Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 5/1/2026 9:20:30 AM

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

No. S290840

IN THE SUPREME COURT OF CALIFORNIA

BRING BACK THE KERN, et al.,
Plaintiffs and Respondents,
v.
CITY OF BAKERSFIELD,
Defendant and Respondent.

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

Appeals from Orders Granting a Preliminary Injunction
in Favor of Plaintiffs
Kern County Superior Court Case No. BCV-22-103220
The Honorable Gregory A. Pulskamp, Judge Presiding

AMICUS BRIEF OF NORTHERN CALIFORNIA WATER ASSOCIATION AND REGIONAL WATER AUTHORITY IN SUPPORT OF REAL PARTIES IN INTEREST NORTH KERN WATER STORAGE DISTRICT ET AL.

Filed concurrently with Application for Leave to File Amicus Curiae Brief and Request for Judicial Notice

* RYAN S. BEZERRA, SBN 178048
rsb@bkslawfirm.com
ZACHARY C. CASTAGNOLA-JOHNSON, SBN 360139
zcj@bkslawfirm.com
BKS LAW FIRM, PC
1600 K Street, Suite 4A
Sacramento, CA 95814
Telephone: 916-446-4254

Counsel for Amici Curiae
Northern California Water Association and
Regional Water Authority

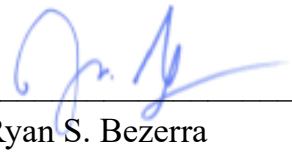
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned certifies there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, Rule 8.208.

Dated: May 1, 2026

Respectfully submitted,

BKS LAW FIRM, PC



Ryan S. Bezerra
Zachary C. Castagnola-Johnson

Attorneys for Amici Curiae Northern California Water Association and Regional Water Authority

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF 10

INTRODUCTION 15

ARGUMENT 16

I. By Necessity, The Reasonable Use Principle Developed To Maximize Water's Beneficial Use And Manage Water At The Level Of Individual Streams 16

II. Article X, Section 2 Was Enacted Specifically To Preserve The Reasonable Use Principle, So No Single Use Of Water Can Be Exempted From It 24

III. Article X, Section 2 Applies Reasonable Use Requirements To Uses With Senior Priorities To Maximize The Benefits Waterbodies Can Support 32

IV. Following *National Audubon*, No Appellate Law Has Explained How To Accommodate Competing Environmental And Human Water Uses 37

V. A Well-Known Superior Court Decision Concerning The American River, And A Multi-Faceted Settlement Concerning The Yuba River, Demonstrate How Human And Environmental Water Uses Can Be Reconciled Under Article X, Section 2 40

CONCLUSION 49

CERTIFICATE OF COMPLIANCE 50

TABLE OF AUTHORITIES

CASES

Antelope Valley Groundwater Cases
(2021) 62 Cal.App.5th 992 37

Bates v. Weymouth Iron Co.
(Mass. 1851) 62 Mass. 548 20

Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co.
(1989) 207 Cal.App.3d 363 38

Cal. Pastoral and Agricultural Co. v. Madera Canal and Irrigation Co.
(1914) 167 Cal. 78 ..... 25, 26

Cal. Trout v. State Water Resources Control Bd.
(1989) 207 Cal.App.3d 593 39

Cal. Trout v. Superior Court
(1990) 218 Cal.App.3d 187 39

California v. United States
(1978) 438 U.S. 645 42

Camacho v. Superior Court
(2023) 15 Cal.5th 354 45

Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano
(2015) 235 Cal.App.4th 1493 24

Cary v. Daniels
(Mass. 1844) 49 Mass. 466 ..... 20, 21

Casitas Mun. Water Dist. v. United States
(Fed.Cir. 2013) 708 F.3d 1340 39

City of Barstow v. Mojave Water Agency
(2000) 23 Cal.4th 1224 ..... 12, 19, 32, 45

City of Lodi v. East Bay Mun. Utility Dist.
(1936) 7 Cal.2d 316 ..... passim

City of Santa Maria v. Adam
(2012) 211 Cal.App.4th 266 37

Coso Energy Developers v. County of Inyo
(2004) 122 Cal.App.4th 1512 17

El Dorado Irr. Dist. v. State Water Resources Control Bd.
(2006) 142 Cal.App.4th 937 ..... 11, 12, 45

Elliot v. Fitchburg R. Co.
(Mass. 1852) 64 Mass. 191 ..... 20, 22, 23

Elliot v. Fitchburg Railroad Co.
(Mass. 1852) 64 Mass. 191 21

Environ. Defense Fund v. East Bay Mun. Utility Dist.
(1977) 20 Cal.3d 327 ..... 41, 42

Environ. Defense Fund v. East Bay Mun. Utility Dist.
(1980) 26 Cal.3d 183 ..... 41, 42

Environ. Defense Fund. v. East Bay Mun. Utility Dist.
(Cal. Super Ct. Jan. 2, 1990) No. 425955 41

Environ. Law Foundation v. State Water Resources Control Bd.
(2018) 26 Cal.App.5th 844 39

Fiske v. Framingham Mfg Co.
(Mass. 1832) 29 Mass. 68 20

Fitch v. Seymour
(Mass. 1845) 50 Mass. 462 20

Gin S. Chow v. City of Santa Barbara
(1933) 217 Cal. 673 ..... 15, 17, 24, 33

Gould v. Boston Duck Co.
(Mass. 1859) 79 Mass. 442 20

Herminghaus v. So. Cal. Edison
(1926) 200 Cal. 81 ..... 24, 28, 29, 31

Imperial Irr. Dist. v. State Water Resources Control Bd.
(1990) 225 Cal.App.3d 548 33

Irwin v. Phillips
(1855) 5 Cal. 140 25

Joslin v. Marin Mun. Water Dist.
(1967) 67 Cal.2d 132 ..... 16, 17

Kansas v. Colorado
(1907) 206 U.S. 46 20

Katz v. Walkinshaw
(1903) 141 Cal. 116 ..... 26, 27, 28

Kearney v. Salomon Smith Barney, Inc.
(2006) 39 Cal.4th 95 46

Light v. State Water Resources Control Bd.
(2014) 226 Cal.App.4th 1463 ..... 23, 39

Lux v. Haggin
(1886) 69 Cal. 255 ..... 22, 23, 24

Meridian, Ltd. v. City and County of San Francisco
(1939) 13 Cal.2d 424 33

Miller & Lux v. Madera Canal & Irr. Co.
(1909) 155 Cal. 59 28

Millview County Water Dist. v. State Water Resources Control Bd.
(2014) 229 Cal.App.4th 879 ..... 32, 33

Murdock v. Stickney
(Mass. 1851) 62 Mass. 113 20

National Audubon Society v. Superior Court
(1983) 33 Cal.3d 419 ..... passim

No. Cal. Power Co. v. Flood
(1921) 186 Cal. 301 25

North Kern Water Storage Dist. v. Kern Delta Water Dist.
(2007) 147 Cal.App.4th 555 22

Offshore Rental Co. v. Continental Oil Co.
(1978) 22 Cal.3d 157 46

Peabody v. City of Vallejo
(1935) 2 Cal.2d 351 ..... 17, 33

People v. Morales
(2016) 63 Cal.4th 399 31

People v. Shirokow
(1980) 26 Cal.3d 301 15

Restore Hetch Hetchy v. City and County of San Francisco
(2018) 25 Cal.App.5th 865 12

San Luis Obispo Coastkeeper v. County of San Luis Obispo
(9th Cir. 2025) 161 F.4th 590 39

Stanford Vina Ranch Irr. Co. v. State of California
(2020) 50 Cal.App.5th 976 ..... 39, 40

State Water Resources Control Bd. Cases
(2006) 136 Cal.App.4th 674 ..... 21, 29

Title Ins. & Trust Co. v. Miller & Lux
(1920) 183 Cal. 71 22

Town of Antioch v. Williams Irr. Dist.
(1922) 188 Cal. 451 ..... 27, 28

Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.
(1935) 3 Cal.2d 489 ..... 23, 34, 36, 37

Tyler v. Wilkinson
(C.C.D. R.I. 1827) 24 F. Cas. 472, No. 14,312 ..... passim

United States v. State Water Resources Control Bd.
(1986) 182 Cal.App.3d 82 ..... 25, 38

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova
(2007) 40 Cal.4th 412 11

Whittier v. Cocheco Manuf. Co.
(N.H. 1838) 9 N.H. 454 21

Williams v. Nelson
(Mass. 1839) 40 Mass. 141 20

STATUTES

16 U.S.C. § 1536(a)(2) 39

16 U.S.C. § 1538(a)(1)(B) 39

16 U.S.C. § 1539(a)(1)(B) 39

Fish & Game Code § 5937 ..... passim

Public Resources Code § 5093.50 43

Public Resources Code § 5093.54, subd. (e) 41

Public Resources Code § 5841.5, subd. (c) 41

Public Resources Code §§ 5840-5843 41

Stats. 1913, ch. 586, § 17 33

Stats. 1921, ch. 329, § 1 ..... 30, 43

Stats. 1972, ch. 1259, § 1 41

Stats. 1984, ch. 10 41

Water Code § 106 ..... 30, 31, 47

Water Code § 1455 33

Water Code § 1460 33

West's Water Code Appendix § 84-2, subd. (g) 48

West's Water Code Appendix § 84-28 48

OTHER AUTHORITIES

Assem. Conc. Res. No. 16, Stats. 1927
(1927 Reg. Sess.) res. Ch. 30 29

Bezerra & West, *Submerged in the Yuba River: The State Water Resources Control Board's Prioritization of the Governor's Commission's Proposals*
(2005) 36 McGeorge L. Rev. 331 47

Gray, *Ensuring the Public Trust*
(2012) 45 U.C. Davis L. Rev. 973 ..... 42, 43

Levy, *Lemuel Shaw, America's Greatest Magistrate*
(1982) 7 Vill. L. Rev. 389 20

Lynn, *Lemuel Shaw and Herman Melville*
(1988) 5 Const. Commentary 411 20

Newmyer, *Justice Joseph Story on Circuit and a Neglected Phase of American Legal History*
(1970) 14 Am. J. Leg. History 112 17

Owen, *The* Mono Lake Case*, the Public Trust Doctrine, and the Administrative State*
(2012) 45 U.C. Davis L. Rev. 1099 38

Scheiber, *Public Rights and the Rule of Law in American Legal History*
(1984) 72 Cal. L. Rev. 217 ..... 28, 29

Wiel, *Waters: American Law and French Authority*
(1919) 33 Harv. L. Rev. 133 17

RULES

Cal. Rules of Court, Rule 8.520(f) 10

TREATISES

Bezerra, CALIFORNIA WATER LAW
(West Academic 2022) 17, 29, 30

Sax et al., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS
(2nd ed. 1991) 40

REGULATIONS

46 Fed.Reg. 7484
(Jan. 23, 1981) 41

50 C.F.R., Part 660, Table 1 to Subpart H of Part 660 41

72 Fed.Reg. 19862
(April 20, 2007)..... 41

CONSTITUTIONAL PROVISIONS

Cal. Constitution Article X, section 2..... passim

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Guerrero and Associate Justices of the California Supreme Court:

The Regional Water Authority ("RWA") and the Northern California Water Association ("NCWA") respectfully apply for permission to file an *amicus curiae* brief under Cal. Rules of Court, Rule 8.520(f).[1] RWA and NCWA seek permission to submit an *amicus curiae* brief to provide necessary background and historical context on the principle of reasonable use and the development of that principle culminating in, and following, the enactment of the California Constitution Article X, section 2.

