTA submits this brief to assist the Court by illuminating a threshold question that requires resolution before reaching the question certified for review, that is, whether Plaintiffs have

standing to privately enforce Fish and Game Code section 5937 against dam owners. As explained in the brief, Plaintiffs do not and therefore the Court should not decide the question presented in this case. In the event the Court reaches the question, the SJTA's brief will also highlight that any obligation to bypass flows to keep fish in good condition below dams under Fish and Game Code section 5937 must be limited to natural stream flows and cannot extend to previously stored water.

In short, the Court should hold that Plaintiffs' motion for a preliminary injunction should have been denied because Plaintiffs lack standing to privately enforce Fish and Game Code section 5937. In the event the Court reaches the question presented, it should affirm the Court of Appeal's opinion and note that Fish and Game Code section 5937 is limited to natural flows, not stored water.

No party or counsel for a party in the pending appeal has authored the proposed amicus brief in whole or in part, and no party or counsel for a party in the pending appeal has made a monetary contribution intended to fund the preparation or submission of the proposed amicus brief. No person or entity other than the amicus

curiae has made a monetary contribution intended to fund the preparation or submission of the proposed amicus brief.

Dated: April 30, 2026

Respectfully submitted,

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San Joaquin Tributaries Authority

SAN JOAQUIN TRIBUTARIES AUTHORITY'S *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST AND APPELLANTS NORTH KERN WATER STORAGE DISTRICT, ET AL.

I. INTRODUCTION

The San Joaquin Tributaries Authority (SJTA) respectfully requests that the Court not reach the issue certified for review in this case because Plaintiffs do not have standing to enforce Fish and Game Code section 5937 against dam owners. Plaintiffs' contention that Fish and Game Code section 5937 is being violated must be directed at the California Department of Fish and Wildlife (DFW)—the state agency with legislative authority to enforce the statute. The courts should not assume DFW's role in administering the statute by directing or adjudicating any particular use of water under Fish and Game Code section 5937. Given the complexities of water policy, dam operations, and fishery needs, private citizens and courts cannot supplant DFW's role under the statute. To do so would bypass agency expertise in favor of court resolution of policy conflicts, scientific disputes, water management issues, and other technical matters. Of course, courts must retain oversight authority over DFW's administrative processes and its decisions made under the Fish and Game Code, but directly subjecting dam owners to

private litigation over their operations on issues specifically entrusted to DFW to enforce would be unduly burdensome and would risk duplication of efforts and inconsistent results. Accordingly, this Court should hold that private citizens cannot seek to enforce Fish and Game Code section 5937 against dam owners, and therefore Plaintiffs' motion for a preliminary injunction should have been denied without reaching the question certified for review.

Alternatively, if this Court reaches the question certified for review, it should answer it in the affirmative. Courts must consider whether a proposed use of water is consistent with the constitutional prohibition on waste and unreasonable use of water whenever it directs or adjudicates a particular use of water. In so holding, the Court should explicitly note that Fish and Game Code section 5937 is limited to natural stream flows and cannot be used to require releases of previously stored water.

II. STATEMENT OF THE CASE

The SJTA joins the Statement of the Case set forth in the Answer Brief on the Merits of the Real Parties in Interest, North Kern Water Storage District, et al.

III. LEGAL ARGUMENT

A. The Trial Court Should Have Denied the Preliminary Injunction Because Plaintiffs Do Not Have Standing to Enforce Fish and Game Code Section 5937 Against Dam Owners

This Court has certified the following question for review: "Does Article X, section 2 of the California Constitution require a court to consider whether a proposed water use is both 'reasonable' and 'beneficial' whenever it would direct or adjudicate a particular use of water, including when applying a water use statute that does not expressly incorporate the reasonable and beneficial determination?" A threshold issue to the certified question is whether a court should direct or adjudicate a particular use of water at all under Fish and Game Code section 5937.[1] It should not, and the trial court should have denied Plaintiffs' motion for a preliminary injunction on the ground that they lack standing to enforce Fish and Game Code section 5937 against dam owners.

