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In the

Supreme Court

of the

State of California

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

v.

CITY OF BAKERSFIELD,
Defendant and Respondent,

and

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

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL · FIFTH APPELLATE DISTRICT
CASE NOS. F087487, F087503, F087549, F087558, F087560, F087702
SUPERIOR COURT OF KERN COUNTY · HONORABLE GREGORY A. PULSKAMP
CASE NO. BCV-22-103220

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* SUPPORTING PLAINTIFFS AND RESPONDENTS; PROPOSED BRIEF OF *AMICUS CURIAE* TROUT UNLIMITED

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Under California Rules of Court, rule 8.520(f), Trout Unlimited respectfully requests permission to file the attached amicus curiae brief in support of Plaintiffs and Respondents Bring Back the Kern et al.

Trout Unlimited is the nation's largest and oldest conservation-focused 501(c)(3) nonprofit organization working to conserve coldwater fisheries and the habitat that supports them. As part of this work, for over 25 years Trout Unlimited has maintained a Western Water Program staffed with attorneys, scientists, project managers, and policy advocates who have participated in public and private processes to develop and implement instream flow standards to sustain fisheries. Trout Unlimited seeks leave to file the accompanying amicus curiae brief out of concern for the real-world consequences of the opinion filed in the Third District Court of Appeal leading to this appeal. The Court's ruling in this matter could have far-reaching consequences for Trout Unlimited's work in California.

Trout Unlimited's amicus curiae brief will assist the Court in deciding this matter by providing historical context and legislative history for Fish and Game Code section 5937 ("section 5937"); providing practical context regarding the development of instream flow regimes; suggesting a workable, step-by-step approach for harmonizing section 5937 and article X, section 2 of the California Constitution; analyzing the impacts of the Court of Appeal's opinion from the perspective of instream flow

practitioners; and distinguishing between reasonable use and beneficial use as those terms are used in a water law context. The parties' briefs do not address these points, and Trout Unlimited believes they are important perspectives for the Court to consider in deciding this matter. Accordingly, Trout Unlimited respectfully requests permission to file the accompanying brief.

No party or attorney for a party participated in drafting this brief or in Trout Unlimited's decision to file it. No person or entity, including any party or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

May 1, 2026

Trout Unlimited

By: *Matthew Clifford*
Matthew Clifford
California Director and Attorney

PROPOSED AMICUS CURIAE BRIEF

Trout Unlimited ("TU") is the nation's largest and oldest conservation organization working to recover rivers and streams and their trout and salmon populations. In furtherance of that mission, TU has for more than 25 years maintained a Western Water Program staffed by attorneys, scientists, project managers, and advocates, and has participated in public and private processes to develop instream flow standards to protect coldwater fisheries in a variety of legal and factual contexts. TU writes to this Court as amicus curiae out of deep concern for the real-world consequences of the opinion the Court of Appeal issued in this case, *Bring Back the Kern v. City of Bakersfield* (2025) 110 Cal.App.5th 322 ("Court of Appeal Opinion"). The Court of Appeal adopted a reading of article X, section 2 of the California Constitution ("article X, section 2") that would eliminate any role for the Legislature in setting rules governing the reasonable diversion and use of water to protect public fisheries, and instead empower courts to substitute their own judgment as to what practices are reasonable. This is a shock to existing water law that will have far-reaching consequences.

This proposed amicus brief reviews the historical context and legislative history preceding Fish and Game Code section 5937,[1] discusses various analytical errors in the Court of Appeal Opinion, and explains how courts should analyze and apply section 5937 in conjunction with article X, section 2, drawing on

[1] All further statutory references are to the California Fish and Game Code unless otherwise indicated.

both established legal principles and the examples provided by past and ongoing processes to implement instream flow requirements to protect fisheries. For the reasons discussed in this amicus brief, TU respectfully requests that this Court reverse the Court of Appeal Opinion.

INTRODUCTION

Section 5937 of the Fish and Game Code ("section 5937") is a keystone component of California's overall scheme for protecting the fisheries that have been recognized as an important public resource since the state's founding over a century and a half ago. At its core, this case presents the question of how this Court can give effect to that important mandate in a way that harmonizes with article X, section 2 and related provisions of the Water Code.

Both the Court of Appeal and the Real Parties in Interest ("Real Parties") would have the Court believe that giving full effect to section 5937 is an all but impossible task. The Court of Appeal's approach is to construe section 5937's legislatively-required flows as just another "use" of water that the trial court must "balance" against competing uses and determine what is "reasonable" before a dam owner can be required to release a single drop of water, effectively rendering the statute a nullity. The Real Parties go even further, asking the Court to ignore the plain text of section 5937 and hold that the statute does not apply at all to dams where the state has not ordered the construction of a fishway. As a fallback, the Real Parties endorse the Court of Appeal's "balancing" approach, but further emphasize that

Plaintiffs must bear the initial burden of quantifying how much flow the law requires owners to release from their dams, and that the trial court must give no weight to the legislative judgment that those flows constitute a reasonable use of water. Underlying the arguments of both the Court of Appeal and the Real Parties is a vision of section 5937 as some kind of outlier in the constitutional and statutory scheme governing the conservation of fisheries and beneficial use of water, one that places unworkable and unreasonable burdens on diverters and water users and must therefore be applied with extreme care and skepticism, rather than being an integral component of that scheme.