RWA and NCWA assert that, where it is not possible to resolve water disputes by priorities, California courts must consider competing uses of water simultaneously in order to maximize beneficial use, based on Article X, section 2 and the reasonable use principle. This brief will assist the Court with answering the following question presented in this case: "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?"

For the reasons stated in this application and in the attached *amicus curiae* brief, RWA and NCWA respectfully request leave to file that brief.

The application and *amicus curiae* brief were authored by Ryan S. Bezerra and Zachary C. Castagnola-Johnson of BKS Law Firm, PC on behalf of RWA and NCWA. No other person or entity made a monetary contribution to this brief's preparation and submission.

---

[1] This application is timely made within 30 days of the filing of the reply brief on the merits.

RWA is a joint powers authority formed in 2001, representing 21 water-supplier members in the greater Sacramento region. RWA's mission is to serve, represent and align the interests of regional water providers and stakeholders for the purpose of improving water supply reliability, availability, quality and affordability. RWA's members include cities, water and irrigation districts, mutual water companies, investor-owned water utilities and community services districts.

RWA's role is to assist these members with implementing successful water resources management strategies and to oversee and improve an integrated regional water management plan. In particular, RWA promotes improvements in water use efficiency in the region to ensure long-term needs are met. Along these lines, RWA does extensive education and advocacy work to disseminate information, understand and communicate issues regulatory and otherwise, and ensure and protect water supply reliability. RWA has filed briefs as *amicus curiae* previously in this Court and the Court of Appeal on matters impacting water providers and regional water management. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 420 ("*Vineyard*"); *El Dorado Irr. Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 942 ("*El Dorado*").)

In particular, since the early 2000s, RWA and its members have worked with environmental groups and business groups to implement, through the Water Forum stakeholder organization, the coequal goals of providing a reliable and safe water supply for the Sacramento metropolitan region and of preserving the lower American River's environmental values through long-term planning and cooperative engagement. (See *Vineyard, supra,* 40 Cal.4th, at p. 423.) RWA thus is particularly concerned that this case will impact the Water Forum parties' relationships and impair the

ability of other regions in the state to develop regional water solutions cooperatively.

NCWA is a nonprofit corporation that was formed in 1992 to safeguard and ensure reliable and affordable water supplies in the Sacramento Valley. NCWA's mission is to advance the economic, social, and environmental sustainability of the Sacramento Valley by enhancing and preserving its water rights, supplies, and water quality. NCWA is composed of dozens of water districts, water companies, small towns, rural communities and landowners that beneficially use both surface and groundwater resources within the Sacramento River Basin.

The landscapes served by NCWA's members are incredibly varied and include two million acres of family farms; freshwater habitat for threatened and endangered fish; small towns, rural communities, disadvantaged communities, and the State Capitol; six National Wildlife Refuges, more than fifty State Wildlife Areas and other privately managed wetlands; and forests and meadow in the mountains and waterfowl habitat in the Pacific Flyway on the valley floor. NCWA has filed briefs as *amicus curiae* previously in this Court and the Court of Appeal on matters impacting water rights, supplies, and water quality. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1232 ("*City of Barstow*"); *Restore Hetch Hetchy v. City and County of San Francisco* (2018) 25 Cal.App.5th 865, 868; *El Dorado, supra,* 142 Cal.App.4th, at p. 942.)

NCWA's concern arises from its work collaborating with state and federal agencies and advocating for holistic water management in California to balance drinking water needs for disadvantaged communities with efforts to improve freshwater conditions for threatened and endangered fish, restore floodplains and forests, and provide for healthy soils and aquifers to promote agriculture. In particular, NCWA strongly supports multi-faceted cooperative solutions to water disputes like the Yuba

River Accord, which resolved many years of controversy about the Yuba River's streamflows. The Yuba River is within NCWA's geographic area.

The issues in this case are significant to RWA and NCWA because the members that they represent provide water for a wide variety of beneficial uses, including domestic, municipal, irrigation, and environmental, that will undoubtedly be impacted by this Court's decision.

RWA and NCWA are concerned that, should this Court rule that fish flows under Fish & Game Code section 5937 are effectively exempt from reasonable use requirements, the development of multi-faceted water solutions like the Water Forum Agreement and the Yuba River Accord will be put at serious risk. Removing the balance that is necessary for accommodating human and environmental uses of specific streams, within the context defined by each of those streams' unique opportunities and constraints, will just encourage more conflict and litigation as one side of those controversies likely would feel empowered to press an advantage. RWA and NCWA respectfully submit this brief as *amici curiae* on behalf of North Kern Water Storage District and the other real parties in interest to assert the position that, under Article X, section 2's fundamental policy that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable," no single beneficial use of water can wholly govern just because it is reflected in statute.

Dated: May 1, 2026

Respectfully submitted,

BKS LAW FIRM, PC

Ryan S. Bezerra
Zachary C. Castagnola-Johnson

Attorneys for Amici Curiae Northern California Water Association and Regional Water Authority

INTRODUCTION

This Court has called California's scarce and variable supply of water "the very life blood" of our state. (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 702 ("*Gin S. Chow*").) Moreover, water is of course essential for life generally. Accordingly, since the dawn of American and California water law, the courts have almost always used the principle of reasonable use, where other legal tools are not enough, to ensure that limited water supplies can produce as much benefit for the public as possible. The most prominent exception to this pattern in California's legal history—namely, the early 20th century exemption of riparian rights from reasonableness requirements, relative to appropriative rights—caused the Legislature and the voters to respond by enacting Article X, section 2.[2] That enactment reflected the explicit political recognition that the single-use exemption would have strangled comprehensive water management.

In its landmark 1983 decision in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 ("*National Audubon*"), this Court incorporated environmental public trust interests into California law. The law, however, has not developed clear rules for how the accommodation of human and environmental water uses that *National Audubon* sought should occur. In this case, Appellants essentially assert that the environmental uses reflected in Fish & Game Code section 5937 ("Section 5937") have an unbounded priority, one unconstrained by reasonable use—just like early 20th century riparian rights. The question for which this Court granted review therefore is, "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

[2] In some of the cases cited in this brief, Article X, section 2 is referred to as Article XIV, section 3, which was its original numbering. (See *People v. Shirokow* (1980) 26 Cal.3d 301, 308.)

particular use of water, including when applying a water use statute that does not expressly incorporate the reasonable and beneficial determination?"

The answer must be, "Yes." A contrary result would not only repeat the problem that precipitated Article X, section 2's enactment, but would be contrary to the sophisticated ways in which courts and parties have resolved conflicts between human and environmental uses since *National Audubon*. In particular, one well-known Superior Court decision, known as the "Hodge Decision," resolved years and years of disputes about human and environmental uses of the American River through a holistic methodology, based on Article X, section 2's explicit adoption of the reasonable use principles. It is a mark of that approach's success that there was no appeal.

To maintain the space for such solutions, it is necessary to reject Appellants' position that generalized statewide statutes like Section 5937 put water uses addressed in isolation by such statutes beyond reasonable use requirements. That is the only way to implement Article X, section 2's fundamental policy that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable."

What this Court has called the "inescapable reality of life"—namely, that California's climate and hydrology require active water management, management that necessarily occurs at the level of individual uses—demands no less. (See *Joslin v. Marin Mun. Water Dist.* (1967) 67 Cal.2d 132, 140 ("*Joslin*").)

ARGUMENT

I. By Necessity, The Reasonable Use Principle Developed To Maximize Water's Beneficial Use And Manage Water At The Level Of Individual Streams

In one of its earliest decisions under Article X, section 2, this Court crystallized why it often is difficult to make general rules to allocate water:

> The waters of our streams are not like land which is static, can be measured and divided and the division remain the same. Water is constantly shifting, and the supply changes to some extent every day. A stream supply may be divided but the product of the division in nowise remains the same. When the supply is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield.

(*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368 ("*Peabody*").)

This Court also has recognized that the challenges of allocating water are particularly pressing in California, because the variability of our state's supplies make water the resource of "transcendent importance." (*Joslin, supra,* 67 Cal.2d, at p. 140.) California's "waters are the very life blood of its existence." (*Gin S. Chow, supra,* 217 Cal., at p. 702.)

Even before the United States acquired California in 1848, though, American courts applied the concept of reasonable use as the tool to fit competing uses within what a given river's supplies could sustain. (See *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512, 1522 (discussing the United States' 1848 acquisition of California).) In 1827, Justice Joseph Story's opinion in *Tyler v. Wilkinson* (C.C.D. R.I. 1827) 24 F. Cas. 472, No. 14,312, became the first American water law decision.[3] (Wiel, *Waters: American Law and French Authority* (1919) 33 Harv. L. Rev. 133, 136.) Even that very first decision demonstrated the concept of reasonable use as a tool for maximizing the benefits a water source can provide.