1. Standing Is Jurisdictional and Can Be Raised at Any Time

Standing is a jurisdictional issue that may be raised at any time. (*Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 789

[1] All statutory references are to the Fish and Game Code, unless noted otherwise.

[addressing standing despite issue not being raised below]; *McKinney v. Board of Trustees* (1982) 31 Cal.3d 79, 90 [same].) In this case, the issue was raised at the trial court, which held that Plaintiffs have standing to enforce section 5937 under the public trust doctrine. The trial court erred and its order granting a preliminary injunction should be reversed.

2. Plaintiffs Do Not Have Standing to Assert a Private Cause of Action Against Dam Owners Under Fish and Game Code Section 5937

"A violation of a state statute does not necessarily give rise to a private cause of action." (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 596.) "[W]hether a party has a right to sue depends on whether the Legislature has manifested an intent to create such a private cause of action under the statute." (*Id.*) "Such legislative intent, if any, is revealed through the language of the statute and its legislative history." (*Id.*) If a statute does not expressly create a private cause of action or reference a "remedy or means of enforcing its substantive provisions," then courts may resort to the statute's legislative history. (*Id.* at 597.) If "the Legislature expressed no intent on the matter either way, directly or impliedly, there is no private right of action … with the possible exception that compelling reasons of public policy might require

judicial recognition of such a right." (*Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 142.)

In this case, section 5937 does not expressly create a private cause of action, the legislative history does not support one, and public policy weighs strongly against it.

(a) Fish and Game Code Section 5937 Does Not Expressly Create a Private Cause of Action

Section 5937 states that dam owners must "allow sufficient water 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.) Nothing in this statutory language creates or references a private cause of action to enforce the passage of water through a fishway or over, around, or through a dam.

Notably, the Legislature expressly created private causes of action to enforce violations of other provisions of the Fish and Game Code, indicating that it knew how to do so and that it did not intend to do so for section 5937. For instance, section 12024 provides that any person who violates section 6400 by placing live fish, animals or aquatic plants into the waters of the State without the permission of

DFW "is liable for all public and private response, treatment, and remediation efforts resulting from the violation." (Fish & G. Code, § 12024(a).) The provision explicitly states that the costs of these remediation efforts "shall be collectible by the federal, state, county, public agency, or private individual or individuals, incurring those costs…." (*Id.* [emphasis supplied]; see also, Fish & G. Code, § 12023 ["A person who personally or through another violates Section 6400, through the use of an aquatic nuisance species, is liable to the owner of any privately or publicly owned property for any damages to that property caused by the violation."] Similarly, section 2195 provides that when DFW confiscates a restricted animal and places it with a new custodian for care, "the new custodian may bring a civil action to recover the reasonable costs incurred … for any necessary relocation of the animal … [and] any actual and necessary costs to return the animal to a healthy state." (Fish & G. Code, § 2195.) There is no similar language authorizing a private cause of action to enforce section 5937 against dam owners, indicating the Legislature did not intend to create such a cause of action.

Moreover, the Legislature has assigned DFW the responsibility of administering and enforcing the Fish and Game Code "through regulations adopted by [DFW], except as otherwise

specifically provided by [the] code." (Fish & G. Code, § 702.) This assignment of responsibility and the discretion that accompanies it is specifically referenced in section 5937, which provides DFW with discretion to grant permission to dam owners to pass water through culverts or waste gates "when, in the judgment of [DFW], it is impracticable or detrimental to the owner to pass the water through the fishway." (Fish & G. Code, § 5937 [emphasis supplied].) In other words, the Legislature clearly expressed an intent that DFW exercise its discretion and judgment in enforcing this provision.