Tyler v. Wilkinson arose from several mills' use of water flowing in the Blackstone River in Pawtucket, Rhode Island, just west of the border

---

[3] At the time, U.S. Supreme Court justices "rode circuit" and decided cases on appeal alone. (Bezerra, CALIFORNIA WATER LAW (West Academic 2022) § 4.2, p. 77 ("Bezerra") (citing Newmyer, *Justice Joseph Story on Circuit and a Neglected Phase of American Legal History* (1970) 14 Am. J. Leg. History 112, 115, 126, 128).)

with Massachusetts. (24 F. Cas., at p. 473.) An "ancient dam" was built at the river's falls there "as early as 1718" and was relied upon by "proprietors" on both side of the river to power their mills. (*Id.*) "About the year 1714," a canal known as "Sergeant's trench" was built from above the falls to permit fish to migrate upriver. (*Id.*) To take advantage of the artificial flow of the water diverted into the trench, mills were built along the trench beginning in 1730. (*Id.*)

The plaintiffs in the case were the riparian mill owners located directly on the river, who sued the defendants, mill owners along the trench, for a declaration that the defendants held only a "wastewater privilege that is … a right to use only such surplus water" the plaintiffs did not want and for a related injunction. (*Tyler v. Wilkinson, supra,* 24 F. Cas., at p. 473.)

Justice Story began his analysis by defining what rights each riparian mill owner actually held, thus establishing the principle of reasonable use:

> In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another . . . There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights.

(*Tyler v. Wilkinson*, *supra*, 24 F. Cas., at p. 474.)

Justice Story explained, though, that these rights did not allow the riparians to completely dewater the mills that relied on diversions into the trench. Where the riparians had allowed the mills on the trench to take water for long enough, the riparians then could not deny those mills the volume of water on which they had relied. (*Id.*) In the case of Massachusetts and Rhode Island in 1827, the relevant period was 20 years.[4] (*Id.*)

Justice Story described the resulting rights of the mills on the trench as follows:

> [I]n questions of usage, the fact, how much water has been actually used, is not always decisive of the nature and extent of the right. Nor are occasional interruptions of the use, under peculiar circumstances, conclusive of a superior right to control and limit the entire use, to suspend it at pleasure, or destroy it at discretion. *The nature and object and value of the use are very material ingredients to explain and qualify the effect of such interruptions.* It is not, for instance, to be presumed, that valuable mills will be erected to be fed by an artificial canal from a river, and the stream be indispensable for the support of such mills, and yet, that the right to the stream is so completely lodged in another, that it may be cut off, or diminished, or suspended at pleasure . . . Men who build mills, and invest valuable capital in them, cannot be presumed, without the most conclusive evidence, to give their deliberate assent to the acceptance of such ruinous conditions.

(*Tyler v. Wilkinson*, *supra*, 24 F. Cas., at p. 475 (emphasis added).)

As a result, Justice Story held that the mills along the trench were entitled to the flow through the trench that had occurred during the 20 years preceding the case's filing, but no more, with the riparian mills being entitled to the rest. (*Id.*) Moreover, Justice Story established two reasonable

---

[4] In California, the relevant statutory period is five years. (*City of Barstow, supra,* 23 Cal.4th, at p. 1241.)

use principles: (1) that the goal of water management is to maximize the beneficial use of the water; and (2) that water management necessarily occurs at the specific level of specific uses of water.

In the decades after *Tyler v. Wilkinson*, into the late 1850s, Massachusetts' mills animated water law developed by the state's Chief Justice Lemuel Shaw. He was a giant of 19th century American law, being called "America's Greatest Magistrate" by one commentator.[5] (Levy, *Lemuel Shaw, America's Greatest Magistrate* (1982) 7 Vill. L. Rev. 389.) In a line of cases interpreting Massachusetts' "mill acts"—which preceded the American Revolution and generally authorized a downstream mill owner to impound water that flooded upstream land upon a payment of appropriate compensation—Shaw relied on the nature of the unique streams and waterbodies at issue to define mill owners' rights.[6] Justice Shaw's decisions were quite influential. The U.S. Supreme Court relied on one of them in its first interstate water decision in 1907. (See *Kansas v. Colorado* (1907) 206 U.S. 46, 102-104.)

Justice Shaw's decisions also presaged disputes that remain common in California. For example, in *Cary v. Daniels* (Mass. 1844) 49 Mass. 466, Justice Shaw relied on a stream's character to explain how the owner of a senior downstream mill violated the rights of a junior upstream mill when the senior raised its dam so that its impoundment obstructed the junior's wheel:

---

[5] Shaw also was Herman Melville's father-in-law. (Lynn, *Lemuel Shaw and Herman Melville* (1988) 5 Const. Commentary 411, 420-424.)

[6] See *Fiske v. Framingham Mfg Co.* (Mass. 1832) 29 Mass. 68, 71-73; *Williams v. Nelson* (Mass. 1839) 40 Mass. 141, 146; *Fitch v. Seymour* (Mass. 1845) 50 Mass. 462, 468; *Murdock v. Stickney* (Mass. 1851) 62 Mass. 113, 114-118; *Bates v. Weymouth Iron Co.* (Mass. 1851) 62 Mass. 548, 553-556; *Elliot v. Fitchburg R. Co.* (Mass. 1852) 64 Mass. 191, 198; *Gould v. Boston Duck Co.* (Mass. 1859) 79 Mass. 442, 443-445, 451-453.

> [O]ne of the beneficial uses of a watercourse, and in this country one of the most important, is its application to the working of mills and machinery . . . *It is therefore held, that each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land, on the same stream, above and below* . . . It seems to follow, as a necessary consequence from these principles, that in such case, the proprietor who first erects his dam for such a purpose has a right to maintain it, as against the proprietors above and below; and to this extent, prior occupancy gives a prior title to such use. It is a profitable, beneficial, and reasonable use, and therefore one which he has a right to make . . .
>
> But such appropriation of the stream to mill purposes, upon the principles stated, gives the proprietor a prior and exclusive right to such use only so far as it is actual . . . [T]he proprietor below may have the benefit of that surplus . . . *[A]lthough the proprietor above might, in the first instance, have raised his dam higher, keeping within the limits of a reasonable use, yet after such appropriation by the proprietor below, he cannot raise his dam and take such surplus; because, as to that, the lower proprietor has acquired a prior right*.

(*Cary v. Daniels, supra,* 49 Mass., at pp. 476-478 (emphasis added).)

Such logic is little different than California law's "no injury" rule that governs changes to appropriative water rights. (See *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 735-744 (discussing the "no injury" rule's history) ("*SWRCB Cases*").)[7]

While Justice Shaw referenced reasonable use principles in *Cary v. Daniels*, it is his 1852 opinion in *Elliot v. Fitchburg Railroad Co.* (Mass. 1852) 64 Mass. 191, that is most critical here. It is critical because this

[7] This decision relies on *Whittier v. Cocheco Manuf. Co.* (N.H. 1838) 9 N.H. 454, 458, where, in 1838, the New Hampshire court relied on *Tyler v. Wilkinson*. (*SWRCB Cases*, *supra*, 136 Cal.App.4th, at p. 740.)

Court explicitly incorporated *Elliot*'s reasonable use principles in *Lux v. Haggin* (1886) 69 Cal. 255, 402-406, which not only is a landmark precedent, but also laid the foundation for the Kern River's management. (See *Title Ins. & Trust Co. v. Miller & Lux* (1920) 183 Cal. 71, 74-79 (describing how the 1888 "Lux-Haggin contract" settled the *Lux v. Haggin* case); *North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 571 ("Miller-Haggin agreement" allocates Kern River water).)

Elliot involved a downstream landowner's action against a railroad that had contracted with an upstream landowner to divert, for a nearby depot, water from the creek that ran through both properties, but whose flow the upstream landowner had augmented by building ditches through a meadow so that the water flowed more easily from the source spring into the creek. (*Elliot*, *supra*, 64 Mass., at pp. 192-193.) The downstream riparian sued for a declaration that its water rights were violated, even though it showed no damage. (*Id.*) In the court's ruling for the railroad, Justice Shaw explained that, while the same legal rules applied to streams generally, how they applied depended on the nature of the relevant stream and what "reasonable" uses landowners along the stream could make without injuring each other:

> This appears to have been a small stream of water; but it must, we think, be considered that the same rules of law apply to it . . . [but] *what would be a reasonable and proper use of a considerable stream, ordinarily carrying a large volume of water, for irrigation or other similar uses, would be an unreasonable and injurious use of a small stream, just sufficient to furnish water for domestic uses for farm-yards, and watering-places for cattle . . .*
>
> [N]o riparian proprietor can wholly abstract or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law

> incidental and beneficial, necessarily flows from the principle, that the right to the reasonable and beneficial use of a running stream, is common to all the riparian proprietors, and so, each is bound so to use his common right, as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right, by all the proprietors.

(*Elliot*, *supra*, 64 Mass., at pp. 193, 195.)

To support this theory, *Elliot* cited several of "the most reliable American authorities," which included *Tyler v. Wilkinson*, *supra*. (*Elliot*, *supra*, 64 Mass., at p. 196.)

Calling Justice Shaw a "learned judge and luminous writer," this Court incorporated this portion of *Elliot* into *Lux v. Haggin* through an extraordinary quotation that consumes over three pages of the official reports. (*Lux v. Haggin*, *supra*, 69 Cal., at pp. 402, 403-406.) Moreover, in one of its earliest and most cited interpretations of Article X, section 2, this Court tracked Justice Shaw's explanation about why an individual stream's unique characteristics and uses matter greatly:

> In determining what is a reasonable quantity for beneficial uses, it is the policy of the state to require within reasonable limits the highest and greatest duty from the waters of the state . . .
>
> What is a beneficial use, of course, depends upon the facts and circumstances of each case. *What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need.* What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.

(*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 547, 567 (emphasis added) ("*Tulare*"); *Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1479 (quoting this portion of *Tulare*) ("*Light*").)

The thread of applying the reasonable use principle to competing uses of a stream to generate as much benefit as possible from that stream's unique resources has run through American and California water law from their very beginnings. In reading *Tyler v. Wilkinson*, it becomes difficult to remember that it is nearly 200 years old because it still speaks so clearly to what we must consider in water disputes now. Justice Lemuel Shaw relied on, and augmented, *Tyler v. Wilkinson* in ways that this Court imported into California law in *Lux v. Haggin* and effectively has repeated under Article X, section 2. Answering "no" to the question presented thus would cut the thread that ties nearly 200 years of American water law together.