Notably, courts have held that private parties cannot "enforce maintenance of a [stream] flow for commercial or recreational fishing or spawning for the reason that the State of California, not only in the Water Code, but in the Fish and Game Code, has placed that responsibility upon public officials." (*Rank v. Krug* (1950) 90 F.Supp. 773, 801.) "It is too plain to need argument that a citizen cannot compel compliance where that duty is lodged with regularly selected officials whose duties are clearly defined by statute, any more than a private citizen could step in and assume the duties of a prosecuting attorney or governor, unless they were duly elected as provided in the constitution and laws of the state." (*Id.*) Here, the Legislature has created specific positions and employee roles within

DFW to enforce the Fish and Game Code, including the director and deputy director appointed by the Governor (Fish & G. Code, §§ 700, 701, 701.3), and other "deputies, clerks, assistants, and other employees as the department may need to discharge … the duties imposed upon it by law." (Fish & G. Code, § 850.) The Legislature has also clearly defined the duties of those officials (See e.g., Fish & G. Code, § 5930 [requiring DFW to "examine all dams in all rivers and streams … frequented by fish"]; § 5931 [authorizing DFW to require fishways]) and granted them the authority and resources necessary to enforce the code. (See e.g., Fish & G. Code, § 851 [making deputies "peace officers" with authority "to make arrests for violations of this code"]; Fish & G. Code, § 1000 [authorizing DFW to "expend funds necessary for biological research and field investigation" related "to the conservation, propagation, protection, and perpetuation of birds … mammals, reptiles, amphibians, and fish"].) Creating a private cause of action would strip DFW officials of their duties and the discretion that is based on their expertise. Private citizens may request through established administrative channels that DFW take certain actions, but DFW must retain its discretion in enforcing section 5937.

Moreover, a private cause of action to enforce section 5937 would be inconsistent with section 1017, which sets forth state policy that DFW resolve—through informal consultation—the "potential conflicts between the management, conservation, and protection of fish and wildlife resources … and private and public activities that may affect them." (Fish & G. Code, § 1017.) A private cause of action also would be inconsistent with Division 9 of the Fish and Game Code, which establishes fines and penalties for violations of any of its provisions.

In sum, section 5937 does not expressly create a private right of action to sue dam owners. The absence of such a right is in direct contrast to other provisions of the Fish and Game Code which expressly do create such rights. Instead, the duty to enforce the Fish and Game Code has been "lodged with regularly selected officials" at DFW who are appointed by the Governor and "whose duties are clearly defined" by the code. (*Rank, supra,* 90 F.Supp. at 801.) Moreover, the Legislature has expressed a policy preference that conflicts arising from the protection of fish and wildlife and the activities that may adversely affect fish and wildlife be resolved by DFW through informal consultation, not through private citizen suits. Accordingly, there is no legal basis for permitting "a private

citizen [to] step in and assume the duties of a prosecuting attorney or governor" to enforce section 5937 through a private cause of action against dam owners. (*Id.*)

(b) The Legislative History Does Not Support a Private Cause of Action

The legislative history of section 5937 does not support a private cause of action for enforcement against dam owners. This Court has held that where "neither the Legislative Analyst nor the Legislative Counsel observed that the new act created a private right of action[,] [there] is a strong indication the Legislature never intended to create such a right of action." (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 300.) Here, none of the legislative history reflects an intent to create a private right of action against dam owners. The language in section 5937 that is the subject of the present dispute (i.e., *allow sufficient water to pass over, around or through the dam*) was added to the code in 1937 pursuant to Senate Bill No. 800. (Declaration of Brett A. Stroud in Support of Motion for Judicial Notice by Real Parties in Interest, North Kern Water Storage District, et al., [Stroud Decl.] Exhibit C20 [Senate Bill No. 800 (1937 Reg. Sess.) as introduced January 22, 1937 (adding the phrase "*or in the absence of a fishway*

allow sufficient water to pass over, around or through the dam" to section 525, predecessor statute to section 5937)].)[2] There is nothing in the legislative history of Senate Bill No. 800 reflecting an intent to create a private right of action against dam owners. (Stroud Decl., Exhibits C20 [p. 409], C21 [p. 410], C22 [p. 411], C23 [pp. 412-413], C24 [pp. 414-415], C25 [pp. 416-423], C26 [pp. 424-435], C27 [pp. 436-444], C28 [pp. 445-446], C29 [pp. 447-452], C30 [p. 453].) In fact, the Summary Digest notes that the addition of the new language simply "[g]ives [dam] owner[s] [an] option to allow water to flow over, around or through dam if there is no fishway at [the] dam." (Stroud Decl., Exhibit C28, p. 446.)

Additionally, as the parties in this case note, the predecessor statute to section 5937 was set forth in Penal Code section 637. (See Stroud Decl., Exhibits C1-C15.) Criminal laws are generally not enforceable through a private cause of action. (See *Animal Legal Defense Fund, supra,* 160 Cal.App.4th 136, 141 [noting "three different ways [that] alleged violations of criminal law can result in

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[2] The SJTA supports and joins the Motion for Judicial Notice by Real Parties in Interest, North Kern Water Storage District, et al., requesting judicial notice of, among other things, the legislative history of Fish and Game Code section 5937 and its predecessor statutes.

civil actions"—none of which are applicable here].) If the Legislature had intended to create a private right of action when it reorganized the state's fish and wildlife laws into the Fish and Game Code, it would have done so explicitly. (See *Rodeo Sanitary Dist. v. Board of Supervisors* (1999) 71 Cal.App.4th 1443, 1453 ["reorganizing and renumbering various existing statutes from the Government Code and Health and Safety Code into the Public Resources Code" did not "allow counties to assume the powers of local sanitary districts"; the argument "that there was some unexpressed legislative intent to overrule the district's authority invites us to read legislative history tea leaves; we decline the invitation"].) The Legislature did not do so, and the legislative history does not support a private cause of action for enforcement against dam owners.

(c) The Public Trust Doctrine Does Not Create a Private Cause of Action Against Dam Owners

The public trust doctrine does not create a private right of action for Plaintiffs to enforce section 5937 against dam owners. The public trust doctrine "places on the state the responsibility to enforce the trust." (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1368.) "If the appropriate state agencies fail to do so, members of the public may seek to compel the

agency to perform its duties, but neither members of the public nor the court may assume the task of administering the trust." (*Id*.) In other words, the public trust doctrine may establish standing as to DFW for a failure to enforce the public trust, but it does not create standing against third parties—such as the dam owners in this case—for purportedly harming the public trust. Prior application of the public trust doctrine makes this point clear.

In *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, plaintiffs commenced an action against windmill owners for alleged violations of the public trust doctrine arising from harm caused to raptors and other birds by windmill operations. (*Id*. at 1354.) The court recognized that the state has obligations under the public trust doctrine derived from both common law and statutory law to account for the public trust in planning and decision making. (*Id.* at 1364.) It also recognized that members of the public may seek to enforce those obligations against the state, consistent with this Court's decision in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419. (*Id.* at 1364-1371.) However, as directly relevant here, the court held "there is no basis for recognizing an action that is not directed against the appropriate state agency

responsible for authorizing the wind farm operations [that are allegedly violating the trust]." (*Id.* at 1371.)

In reaching this conclusion, the court relied on traditional trust concepts and prior application of the public trust doctrine. The court observed, "[u]nder traditional trust concepts, plaintiffs, viewed as beneficiaries of the public trust, are not entitled to bring an action against those whom they allege are harming trust property." (*Id.* at 1367.) Rather, "[t]he trustee charged with the responsibility to implement and preserve the trust alone has the right to bring such an action." (*Id.*) If the trustee "cannot or will not enforce a valid cause of action that the trustee ought to bring against a third person, a trust beneficiary may seek judicial compulsion against the trustee"—not the third party. (*Id.*) "Thus, analogizing this action to the enforcement of a traditional trust agreement, the action must be brought against the appropriate representative of the state as the trustee of the public trust." (*Id.*)

With respect to the public trust specifically, the court observed that "[t]he heart of the public trust doctrine … is that it imposes limits and obligations on governments." (*Id.* at 1365.) "It is an affirmation of the duty of the state" to protect public trust resources. (*Id.* at 1365.) The court recognized that in *National Audubon Society*

"the remedy prescribed was not an injunction against the [Los Angeles Department of Water and Power's] use of the water [from the Mono Basin], nor was it an award of restitution or a declaratory judgment establishing an acceptable level of water appropriation," but rather a holding that "some responsible body" at the state level "should reconsider the allocation of the water rights involved" taking into consideration public trust resources. (*Id.* at 1368.) This is consistent with *Cal. Trout v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, where plaintiffs petitioned for a writ of mandate commanding the State Water Resources Control Board to rescind two licenses that it issued to the City of Los Angeles and its Department of Water and Power in alleged violation of Fish and Game Code section 5946. The challenge, and the remedy, were directed at the State Water Board, not at the city.