II. Article X, Section 2 Was Enacted Specifically To Preserve The Reasonable Use Principle, So No Single Use Of Water Can Be Exempted From It

The short story of how Article X, section 2 came to be is well-known. In 1926, this Court held in *Herminghaus v. So. Cal. Edison* (1926) 200 Cal. 81, 108-115, that riparian landowners' water uses were not bound by reasonable use requirements as against appropriators who sought to store water, even if that caused over 90% of a river's runoff to go unused. The Legislature, and the people, disagreed with this rule, causing Article X, section 2 to be promptly enacted in 1928. (See *National Audubon, supra,* 33 Cal.3d, at pp. 442-443; *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1509 ("*Capistrano*").) Five years later, in *Gin S. Chow*, Justice John Shenk, the dissenter in *Herminghaus*, wrote this Court's decision that confirmed Article X, section 2's effect as an exercise of the police power that constrained riparian rights to reasonable use. (*Gin S. Chow*, *supra*, 217 Cal., at pp. 700-704; *Capistrano*, *supra*, 235 Cal.App.4th, at pp. 1509-1511.)

This story, however, obscures to a degree how *Herminghaus*, and the line of cases leading to it, departed from this Court's other water law

principles. From its very beginnings in the chaos that ensued after gold was discovered in California in 1848, the state's water law has explicitly incorporated policy concerns about how to protect investments and maximize the benefits the available waters can provide.

To start, in *Irwin v. Phillips* (1855) 5 Cal. 140, 146-147, this Court first recognized appropriative rights governed by "first in time, first in right" priority. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 102 ("*U.S. v. SWRCB*").) Taking "notice of the political and social condition of the country," which involved miners operating on federal and state land with federal and state encouragement but not land grants, the Court held that "a universal sense of necessity and propriety" supported recognizing the rights of miners "who by prior appropriation, have taken the water from their natural beds, and by costly artificial works have conducted for miles over mountains and ravines, to supply the necessities of gold diggers," without which much of the state "would remain without development." (*Irwin v. Phillips, supra,* 5 Cal., at p. 146.)

By the early 20th century, this Court had refined appropriative rights by stating the rule that they are defined not by the amount of water diverted, but rather the amount actually applied to a beneficial use, plus an allowance for reasonable losses between the diversion and the use. (See, e.g., *No. Cal. Power Co. v. Flood* (1921) 186 Cal. 301, 304-305.) In 1914, in *Cal. Pastoral and Agricultural Co. v. Madera Canal and Irrigation Co.* (1914) 167 Cal. 78, this Court referred to the appropriation statutes the Legislature enacted in 1872 and Idaho case law to base that rule on a policy of maximizing the benefits water could provide:

> There [in Idaho], as here (Civ. Code, sec. 1411), the statute prescribed that the appropriation must be for some useful or beneficial purpose, and that when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. It was declared in the case last cited [*Farmers'*

> *etc. Ditch Co. v. Riverside Irr. Dist.* (1909) 16 Idaho 535] that it was the policy of the law of the state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and other useful and beneficial purposes. Such is clearly the policy of the law of this state . . .
>
> [O]ne actually diverting water under a claim of appropriation for a useful or beneficial purpose, cannot by such diversion acquire any right to divert more water *than is reasonably necessary for such use or purpose*, no matter how long a diversion in excess thereof has continued[.]

(*Cal. Pastoral*, *supra,* 167 Cal., at pp. 84-85 (emphasis added).)

In the seminal 1903 decision on rehearing in *Katz v. Walkinshaw* (1903) 141 Cal. 116, 133-134, this Court even more overtly shaped groundwater law to support effective water use and related investments by adopting "[t]he doctrine of reasonable use." Justice Lucien Shaw's majority opinion rejected the argument that the traditional maxim of absolute ownership under which a landowner owned everything within its property's bounds, from the deepest depths to the highest heights, should govern groundwater. (*Id.* at pp. 121-123, 129-133.) He explained that, even if the common law had incorporated that maxim, it also supported modifying the governing rule given California's variable climate, the apparent need for water from sources other than surface streams and the need to pump from the deep basins and filled valleys where the state's groundwater was available. (*Id.* at pp. 123-128.)

Moreover, Justice Shaw described how a doctrine of correlative "reasonable use" would better protect the investments necessary to support groundwater's beneficial use:

> [Under the maxim, groundwater pumpers] will have absolutely no protection in law against others having stronger pumps, deeper wells, or a more favorable situation, who can thereby take from them unlimited quantities of the water, reaching to the entire supply, and without regard to the place of use . . .

> The doctrine of reasonable use . . . affords some measure of protection to property now existing, and greater justification for the attempt to make new developments. It limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken . . . *So far as the active interference of others is concerned, therefore, the danger to such undertakings is much less, and the incentive to development much greater, from the doctrine of reasonable use than from the contrary rule*.

(*Katz, supra,* 141 Cal., at pp. 133-134 (emphasis added).)

By 1922, Lucien Shaw was this Court's Chief Justice and he incorporated broad policy concerns about supporting effective water use in applying reasonable use to limit appropriative rights. In *Town of Antioch v. Williams Irr. Dist.* (1922) 188 Cal. 451, 453-455, he wrote the majority opinion by which this Court reversed an injunction favoring the city, an appropriator located where fresh flows from the Central Valley's rivers meet San Francisco Bay's salt water, against numerous upstream diverters, an injunction that had reflected the city's theory that, without those diversions, its supplies would be fresher. Chief Justice Shaw wrote that accepting the city's arguments "would be extremely unreasonable and unjust to the inhabitants of the valleys above and highly detrimental to the public interests besides." (*Id.* at p. 465.)

He supported this conclusion by explaining how the Sacramento and San Joaquin Rivers that converged to flow past Antioch were the largest in the state, winding through "wide valleys in which are many hundreds of thousands of acres of land suitable for irrigation and comparatively barren without it;" how storage reservoirs were planned to support that irrigation; and how Antioch could avoid problems with salty water reaching its diversion by moving that diversion "a few miles up the river." (*Id.* at pp. 464-465.)

Compared with *Katz* and *Town of Antioch*, the line of concurrent decisions exempting riparian rights from reasonable use requirements, and leading to *Herminghaus*, *supra*, was a remarkable deviation. (See Scheiber, *Public Rights and the Rule of Law in American Legal History* (1984) 72 Cal. L. Rev. 217, 235-237, 243-248.) First, in *Miller & Lux v. Madera Canal & Irr. Co.* (1909) 155 Cal. 59 ("*Miller & Lux*"), and then in *Herminghaus*, the Court rejected the idea that California's likely need for water storage could justify requiring riparian landowners to keep their demands within their uses' reasonable needs:

> It is argued that unless appropriators are permitted to divert and store for future use water which would otherwise run into the sea and be wasted, there will be a failure to make the most beneficial use of the natural resources of the state and that riparian owners should not be permitted to obstruct the development of these resources. It may be that, if non-riparian owners are permitted to intercept the winter flow of streams, in order to irrigate non-riparian lands or to develop power, the water so taken will permit the cultivation of more land and benefit a greater number of people than will be served if the flow continues in its accustomed course. But the riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, "a parcel of the land itself." Neither a court nor the legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation.

(*Miller & Lux*, *supra*, 155 Cal., at pp. 64-65; see also *Herminghaus*, *supra*, 200 Cal., at p. 101 (quoting *Miller & Lux*).)

This refusal to budge from *Miller & Lux* in 1909 to *Herminghaus* in 1926 was particularly striking because of the political developments between the two decisions. In 1913, the Legislature enacted the Water

Commission Act based on a prior state commission report that highlighted how not applying reasonable use requirements to riparian landowners denied others water and resulted in flooded lands. (Bezerra, *supra*, § 5.4, at pp. 132-133; Scheiber, *supra*, 72 Cal. L. Rev., at p. 245; see also *SWRCB Cases*, *supra*, 136 Cal.App.4th, at pp. 741-742 (discussing the key Conservation Commission report and Water Commission Act).) The Water Commission Act not only established water-right permitting, but also included a limit on riparian rights' demands, which *Herminghaus* essentially found unconstitutional. (200 Cal., at pp. 116-118.)

Herminghaus was decided on December 24, 1926 and the political reaction was immediate. (*Id.* at p. 81.) Just over a week later, on January 1, 1927, the state Director of Public Works delivered to the Legislature multiple technical reports to support a comprehensive statewide water plan. (Real Parties In Interest's Exhibits In Support Of Motion For Judicial Notice, vol. 1, exh. B8, pp. 92-100 ("Real Parties' MJN").) That plan included proposals for reservoirs on several major rivers, including "Isabella Reservoir" on the Kern River—but *Herminghaus* threatened to render them all nearly impossible. (See Real Parties' MJN, vol. 1, exh. B8, pp. 96-99.) The Senate and the Assembly appointed a joint committee to review the state plan. (Real Parties' MJN, vol. 1, exh. B1, p. 69, discussing Assem. Conc. Res. No. 16, Stats. 1927 (1927 Reg. Sess.) res. Ch. 30, p. 2258.) The joint committee's report attacked *Herminghaus*:

> Immediately upon beginning its hearings it became apparent to your committee that the execution of the coordinated plan would bring it in direct conflict with a most serious legal obstacle—the rights of riparian owners along the streams involved. Your committee felt that it could do no greater service to the State as a whole than to seek relief from the doctrine of wasteful riparian rights, a doctrine set forth in the recent decision of the Supreme Court of California in the Herminghaus case and substantiated by a long line of court decisions. This doctrine, we believe, if carried out without

> limit would not only make the accomplishment of the [state's] coordinated plan practically impossible, but would endanger the rights of thousands of California's citizens whose very existence depends upon appropriated water rights.

(Real Parties' MJN, vol. 1, exh. B1, p. 70.)

The Legislature quickly considered a constitutional amendment to put before the voters, with Assembly Constitutional Amendment No. 27 ("ACA 27") being the main proposal. (Real Parties' MJN, vol. 1, exh. B2, p. 79.) After its March 9, 1927 introduction, ACA 27 was amended multiple times before it took the form we now know as Article X, section 2 when the Assembly and the Senate approved it on April 25, 1927. (Bezerra, *supra*, § 6.2.2, pp. 164-169.)

For this case, the most significant amendment to ACA 27 was the deletion of the policy now embodied in Water Code section 106. First enacted as a statute in 1921, section 106 reads, "It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." (See Stats. 1921, ch. 329, § 1, p. 443.) ACA 27 originally included nearly identical language to be added to the state Constitution, but was deleted before the Legislature advanced ACA 27 to the voters. (Bezerra, *supra*, § 6.2.2, pp. 164-169.) In other words, *in developing Article X, section 2, the Legislature consciously chose not to prefer in the Constitution a class of water use already preferred by statute.*

Two legislators wrote the one-page ballot argument to the voters favoring Article X, section 2's enactment. (Real Parties' MJN, vol. 1, exh. B11, p. 145.) There was no opposition argument. The argument favoring Article X, section 2 cut to the heart of the matter:

> California has practically no rain in the summer. The state's future development requires that its water shall be stored in order that it may be used in summer and fall for domestic use

> for great cities, irrigation of lands, development of power, navigation, and for the purpose of flood control . . .
>
> Under present [legal] interpretations the riparian owner is not bound by any rule of reasonableness in the use of water. For example, in the Herminghaus case it was held that approximately 97 per cent of the water of the streams should flow by the land in order that 3 per cent be used for irrigation.
>
> The development of California requires that a different rule from this be adopted. The amendment preserves to the riparian owner all the water to which he may be entitled for beneficial use by reasonable methods of use, but requires that the unwarranted and needless waste of water should be prevented.

(Real Parties' MJN, vol. 1, exh. B11, p. 145.)

Ballot arguments are among constitutional amendments' most persuasive legislative history. (*People v. Morales* (2016) 63 Cal.4th 399, 406.) Here, the ballot argument, the Legislature's receipt of the state's water plan immediately after *Herminghaus* and its then immediate actions to advance that plan by overturning *Herminghaus* combine to prove a point critical to this case. Specifically, in enacting Article X, section 2, to support effective water management, the Legislature and then the people rejected the idea that any water use is exempt from reasonable use requirements.

Article X, section 2's fundamental policy therefore speaks in general terms. To support "the water resources of the State" being "put to beneficial use to the fullest extent of which they are capable," section 2 directs that "unreasonable use … be prevented" and "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." Article X, section 2 removed riparian uses' exemption from reasonable use requirements and thus subjected *all water uses* to those requirements—even the domestic and irrigation uses that were already favored by the statute that is now Water

Code section 106. All of this law and history contradict the idea presented by Appellants that fishery uses under Section 5937 can be exempt from the reasonable use requirements under Article X, section 2.

III. Article X, Section 2 Applies Reasonable Use Requirements To Uses With Senior Priorities To Maximize The Benefits Waterbodies Can Support

In *City of Barstow*, this Court surveyed the character of various types of water rights, how Article X, section 2 applies to those rights, and how such rights had applied to allocate water in "previous cases resolving regional water uses." (*City of Barstow, supra,* 23 Cal.4th, at pp. 1240-1243.) From that survey, this Court concluded, "Thus, *water right priority has long been the central principle* in California water law." (*Id.* at p. 1243 (emphasis added).) Notwithstanding priority, reasonable use enables people to benefit from their investments making water useful. (See pp. 16-24 *ante*.)

The Legislature has recognized priorities as governing water rights for over 150 years. It enacted the state's first law defining a process for initiating an appropriative right in surface water in 1872. (*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 890-891 ("*Millview*").) While an optional method of initiating such a right, these statutes, where used, provided clarity about when an appropriator initiated his or her diversion and therefore what his or her right's priority date was. (*Id.*) When the Legislature enacted the Water Commission Act, which took effect in 1914 and established the state's permitting scheme for new surface-water diversions, it stated the basic rule of priority:

> Upon the approval of any application by the commission, said approval shall give priority of right as of the date of said application, and shall give the right to take and use the amount of water specified in said approval until the issuance by the state water commission of a license for the use of said

> amount of water, or until the said commission refuses to issue said license.

(Stats. 1913, ch. 586, § 17, p. 1022; see also *Millview*, *supra*, 229 Cal.App.4th, at pp. 890-891 (describing the act's history).)

Water Code section 1455 now states this basic rule, although it is subject to some exceptions. (See, e.g., Wat. Code, § 1460 (a "municipality's" application "shall be considered first in right, irrespective of whether it is first in time").)

Notwithstanding how these longstanding statutes explicitly recognize priorities, however, Article X, section 2 subjects *all* water uses to a reasonable use requirement. "All uses of water, including public trust uses, must now conform to the standard of reasonable use." (*National Audubon, supra,* 33 Cal.3d, at p. 443.) At its most basic—and consistent with Article X, section 2's genesis as a constraint on largely unbounded riparian rights—reasonable use requirements prohibit a water user from diverting substantially more water than its underlying beneficial use requires. (*Imperial Irr. Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 553 (describing losses), 561-564 (no vested right in unreasonable use).)

Article X, section 2's political objective was to promote water storage, so it is unsurprising that most of the early decisions interpreting that constitutional amendment concerned and supported storage projects. (See *Gin S. Chow*, *supra*, 217 Cal., at pp. 677-680, 700-704; *Peabody*, *supra*, 2 Cal.2d, at pp. 358-361, 366-369, 373-376; *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 320-324, 335-340 ("*Lodi*"); *Meridian, Ltd. v. City and County of San Francisco* (1939) 13 Cal.2d 424, 432-436, 443-448.) This Court also has applied Article X, section 2's reasonable use requirements in a more nuanced way to promote the

maximum benefits a waterbody can provide. Two doctrines are good examples. The first originated in this Court's 1935 *Tulare* decision.

The 1935 *Tulare* decision involved the adjudication of many parties' claims to the natural streamflows of the Kaweah River's delta and associated groundwater. (*Tulare*, *supra*, 3 Cal.2d, at pp. 502-504.) The trial court had found that riparian landowners had a prior right to the "entire natural flow" and, as to the river's underflow, a prior right to "the whole of the underground flow." (*Id.* at pp. 520-521, 523.) This Court reversed, holding that Article X, section 2 prohibited judgments that relied on the theory that riparian and overlying landowners had a right to maintain natural flows and to generally "reasonable" amounts of water. (*Id.* at pp. 523-526.) In *Tulare*, this Court further explained that, while Article X, section 2 allowed for reservations for future riparian use, it also required the courts to quantify riparians' and overlying landowners' current "reasonable beneficial uses" in order to determine whether there was water available for junior rightholders. (*Id.* at pp. 523-526.)

Under *Tulare*, even where priorities are undisputed, Article X, section 2 is not satisfied by a court simply declaring what a priority use *generally* "needs" before cutting juniors off from water supplies. Courts must apply a reasonable use analysis to the senior rights to determine what the beneficial uses supporting those rights *specifically* and *reasonably* require before declaring that there is no water available for other uses. As applied to the present case, under *Tulare*, Article X, section 2 therefore requires that this Court apply a reasonable use analysis to fishery "needs" under Section 5937 before cutting off human uses like irrigation—even if one makes the questionable assumption that Section 5937 involves a use with priority like those of the riparians in *Tulare*.

The second example of this Court's nuanced application of Article X, section 2 relative to priority uses originated in another early case, *Lodi*,

supra, 7 Cal.2d 316. *Lodi* involved East Bay Municipal Utility District's ("EBMUD") effort to store water on the Mokelumne River for conveyance across the Central Valley to the EBMUD's Bay Area jurisdiction, with a maximum diversion of 220,000 acre-feet per year. (*Id.* at pp. 322-324, 335.) The City of Lodi, located downstream on the river in the valley, relied on wells recharged by the river for its municipal supply, which averaged about 3,600 acre-feet per year. (*Id.* at p. 321.) "[T]here [was] no serious dispute on the issue that the city's right to . . . a total of 3,600 acre-feet annually is prior in time and right" to EBMUD's rights. (*Id.*) Lodi objected to EBMUD's project and the trial court ordered that EBMUD forgo between 120,000 to 360,000 acre-feet per year so that it could flow past Lodi to support recharge to its wells. (*Id.* at p. 336.) As Justice John Shenk, writing for this Court, put it:

> In other words, in order that the plaintiff may continue to pump its 3,600 acre-feet annually from its wells, the District is compelled to release from 120,000 to 360,000 acre-feet annually, the court finding that such releases were necessary to force Lodi's water into the underground basin.

(*Id.*)

This Court reversed the trial court, holding that, while Lodi clearly had priority, Article X, section 2 required that the courts determine whether it was possible to satisfy Lodi's underlying use with a lower water demand, so that EBMUD, as a junior, also could share the river's water. (*Lodi*, *supra*, 7 Cal.2d, at p. 339.) Justice Shenk stated the key question as follows:

> The question is, can the right of the city be fully protected without requiring the tremendous releases entailed in this decree? Those releases, after they serve the purpose of forcing a relatively small quantity of water into the surrounding underground water table, for the most part, waste into the sea. Under such circumstances the 1928 constitutional amendment [Article X, section 2] . . . compels the trial court, before issuing a decree entailing such waste of water, to ascertain whether there exists a physical solution of the problem

> presented that will avoid the waste, and that will at the same time not unreasonably and adversely affect the prior appropriator's vested property right.

(*Lodi*, *supra*, 7 Cal.2d, at pp. 339-340.)

The trial court had rejected the parties' competing practical proposals because they could not agree among themselves. (*Id.* at p. 341.) This Court held that Article X, section 2 imposed on the trial court a duty to do better:

> *Since the adoption of the 1928 constitutional amendment, it is not only within the power but it is also the duty of the trial court to admit evidence relating to possible physical solutions, and if none is satisfactory to it to suggest on its own motion such physical solution.*

(*Lodi*, *supra*, 7 Cal.2d, at p. 341 (emphasis added).)

Lodi thus held that a finding of priority of one water right over another is not the end of the matter. Article X, section 2 imposes on the courts "*the duty*" to consider whether the beneficial use underlying the senior right can be accomplished while demanding less water from the junior rightholder so that the junior can use water, too. *Lodi*'s rule flows naturally from the overarching policy that begins Article X, section 2:

> 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.