Relying on this precedent, the court in *FPL Group* held "the doctrine places on the state the responsibility to enforce the trust" and "[i]f the appropriate state agencies fails to do so, members of the public may seek to compel the agency to perform its duties, but neither members of the public nor the court may assume the task of administering the trust." (*Center for Biological Diversity, Inc. v. FPL Group, Inc., supra,* 166 Cal.App.4th at 1368.) Granting authority to

the public or the courts to enforce the trust would "'bypass' the expertise that has been brought to bear on the subject" by the state agencies responsible for enforcing it. (*Id.* at 1368.) Accordingly, the "defect" in the complaint was that it was "brought against the wrong parties"—the windmill owners. (*Id.* at 1367.) "A challenge to the permissibility of [the] conduct" of a party that has allegedly violated the public trust "must be directed to the agencies that have authorized the conduct." (*Id.* at 1370.)

For the same reasons, Plaintiffs' claim against the dam owners under section 5937 must be dismissed because it was brought against the wrong parties. As noted above, the Legislature has vested DFW with the responsibility of enforcing section 5937. If DFW violates this responsibility, "members of the public may seek to compel the agency to perform its duties." (*Center for Biological Diversity, Inc. v. FPL Group, Inc., supra,* 166 Cal.App.4th at 1368.) Analogizing this situation to traditional trust concepts, DFW is the trustee and the public is the beneficiary. Therefore, any alleged violation of the public trust must be directed towards DFW, not towards the third-party dam owners.

Critically, neither "the public nor the court may assume the task of administering the trust." (*Id.*) The question that this Court

has certified for review improperly assumes courts can or should administer the trust by directing or adjudicating a particular use of water under section 5937. In a case such as this—commenced against dam owners instead of the responsible state agency—courts should not direct or adjudicate any particular use of water. The question for the courts is limited to whether DFW (the responsible state agency) complied with its obligations under section 5937 and/or the public trust doctrine. Courts will be "available to review the responses to those agencies, but they are not available to supersede their role in the regulatory process." (*Id.* at 1372.)

Accordingly, this Court should hold that the public trust doctrine does not create standing for Plaintiffs to assert a private cause of action against dam owners under section 5937.

(d) Public Policy Weighs Against a Private Right of Action Against Dam Owners

"[W]hen neither the language nor the history of a statute indicates an intent to create a new private right to sue, a party contending for judicial recognition of such a right bears a heavy, perhaps insurmountable, burden of persuasion." (*Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 133.) Plaintiffs in this case cannot satisfy that burden because public policy weighs

strongly against creating a private right of action against dam owners under section 5937.

First, the question of what amount of water is *sufficient* to keep fish below a dam in *good condition* will require consideration of complex and technical issues related to water policy, dam operations, and fishery sciences. Courts have recognized that "the agencies entrusted with the statutory obligation of balancing the needs of human populations with those [of wildlife] are guided by the expertise of their scientific staffs and independent consultants." (*Environmental Council of Sacramento v. City of Sacramento* (2006) 142, Cal.App.4th 1018, 1042.) By contrast, courts are "neither scientists nor policy makers." (*Id.*) Here, DFW has been entrusted with enforcing the Fish and Game Code, including section 5937. If a private party believes that DFW has failed to enforce section 5937—whether by establishing an improper flow requirement or by failing to act at all—it can directly challenge DFW's enforcement or lack thereof. (See *Center for Biological Diversity, Inc. v. FPL Group, Inc., supra,* 166 Cal.App.4th at 1366 ["the public retains the right to bring actions to enforce the trust when the public agencies fail to discharge their duties"].) In such a case, the court will benefit from either a DFW decision on the issue, or a DFW explanation as to why

it has taken no action. By contrast, a private cause of action against dam owners for DFW's alleged failure to enforce section 5937 would improperly "'bypass' the expertise that has been brought to bear on the subject" by DFW. (*Id.* at 1368.)

Second, permitting a private cause of action against dam owners could lead to inconsistent decisions from multiple courts. Superior Courts abide by county lines; rivers do not. If one or more plaintiffs were to challenge the sufficiency of flows in different stretches of the same river, in different cases brought in different counties, it could lead to inconsistent decisions by different Superior Courts as to what constitutes a sufficient amount of flow to keep fish in good condition. By contrast, if challenges under section 5937 are limited to DFW's action or inaction, courts will either determine the validity of DFW's decision or compel DFW to make a decision exercising its discretion (*e.g.,* without ordering DFW to establish a particular flow amount). (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1268 ["Traditional mandamus may be used to compel an agency to exercise its discretion but not to control it"].) That procedure centralizes the issue of what constitutes *sufficient flow* or *good condition* in DFW, rather than in several Superior Courts whose jurisdictions happen to include the river.

Finally, permitting a private right of action against dam owners will improperly force courts to decide policy issues regarding water use, dam operations, and fishery protection that they are not suited to decide. As noted above, courts are not policy makers. They should not intrude into highly technical and policy-laden decisions regarding water use and fishery protection where, as here, the Legislature has specifically identified an agency with appropriate expertise to address the issue.

B. Fish and Game Code Section 5937 Cannot Be Used to Compel Releases of Stored Water

For the reasons set forth above, this Court should find that Plaintiffs lack standing to enforce section 5937 against dam owners. In the event the Court finds otherwise, it should hold that courts must consider whether a proposed use of water is reasonable and beneficial when directing a particular use of water, including when directing a particular use of water under section 5937. In doing so, the Court should specify that section 5937 cannot compel releases of stored water.

When interpreting a statute, "the statutory language … is the most reliable indicator of legislative intent." (*City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 625

[internal quotations and citations omitted].) "[W]ords of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 716.) As demonstrated below, the Legislature's choice of words demonstrates an intent to cover natural river flows, not reservoir releases.

Section 5937 provides, in pertinent part, that the owner of any dam shall "allow sufficient water to pass over, around or through the dam." (Fish & G. Code, § 5937 [emphasis supplied].) By using the word *pass*, as opposed to *release*, the Legislature expressed an intent to require the passage of natural flows, not the release of water that had already been stored. Similarly, by focusing on water passing over, around, or through a *dam*, as opposed to focusing on water in a *reservoir*, the Legislature again expressed an intent to require passage of natural flows, not the release of reservoir storage. If the Legislature had intended to require dam owners to release stored water, it would have so stated.

The State Water Resources Control Board's interpretation of section 5937 supports the conclusion that the statute is limited to natural flows. Specifically, the Board adopted a regulation interpreting the requirements of section 5937 in relation to the

Board's issuance of permits for diverting water from a stream by means of a dam. (Cal. Code Regs., tit, 23, § 782.) As relevant here, the provision states: "In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir." (*Id.*) In other words, the Board understands section 5937 to apply only to natural flows and therefore limited its own regulation of flow accordingly, to the existing natural flow in the river.

This interpretation of section 5937 is further borne out in decisions of the State Water Resources Control Board. For instance, in Water Right Order (WR Order) 78-1, the Board held that it would not require the water right permittee to release *imported water* for purposes of complying with section 5937, analogizing imported water to stored water. (Attachment 1 [WR Order 78-1].)[3] The Board stated, "If the dam at issue here were part of a storage diversion, the mandated permit term would have included" the language from section 782 of the Board's regulations, stating that the permit "shall not require the passage or release of water at a greater rate than the

[3] Pursuant to California Rules of Court, rule 8.520(h), a copy of WR Order 78-01, obtained from the State Water Resources Control Board's official government website, is attached hereto as Attachment 1.

unimpaired natural inflow into the reservoir." (Attachment 1, pp. 2-3 [emphasis in original].) The Board explained, "[t]his sentence, which is not part of Fish and Game Code Section 5937, was intended to interpret the scope of an applicant's duty under Section 5937 to bypass water by limiting that duty to the rate of unimpaired natural inflow." (Attachment 1, p. 3.) Courts grant "respect to administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose." (*Nipper v. California Auto Assigned Risk Plan* (1977) 19 Cal.3d 35, 45.) As the Board's interpretation that section 5937 applies only to natural flow is not clearly erroneous—and in fact is consistent with the Legislature's choice of the word *pass*—that interpretation should be followed here.