(Emphasis added.)

If anything, *Lodi* goes even further than *Tulare* in seeking to implement this policy. It is not just that senior rights' reasonable demands must be determined before juniors are cut off. Under *Lodi*, the courts

themselves have the constitutional duty to determine whether seniors' beneficial uses can be met through a physical solution that makes more water available to juniors. Physical solutions under *Lodi* are not an anomaly. In fact, they are only growing in importance, as demonstrated by their prominent role in resolving recent groundwater basin adjudications. (See *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 277, 280-286, 298-300; *Antelope Valley Groundwater Cases* (2021) 62 Cal.App.5th 992, 1016-1021, 1037-1042.)

Here, *Tulare* and *Lodi* thus require that, before cutting off human water uses to support fishery uses to which Section 5937 applies—if we assume *arguendo* that they are senior to human uses—those fishery uses must be analyzed under Article X, section 2 in at least two ways. First, under *Tulare*, this Court must determine those uses' *actual* reasonable demands, so that it can determine how much water is available for others. Second, under *Lodi*, this Court must determine whether a physical solution is possible that would meet those fishery uses' reasonable needs *without* cutting off any competing human uses.

This means that the answer to the Court's question presented is, "Yes."

IV. Following *National Audubon*, No Appellate Law Has Explained How To Accommodate Competing Environmental And Human Water Uses

In its 1983 *National Audubon* decision, this Court injected into California water law a significant new interest, specifically a public trust interest in instream environmental values. (33 Cal.3d, at p. 445.) *National Audubon* held that the public trust was at least theoretically sufficient—in some circumstances and in some ways—to require reconsideration of human water uses due to impacts on environmental resources. (*Id.* at pp.

446-447.) *National Audubon* also declared, however, that it is necessary to accommodate public trust and human uses of water:

> [B]oth the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust.

(*Id.* at p. 445.)

To "seek this accommodation," *National Audubon* stated several principles, which included that "efficient use" of water for human uses "requires diverting water from in-stream uses" and that "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." (*Id.* at p. 446.) *National Audubon* explicitly based these principles on Article X, section 2, among other authorities. (*Id.*)

National Audubon, though, did not state clear rules for how to reconcile human and environmental water uses. Since 1983, *National Audubon* has spawned a small industry of scholarship, but little appellate law to explain how the desired "accommodation" of interests can be achieved. (See Owen, *The* Mono Lake Case*, the Public Trust Doctrine, and the Administrative State* (2012) 45 U.C. Davis L. Rev. 1099, 1101-1102 (discussing the volume of related legal commentary).) The appellate decisions flowing from *National Audubon* instead have focused mainly on the public trust doctrine's scope. (See, e.g., *U.S. v. SWRCB, supra,* 182 Cal.App.3d, at pp. 106, 149-150 (public trust as basis for reserved regulatory authority); *Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co.* (1989) 207 Cal.App.3d 363, 380-381 (where public trust already

considered, less reason for applying it again); *Environ. Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 856-861 (public trust's application to groundwater interconnected with surface water).) Even the results of the Mono Lake decisions that flowed directly from *National Audubon* primarily concerned whether, and how rapidly, the state would need to apply new environmental requirements for the lake's tributaries, rather than those requirements' substance. (*Cal. Trout v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 593, 626-633; *Cal. Trout v. Superior Court* (1990) 218 Cal.App.3d 187, 194, 205-213.)

This lack of case law may exist partly because concerns about public trust resources, and therefore Section 5937, overlap with disputes under the federal Endangered Species Act. (See 16 U.S.C. §§ 1536(a)(2) (federal agencies to ensure authorized projects do not jeopardize listed species), 1538(a)(1)(B) (take of endangered species generally prohibited), 1539(a)(1)(B) (incidental take permits).) That statute has spawned significant litigation in California about conditions for sensitive fish. (See, e.g., *Casitas Mun. Water Dist. v. United States* (Fed.Cir. 2013) 708 F.3d 1340, 1343-1345; *San Luis Obispo Coastkeeper v. County of San Luis Obispo* (9th Cir. 2025) 161 F.4th 590, 594-595.)

Where disputes have occurred under state law, they mainly have involved highly time-specific conflicts between human and environmental uses. For example, *Light* concerned the State Water Resources Control Board's (the "State Water Board") regulations to address how simultaneous diversions from the Russian River by many vineyards to protect their grapes against frost on infrequent cold nights caused juvenile salmon to be stranded in pools isolated from the river. (*Light, supra,* 226 Cal.App.4th, at pp. 1472-1475, 1486-1487.) Likewise, *Stanford Vina Ranch Irr. Co. v. State of California* (2020) 50 Cal.App.5th 976, concerned temporary emergency regulations that the State Water Board adopted during a severe drought,

which mandated reduced irrigation diversions to provide "belly-scraping flows" just so that endangered salmon could migrate to higher parts of a stream. (*Id.* at pp. 983-984, 986-987, 989-991, 993, 1004.) These cases' scope is not nearly as broad as the Appellants' claims here, which seek judicially determined indefinite rules governing a river's flows.

It therefore is necessary to look beyond appellate decisions for an example of how Article X, section 2 has been applied to accommodate human and environmental water uses as *National Audubon* envisioned.

V. A Well-Known Superior Court Decision Concerning The American River, And A Multi-Faceted Settlement Concerning The Yuba River, Demonstrate How Human And Environmental Water Uses Can Be Reconciled Under Article X, Section 2

Sacramento Valley rivers in the areas that RWA and NCWA serve provide examples for how the accommodation of human and environmental water uses that this Court envisioned in *National Audubon* can actually occur. The accommodation concerning the American River occurred through a well-known Superior Court decision.[8] The accommodation concerning the Yuba River occurred through a landmark settlement involving several agreements.

The Superior Court decision concerning the American River is known as the "Hodge Decision," after its author Judge Richard Hodge. It developed a holistic methodology to resolve a years-long dispute involving competing uses of the American River that flows through Sacramento.

---

[8] For example, the Hodge Decision is discussed in the water law textbook authored by prominent environmental law scholar, Professor Joseph L. Sax. (See Sax et al., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS (2nd ed. 1991) Public Rights in Water, § D, ch. 6, pp. 594-596 ("[The Hodge Decision] is a trial court opinion, but a very important one. . . . The decision is the first to apply *National Audubon* to an initial appropriation.").)

(Request for Judicial Notice filed herewith ("RJN"), Exh. A [*Environ. Defense Fund. v. East Bay Mun. Utility Dist.* (Cal. Super Ct. Jan. 2, 1990) No. 425955].)

That case involved the effort of EBMUD to take from the river up to 150,000 acre-feet per year of water, under a 1970 contract with the federal Bureau of Reclamation ("Reclamation"), to be routed to EBMUD's Bay Area service area through Reclamation's Folsom-South Canal. (*Environ. Defense Fund v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 188 ("*EDF II*").) The diversion point was to be Reclamation's Nimbus Dam, east of Sacramento and just downstream of Folsom Dam, which would have caused the water to be removed above the "lower" American River below Nimbus. (*Environ. Defense Fund v. East Bay Mun. Utility Dist.* (1977) 20 Cal.3d 327, 332, 349 ("*EDF I*").) EBMUD could have taken the water from downstream of the river's confluence with the Sacramento River, allowing the water to flow through the lower American River. (*EDF II*, *supra*, 26 Cal.3d, at p. 189.)

The lower American River supports important environmental interests. Its fish include multiple sensitive species. (Pub. Res. Code, § 5841.5, subd. (c); see also 50 C.F.R., Part 660, Table 1 to Subpart H of Part 660; 72 Fed.Reg. 19862, 19874 (April 20, 2007).) In 1972, the California Legislature included the lower American River among the first rivers designated under the California Wild and Scenic Rivers Act. (Stats. 1972, ch. 1259, § 1, p. 2512 (enacting Pub. Res. Code, § 5093.54, subd. (e)).) To advance all of these interests, in 1984, the Legislature enacted the Urban American River Parkway Preservation Act. (Stats. 1984, ch. 10, pp. 44-45 (enacting Pub. Res. Code, §§ 5840-5843).) In 1981, the federal government designated the lower American River under the federal Wild and Scenic Rivers Act. (46 Fed.Reg. 7484 (Jan. 23, 1981).)

Due to the effects that the diversions to EBMUD would have on environmental interests, environmental groups sued over EBMUD's contract with Reclamation, and the County of Sacramento intervened. (*EDF I*, *supra*, 20 Cal.3d, at pp. 331-334.) The environmental groups claimed that EBMUD was violating Article X, section 2 by not developing recycled water before seeking American River water; by adding demand to Reclamation's Central Valley Project ("CVP") that would support the construction of more dams in the American River watershed; and by not seeking to divert water from the Sacramento River when doing so would allow that water to flow through the lower American River. (*Id.* at p. 332.)

In a 1977 decision, this Court affirmed the trial court's dismissal of the case, holding, among other things, that the claims about CVP facilities and operations were preempted by federal law. (*Id.* at pp. 334, 340-341.) The U.S. Supreme Court, however, vacated and remanded that decision for consideration based on that Court's 1978 decision in *California v. United States* (1978) 438 U.S. 645.[9] (*EDF II*, *supra*, 26 Cal.3d, at p. 187.) In its second decision, in 1980, this Court held that the state-law claims about EBMUD's point of diversion were not preempted by federal law, and that the courts and the State Water Board have concurrent jurisdiction to decide claims "to enforce the self-executing provisions of article X, section 2." (*Id.* at pp. 192-193, 198-200.) This Court therefore reversed the trial court's dismissal of the case. (*Id.* at p. 200.)

The case returned to the trial court, but was then referred to the State Water Board, which produced a referee report in 1988. (Gray, *Ensuring the Public Trust* (2012) 45 U.C. Davis L. Rev. 973, 988.) The parties returned

[9] *California v. United States* held that Reclamation's projects are subject to state-adopted water-right terms, as long as those terms are not inconsistent with congressional directives. (*California v. United States*, *supra*, 438 U.S., at pp. 675-676, 678-679 (discussed in *EDF II*, *supra*, 26 Cal.3d, at p. 192).)

to the trial court, and specifically Judge Hodge, who conducted a trial *de novo.* (*Id.*) On January 2, 1990, Judge Hodge issued his Statement of Decision. (RJN, Exh. A, p. R003.)

The Hodge Decision's dispute over the lower American River involved *three* interests that *all* arguably could have had the same sort of blanket priority that Appellants assert for Section 5937 here. The first of these interests was reflected in Water Code section 106. As discussed above (pp. 30-32 *ante*), since 1921, that statute has declared that "the use of water for domestic purposes is the highest use of water." (Stats. 1921, ch. 329, § 1, p. 443 (original enactment).) Second was the state's interest in public trust resources, under *National Audubon*. (*National Audubon*, *supra*, 33 Cal.3d, at p. 447.) Third, and most important here, was the interest in maintaining the American River's environmental values under the California Wild and Scenic Rivers Act, which declares:

> It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. *The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution.*

(Pub. Res. Code, § 5093.50 (emphasis added).)

This statutory policy at issue in the Hodge Decision thus states *explicitly* what Appellants here can only claim that Section 5937 *implies*, namely that, by statute, the Legislature has declared one water use to be the "highest" one.

Exercising constitutional authority under Article X, section 2, however, Judge Hodge sought to accommodate *all* of the competing uses and thus to implement that section's fundamental policy, namely that "the

water resources of the State be put to beneficial use to the fullest extent of which they are capable." He reconciled the legal and policy issues at play as follows:

> The Court has concluded that providing high quality drinking water is a significant public policy objective that is furthered by EBMUD's diversion at the Folsom-South Canal. The evidence has demonstrated persuasively, however, that specific conditions must attach to that diversion in order to protect sensitive public trust values. Accordingly, the Court has fashioned a physical solution designed to accommodate the competing concerns which have emerged.

(RJN, Exh. A, p. R004:15-20 (footnote omitted).)

Recognizing that EBMUD had shown at least a colorable scientific possibility that using American River water could be better for the health of EBMUD's customers than using Sacramento River water, the Hodge Decision allowed for EBMUD to take water from the American River at Nimbus, but subject to detailed terms. (*Id.* at pp. R004, R074:20-R075:27, R111:19-R114:25.) Those terms included year-round minimum streamflows at Nimbus that would have to be met before EBMUD could take any water there. (*Id.* at pp. R097:15-R099:9, R112:1-23.) The Hodge Decision based those requirements on extensive technical evidence about the needs of the river's salmon, but, in light of how conflicting that evidence was, also reserved jurisdiction to revisit those requirements based on new technical evidence. (*Id.* at pp. R085-R100, R113.)

Because it was domestic customers' public health needs that supported allowing EBMUD to take water at Nimbus, the Hodge Decision limited EBMUD's use of the water to *only* deliveries to those customers and prohibited EBMUD from transferring that water to other users. (RJN, Exh. A, pp. R075:20-27, R112:24-25.)

The Hodge Decision further explained that its minimum streamflow requirement for the July 1 through October 15 period addressed not only

the needs of the river's fish, but also protected recreational interests because that period is important for those interests, even though it is not as critical for salmon. (*Id.* at pp. R102:10-R103:28.) The decision then incorporated these terms into a physical solution and declared, in that solution:

> The foregoing flow regimen is not merely interim in nature. It is intended as a permanent constitutionally mandated prerequisite to diversion [by EBMUD], modifiable only upon the presentation of convincing evidence which demonstrates the need for such modification . . . .

(RJN, Exh. A, pp. R113:14-R114:25.)

Physical solutions cannot modify water rights' priorities. (*City of Barstow*, *supra*, 23 Cal.4th, at pp. 1247-1251.) Strict application of priorities cannot result in unreasonable use contrary to Article X, section 2, and other principles can compete with priorities in some cases, but generally priorities govern among human water uses. (See *El Dorado, supra,* 142 Cal.App.4th, at pp. 965-967.)

To accommodate both human and environmental water uses, however, standard priorities could not decide the matter, so the Hodge Decision employed a different methodology. Basing that methodology explicitly on Article X, section 2, that decision evaluated each of the competing uses' needs and sought to *maximize each use* within the bounds of the river's unique and limited water resources.

The Hodge Decision referred to this methodology as "balancing," but it was not that exactly. Balancing generally involves identifying multiple general policy factors and weighing how a given case's facts implicate those factors to arrive at a case-specific result. (See, e.g., *Camacho v. Superior Court* (2023) 15 Cal.5th 354, 380-382, 393-394 (describing and balancing factors for the constitutional right to a speedy trial).) That is not actually what Judge Hodge did.

Instead, the Hodge Decision applied, in a more complex setting, *Lodi*'s rule that the courts themselves must find and apply practical solutions to maximize the total benefits that a water source can provide. *Lodi* declared that rule in a case involving only human uses, namely senior and junior appropriators. The Hodge Decision effectively applied that rule where there were not only three competing interests, but also no rules of priority available to ground the analysis. That decision effectively applied Article X, section 2's basic rule that a water right encompasses the amount of water reasonably necessary to support the right's underlying beneficial use to *all* competing uses—including public trust and environmental uses—*simultaneously* to produce rules that, based on the evidence available, would maximize the benefits that the American River could produce.

California water law does not name the type of analysis the Hodge Decision applied. That analysis, however, resembles the interest-based "comparative impairment" doctrine that this Court applies in choice-of-law cases. Under that doctrine, this Court examines the interests underlying the California law and the other law that each might govern a case and assesses how those interests would be impacted if the laws that embody them were to not be applied, with the goal being "the maximum attainment of underlying purpose by *all* governmental entities." (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 100-101, 107-115, 123-124, 128 (quoting *Offshore Rental Co. v. Continental Oil Co.* (1978) 22 Cal.3d 157, 166 [emphasis in *Kearney*]).)

The analogy is not perfect, given how disparate the concerns of water law and choice-of-law cases are, but the comparative impairment doctrine and the Hodge Decision's application of *Lodi*'s physical solution doctrine both look through the competing legal claims to the interests underlying those claims to determine how to accommodate all of those interests to the greatest extent possible. Most importantly for this case, both

analyses require that *the courts consider all competing interests simultaneously*.

Contrary to Appellants' claims here, no single use of water wholly governs just because it is reflected in statute. As the Hodge Decision showed, sometimes multiple applicable statutes speak absolutely—but in isolation—about what water uses are to be preferred, yet applying all of them absolutely is impossible where a real river is concerned. There is only so much water. That is where the concept of reasonable use supplies the tool to solve the problem, both in California under Article X, section 2 since 1928 and under American water law generally since its inception nearly 200 years ago in *Tyler v. Wilkinson*, *supra*, 24 F. Cas. 472.

It is especially important that *National Audubon* anticipated this situation. It rejected Los Angeles' argument that Water Code section 106's preference for domestic uses should govern the case and instead held that preference "must be read in conjunction" with other statutes and policies. (*National Audubon*, *supra*, 33 Cal.3d, at p. 447 fn. 30.) That is what the Hodge Decision did in applying Article X, section 2 and is the opposite of Appellant's position here.

Accepting Appellants' position, and declaring Section 5937 to create a statutory preference beyond reasonable use considerations, also would seriously discourage negotiated solutions that accommodate environmental and human water uses like the Hodge Decision did for the American River.

Similar to the dispute concerning that river, in the 1990s and 2000s, there was a long-running dispute concerning streamflows in the Yuba River to support sensitive fish species. (Bezerra & West, *Submerged in the Yuba River: The State Water Resources Control Board's Prioritization of the Governor's Commission's Proposals* (2005) 36 McGeorge L. Rev. 331, 342-343.) In 2008, after 29 days of State Water Board hearings spread over 11 years and initial rounds of litigation, Yuba County Water Agency ("Yuba

Water"), the California Department of Fish and Wildlife ("CDFW"), the local "member unit" water suppliers Yuba Water serves, multiple environmental groups and the state Department of Water Resources ("DWR") negotiated and concluded a settlement known as the Yuba River Accord. (See RJN, Exh. B, pp. R118-R123 [State Water Board Corrected Order WR 2008-0014 ("2008 Order")].)[10]

The Accord involves multiple agreements. Its "Fisheries Agreement" states Yuba River streamflow requirements to which Yuba Water, CDFW and the signatory environmental groups agreed. (RJN, Exh. B, pp. R120-R122.) Its "Water Purchase Agreement" between Yuba Water and DWR involves compensated transfers from Yuba Water to DWR that consist of some water that Yuba Water releases under the Fisheries Agreement, with DWR delivering the transfer water to contractors located south of the Delta. (*Id.* at pp. R122-R124.) Under the Accord's "Conjunctive Use Agreements," Yuba Water's member units sometimes pump groundwater for irrigation in order to make more river water available for fish in exchange for compensation from Yuba Water's transfer revenues. (*Id.* at p. R124.) The State Water Board approved the Accord in 2008. (*Id.* at pp. R125-R133.) The Accord's transfer program has succeeded, with the State Water Board, in 2026, approving its extension for another 25 years. (RJN, Exh. C, pp. R135-R147 [State Water Board Order WR 2026-0001].)[11]

Like the Hodge Decision for the American River, the Yuba Accord addressed the many beneficial uses of the Yuba River's water by essentially

---

[10] This 2008 order is available on the State Water Board's website at https://waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2008/wro2008_0014corrected.pdf. The Legislature defined Yuba Water's member units in the Yuba County Water Agency Act. (See West's Wat. Code Appendix, §§ 84-2, subd. (g), 84-28.)

[11] This 2026 order is available on the State Water Board's website at https://waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2026/wro2026-0001.pdf.

looking through competing legal claims to arrive at terms that advanced *all* of those uses *together*. Prioritizing the environmental uses covered by Section 5937 in isolation would discourage such voluntary solutions by encouraging one competing interest's proponent to litigate a claimed preference, rather than to negotiate one.

It is necessary to preserve the opportunity for such voluntary negotiated solutions to implement Article X, section 2's fundamental policy. The reality of California's scarce and variable supply of water demands that all tools remain available to manage the resource that are "the very life blood of its existence." The answer to the Court's question presented therefore should be, "Yes."

CONCLUSION

For all the reasons set forth above, the Northern California Water Association and the Regional Water Authority respectfully request that this Court affirm the Court of Appeal's decision.