IV. CONCLUSION

For the foregoing reasons, the Court should find that Fish and Game Code section 5937 does not create a private right of action against dam owners, and therefore Plaintiffs' motion for a preliminary injunction should have been denied because they lack standing. In the event the Court reaches the question certified for review, it should answer it in the affirmative and hold that reasonable and beneficial use must be considered whenever

directing or adjudicating a particular use of water, including when applying a water use statute that does not expressly incorporate the reasonable and beneficial determination. In so holding, the Court should specify that section 5937 is limited to natural flow and cannot compel the release of stored water.

DATED: April 30, 2026.

Respectfully submitted,

PARIS KINCAID WASIEWSKI, LLP

By: */s/ Timothy J. Wasiewski*
VALERIE C. KINCAID
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CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Curiae Brief uses a 13-point Century Schoolbook font and contains a total of 4,964 words, according to the computer program used to prepare the document.

DATED: April 30, 2026 PARIS KINCAID WASIEWSKI, LLP

By: */s/ Timothy J. Wasiewski*
TIMOTHY J. WASIWESKI

PROOF OF SERVICE

I, Sheryl A. Pereda, declare:

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***AMICUS CURIAE* BRIEF and**

***AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTIES IN INTEREST AND APPELLANTS**
NORTH KERN WATER STORAGE DISTRICT, ET AL.

On April 30, 2026, I filed and served the above document via this Court's TrueFiling system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 30, 2026, at Sacramento, California.

SHERYL A. PEREDA

Attachment 1

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 23343, 23344, and 23345 of Honcut Creek Ranch, Yosuba Farms, and Sam Zall, respectively, to Appropriate from South Honcut Creek in Yuba County.	Order:	WR 78-1
	Source:	South Honcut Creek
	County:	Yuba

ORDER MODIFYING DECISION 1476
UPON PETITION FOR RECONSIDERATION

BY THE BOARD:

On December 16, 1977, applicants Honcut Creek Ranch, Yosuba Farms and Sam Zall, timely filed a petition for reconsideration of Board Decision 1476, adopted November 17, 1977. Decision 1476 approved subject applications in part and ordered issuance of permits upon appropriate terms and conditions.

1. Since applicants' diversion includes a dam, and since the Board did not require inclusion of a specific provision for protection of fish, one of the terms and conditions ordered to be included in the permits was the term mandated by Section 762.5, Title 23, California Administrative Code, which provides as follows:

> "Passage of Water for Fish. In compliance with Section 5937 of the Fish and Game Code, all permits for diversion of water from a stream by means of a dam which do not contain a more specific provision for the protection of fish shall require the permittee to 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; provided that during a period of low flow in the stream, upon approval of the Department of Fish and Game, this requirement will be satisfied if sufficient water is passed through a culvert, waste gate, or over or around the dam to keep in good condition any fish that may be planted or exist below the dam if it is impracticable or detrimental to pass the water through a fishway. In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir."

2. Applicants, by their petition for reconsideration, have drawn our attention to the fact that they have supplemented their supply of water from South Honcut Creek with purchased imported water, some of which comes down to them through South Honcut Creek which, to that extent, is being used as a conveyance facility. Such a practice is expressly authorized by Water Code Section 7075. Applicants intend to continue purchasing imported water, to be delivered as described above.

3. Applicants correctly point out that the permit term mandated by Section 762.5 of Title 23 is intended to implement Fish and Game Code Section 5937. Applicants then content that:

"Section 5937 of the Fish and Game Code was not intended and should not be construed to require petitioners to release [sic] imported water from their dam since petitioners pay for such water and, in the absence of their purchases, South Honcut Creek would be dry during much of the purchase season." (Petition, page 3.)