Dated: May 1 2026

Respectfully submitted,

By: _____
Ryan S. Bezerra

By: _____
Zachary C. Castagnola-Johnson

Attorneys for Amici Curiae Northern California Water Association and Regional Water Authority

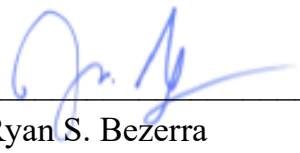
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c), the undersigned certifies that the **34** pages that constitute the *amicus curiae* brief for Northern California Water Association and Regional Water Authority contains **11,081** words (including footnotes but not caption page, Certificate of Interested Entities or Persons, Application for Leave to File Amicus Curiae Brief, signature blocks, or Request for Judicial Notice), as counted using the Word Count feature of Microsoft Word, and that this document uses typeface that is proportionally spaced and a 13-point typestyle consistent with the Rule of this Court.

Dated: May 1, 2026

Respectfully submitted,

BKS LAW FIRM, PC



Ryan S. Bezerra
Zachary C. Castagnola-Johnson

Attorneys for Amici Curiae Northern California Water Association and Regional Water Authority

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 1600 K Street, Suite 4A, Sacramento, CA 95814.

On May 1, 2026, I served true copies of the following document(s) described as:

- **AMICUS BRIEF OF NORTHERN CALIFORNIA WATER ASSOCIATION AND REGIONAL WATER AUTHORITY IN SUPPORT OF REAL PARTIES IN INTEREST NORTH KERN WATER STORAGE DISTRICT ET AL.;**
- **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF AMICUS BRIEF OF NORTHERN CALIFORNIA WATER ASSOCIATION AND REGIONAL WATER AUTHORITY IN SUPPORT OF REAL PARTIES IN INTEREST NORTH KERN WATER STORAGE DISTRICT ET AL.; and**
- **EXHIBITS TO REQUEST FOR JUDICIAL NOTICE.**

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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

Executed on May 1, 2026, at Sacramento, California.

Zachary C. Castagnola-Johnson

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **zcj@bkslawfirm.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	2026-05-01 - RWA & NCWA - Amicus Brief ISO Real Parties in Interest
REQUEST FOR JUDICIAL NOTICE	2026-05-01 - RWA & NCWA - Request for Judicial Notice ISO Amicus Brief
ADDITIONAL DOCUMENTS	2026-05-01 - RWA & NCWA - Exhibits to Request for Judicial Notice ISO Amicus Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Ashley Barton Duane Morris LLP	abarton@duanemorris.com	e-Serve	5/1/2026 9:20:29 AM
Jillian Ames Hanson Bridgett LLP 340657	JAmes@hansonbridgett.com	e-Serve	5/1/2026 9:20:29 AM
Douglas Evertz Murphy & Evertz LLP 123066	devertz@murphyevertz.com	e-Serve	5/1/2026 9:20:29 AM
Virginia Gennaro Office of the City Attorney 138877	Vgennaro@bakersfieldcity.us	e-Serve	5/1/2026 9:20:29 AM
Nicholas Jacobs SOMACH SIMMONS & DUNN 210091	njacobs@somachlaw.com	e-Serve	5/1/2026 9:20:29 AM
Daniel Raytis Belden Blaine Raytis, LLP 218374	dan@bbr.law	e-Serve	5/1/2026 9:20:29 AM
Jennifer Spaletta Stoel Rives LLP 200032	jennifer.spaletta@stoel.com	e-Serve	5/1/2026 9:20:29 AM
Nathan Metcalf Hanson Bridgett 240752	nmetcalf@hansonbridgett.com	e-Serve	5/1/2026 9:20:29 AM
Kevin Bursey	kbursey@wjhattorneys.com	e-	5/1/2026 9:20:29

Wanger Jones Helsley PC		Serve	AM
Christopher Sproul Environmental Advocates 126398	csproul@enviroadvocates.com	e-Serve	5/1/2026 9:20:29 AM
Roger Moore Law Office of Roger B. Moore 159992	rbm@landwater.com	e-Serve	5/1/2026 9:20:29 AM
Maximilian Bricker Somach Simmons & Dunn 350150	mbricker@somachlaw.com	e-Serve	5/1/2026 9:20:29 AM
Scott Kuney Young Wooldridge 111115	skuney@youngwooldridge.com	e-Serve	5/1/2026 9:20:29 AM
Tuloa Sanchez Shute Mihaly Weinberger	tsanchez@smwlaw.com	e-Serve	5/1/2026 9:20:29 AM
Benjamin Covington Horvitz & Levy LLP 340180	bcovington@horvitzlevy.com	e-Serve	5/1/2026 9:20:29 AM
Patrick Soluri Soluri Meserve, A Law Corporation 210036	mae@semlawyers.com	e-Serve	5/1/2026 9:20:29 AM
Mae Ryan Empleo Soluri Meserve, A Law Corporation	legal@semlawyers.com	e-Serve	5/1/2026 9:20:29 AM
Mary Loum Brownstein Hyatt Farber Schreck, LLP 300542	MLoum@bhfs.com	e-Serve	5/1/2026 9:20:29 AM
Dean Wallraff Attorney at Law 275908	dw@aenv.org	e-Serve	5/1/2026 9:20:29 AM
David Weibel Shute, Mihaly & Weinberger LLP	weibel@smwlaw.com	e-Serve	5/1/2026 9:20:29 AM
Jolie-Anne Ansley Duane Morris LLP 221526	JSAnsley@duanemorris.com	e-Serve	5/1/2026 9:20:29 AM
Valerie Stephan Water Audit California	vstephan@waterauditca.org	e-Serve	5/1/2026 9:20:29 AM
Louinda Lacey SOMACH SIMMONS & DUNN 275888	llacey@somachlaw.com	e-Serve	5/1/2026 9:20:29 AM
Zachary Amaya-Philbrook Horvitz & Levy, LLP	zamayaphilbrook@horvitzlevy.com	e-Serve	5/1/2026 9:20:29 AM
Blanca Herrera Duane Morris	BAHerrera@duanemorris.com	e-Serve	5/1/2026 9:20:29 AM
Ali Constant Murphy & Evertz, LLP	aconstant@murphyevertz.com	e-Serve	5/1/2026 9:20:29 AM
Robert Donlan Ellison Schneider Harris & Donlan LLP	rdonlan@wjhattorneys.com	e-Serve	5/1/2026 9:20:29 AM
Colin Pearce Duane Morris 137252	CLPearce@duanemorris.com	e-Serve	5/1/2026 9:20:29 AM

Gary Watt HANSON BRIDGETT LLP 191265	gwatt@hansonbridgett.com	e-Serve	5/1/2026 9:20:29 AM
Richard Iger Kern Delta Water District 263412	richard@kerndelta.org	e-Serve	5/1/2026 9:20:29 AM
Holly Martinez Murphy & Evertz LLP	hmartinez@murphyevertz.com	e-Serve	5/1/2026 9:20:29 AM
Jennifer Estabrook Somach Simmons & Dunn	jestabrook@somachlaw.com	e-Serve	5/1/2026 9:20:29 AM
Craig Carnes Wanger Jones Helsley PC	ccarnes@wjhattorneys.com	e-Serve	5/1/2026 9:20:29 AM
Patrick Soluri Soluri Meserve, A Law Corporation 210036	patrick@semlawyers.com	e-Serve	5/1/2026 9:20:29 AM
Anissa Chitour Morrison & Foerster LLP 341926	achitour@mofo.com	e-Serve	5/1/2026 9:20:29 AM
Bradley Herrema Brownstein Hyatt Farber Schreck, LLP 228976	bherrema@bhfs.com	e-Serve	5/1/2026 9:20:29 AM
Brett Stroud Young Wooldridge, LLP 301777	bstroud@youngwooldridge.com	e-Serve	5/1/2026 9:20:29 AM
Pennie Macpherson Somach Simmons & Dunn	pmacpherson@somachlaw.com	e-Serve	5/1/2026 9:20:29 AM
Sean Herman Hanson Bridgett LLP 302261	sherman@hansonbridgett.com	e-Serve	5/1/2026 9:20:29 AM
Patrick Burns Hanson Bridgett LLP 300219	pburns@hansonbridgett.com	e-Serve	5/1/2026 9:20:29 AM
Christopher Hu Office of the Attorney General 293052	christopher.hu@doj.ca.gov	e-Serve	5/1/2026 9:20:29 AM
william mckinnon Law Office 129329	legal@waterauditca.org	e-Serve	5/1/2026 9:20:29 AM
Michelle Chester Somach Simmons & Dunn 300632	mchester@somachlaw.com	e-Serve	5/1/2026 9:20:29 AM
Ian Fein California Department of Justice 281394	ian.fein@doj.ca.gov	e-Serve	5/1/2026 9:20:29 AM
Kevin Bundy Shute, Mihaly & Weinberger LLP 231686	bundy@smwlaw.com	e-Serve	5/1/2026 9:20:29 AM
Matthew Collom City Attorney's Office	mcollom@bakersfieldcity.us	e-Serve	5/1/2026 9:20:29 AM
Daniel Root	droot@bbr.law	e-	5/1/2026 9:20:29

Belden, Blaine, & Raytis		Serve	AM
Adam Keats Law Office of Adam Keats, PC 191157	adam@keatslaw.org	e-Serve	5/1/2026 9:20:29 AM
Jeremy Rosen Horvitz & Levy LLP 192473	jrosen@horvitzlevy.com	e-Serve	5/1/2026 9:20:29 AM
Scott Slater Brownstein Hyatt Farber Schreck, LLP 117317	sslater@bhfs.com	e-Serve	5/1/2026 9:20:29 AM
Shawnda Grady Wagner Jones Helsley PC 289060	sgrady@wjhattorneys.com	e-Serve	5/1/2026 9:20:29 AM
Zach Castagnola-Johnson BKS Law Firm PC 360139	zcj@bkslawfirm.com	e-Serve	5/1/2026 9:20:29 AM
Ryan Bezerra Bartkiewicz Kronick & Shanahan 178048	rsb@bkslawfirm.com	e-Serve	5/1/2026 9:20:29 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

5/1/2026

Date

/s/Zach Castagnola-Johnson

Signature

Castagnola-Johnson, Zach (360139)

Last Name, First Name (PNum)

BKS Law Firm PC

Law Firm