4. We agree with applicants' contention. If the dam at issue here were part of a storage diversion, the mandated

permit term would have included language implementing the final sentence of Section 762.5, which provides:

> "In the case of a reservoir, this provision shall not require the passage or release of water at a greater rate than the unimpaired natural inflow into the reservoir." (Emphasis added.)

This sentence, which is not part of Fish and Game Code Section 5937, was intended to interpret the scope of an applicant's duty under Section 5937 to bypass water by limiting that duty to the rate of unimpaired natural inflow, insofar as the Board's permitting authority is concerned.

5. In the instant matter, applicants' dam is not part of a storage diversion; the dam facilitates direct diversion both of South Honcut Creek water and the purchased imported water described above.

6. We conclude that the considerations which led to the Board's adoption of the final sentence of Section 762.5 concerning reservoirs are equally applicable to dams facilitating a direct diversion, that is, that the bypass duty should be limited to the natural unimpaired flows coming down to the dam. The permit term at issue here should be modified accordingly.

7. However, applicants' petition contains language suggesting a further interpretation of Fish and Game Code Section 5937 which goes beyond exclusion of purchased imported water from the scope of applicants' duty to bypass. Applicants state:

"The langauge of paragraph 10, however, which purports to require passage of sufficient water 'at all times' to keep in good condition fish that may exist below the dam might be interpreted to require release of imported water when the natural flow of South Honcut Creek would be insufficient to protect the fish and at the same time satisfy the reasonable requirements of those with riparian or appropriative rights." (Petition, pages 3-4; emphasis added.)

Applicants further submit that it would be unreasonable for the Board to require that:

"...where a bed of an intermittent stream is used for transport of imported water to a diversion by means of a dam, water must be released for fish protection even though all the natural flow of the stream is subject to riparian or appropriative rights." (Statement of Points and Authorities, page 2; emphasis added.)

Finally, applicants suggest modification of paragraph 10 of the Order of Decision 1476 by adding the following proviso:

"'provided, that nothing in this permit shall be deemed to require permittees to release water for fish protection outside of the diversion season permitted hereby or at any time that the natural flow of South Honcut Creek is less than that required to satisfy the appropriative or riparian rights of permittees.'" (Petition, page 4.)

8. As we have noted above, we agree with applicants' contention that Fish and Game Code Section 5937 is not intended to include purchased imported water within the scope of the bypass duty. We do not, however, agree with applicant's interpretation of Section 5937, insofar as such interpretation is implied in applicants' petition, that one who diverts directly by means of a dam is entitled under all circumstances to full satisfaction of all beneficial uses, under claim of riparian or appropriative right, from the natural flow in the source before the duty to bypass water for fish arises.

9. Accordingly, applicants' proposed revision of paragraph 10 is not accepted. Modification of paragraph 10 shall be limited to implementing the policy implicit in the final sentence of Section 762.5.

IT IS ORDERED that paragraph 10 of the Order of Decision 1476 be modified to read:

> "10. In compliance with Section 5937 of the Fish and Game Code, the permittee 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; provided that during a period of low flow in the stream, upon approval of the Department of Fish and Game, this requirement will be satisfied if sufficient water is passed through a culvert, waste gate, or over or around the dam to keep in good condition any fish than may be planted or exist below the dam if it is impracticable or detrimental to pass the water through a fishway. This provision shall not require the passage or release of water at a greater rate than the flow in the stream at the diversion, less any flow attributable to use of the stream as a conduit, pursuant to Water Code Section 7075."

Dated: JAN 5 1978

John E. Bryson, Chairman

W. Don Maughan, Vice Chairman

W. W. Adams, Member

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 5/1/2026 by M. Chang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BRING BACK THE KERN v. CITY OF BAKERSFIELD (NORTH KERN WATER STORAGE DISTRICT)**
Case Number: **S290840**
Lower Court Case Number: **F087487**

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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.

4/30/2026

Date

/s/Timothy Wasiewski

Signature

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