Any suggestion that section 5937 is somehow unworkable or at odds with the overall body of California natural resource law is simply mistaken. To the contrary, by applying familiar principles of constitutional and statutory law, one can readily derive the appropriate procedure for applying section 5937 in concert with article X, section 2 in a way that resolves any tension between them and gives effect to both. Moreover, to the extent that process requires technical determinations, it can draw on a body of established science that is routinely applied to establish instream flow prescriptions to keep fish in good condition in public and private processes across California and beyond.

The general outlines of the appropriate procedure for reconciling and applying section 5937 and article X, section 2 are accurately described in the opening and reply briefs filed with

this Court by Plaintiffs and Respondents Bring Back the Kern et al. ("Plaintiffs"). The goal of this brief is not to repeat the arguments in those or the other parties' briefs. Rather, TU's intent is twofold: (1) to offer additional perspective on the legal issues raised by the parties where it may be helpful to the Court; and (2) to more fully flesh out the procedure described in Plaintiffs' briefs, both by addressing steps not implicated by the current posture of this case, and by offering thoughts on how some of the steps could be applied in practice. For this, we draw on TU's experience contributing scientific work and legal analysis in support of public instream flow proceedings across California and other western states.

I. Historical context and legislative intent demonstrate the California Legislature's continuous intent to protect California's fisheries through section 5937 and its predecessors.

In the 1800's, California's streams and rivers ran abundantly with salmon. Reporting to Congress on his 1846 California expedition, Captain John C. Frémont, who gave the Kern River its current name, boasted that "the salmon crowd in immense numbers up . . . every little river and creek. . ." and the salmon's "great abundance" "gives it an important place among the resources of this country." (Frémont, Geographical Memoir Upon Upper California, in Illustration of his Map of Oregon and California, Report to the United States Senate, 30th Cong., 1st Sess., Miscellaneous 148 (1848).) Beginning in the late 1840s, the California Gold Rush drew hundreds of thousands of new people to the region, sparking the rise of California's commercial salmon

fishery. (Eifler, The California Gold Rush: The Stampede that Changed the World (2016) p. 71; Yoshiyama et al., *Historical Abundance and Decline of Chinook Salmon in the Central Valley Region of California* (1998) 18 N. Am. J. Fisheries Mgmt. 487, 493.)

California became a state in 1850 and just two years later enacted its first fish-protective legislation: "An Act to prohibit the erection of Weirs, or other obstructions to the run of Salmon[.]" (1852 Cal. Stat. 325, ch. 82.) The Legislature recognized the threat to anadromous fish posed by obstructions in rivers and streams—namely dams, weirs, nets, and fences—and outlawed such obstructions where salmon lived, classifying the obstructions as nuisances. (*Id.* at § 1.) The 1852 act made it a misdemeanor to obstruct salmon runs, imposed a substantial fine on violators, required that any complaint be investigated "immediately," and required obstacles to be "immediately destroy[ed]" or the fine was doubled. (*Id.* at §§ 2, 3.)

Between 1853 and 1864, California's yearly salmon catch increased from 1,603 to 20,512. (Commissioners of Fisheries, Report of the Commissioners of Fisheries of the State of California for the Years 1870 and 1871, p. 7.) By 1868, California was "better supplied [with fish] than any other equally populous portion of the civilized world, as regards either abundance, excellence, or variety." (Cronise, The Natural Wealth of California (1868), p. 487.) California's fisheries were so abundant that its "markets [were] fully stocked at all seasons" and the state exported fish to China. (*Ibid.*)

In 1870, the Legislature expanded protections for fish by mandating fishways to bypass obstructions in rivers and streams through a law titled "An Act to provide for the restoration and preservation of fish in the waters of this State[.]" (1870 Cal. Stats. 457, § 3, pp. 663-664.) The act was codified in Penal Code section 637 and encompassed all fish, not just salmon, and provided no exceptions for mining, milling, or agriculture. (*Ibid.*) The Commissioners of Fisheries were appointed pursuant to the 1870 act, and their first biennial report, covering 1870 through 1871, noted that the state was "expected to prevent the wanton destruction of fish and required to compel the owners of dams to permit the free passage of fish to their native spawning beds." (Commissioners of Fisheries, *supra*, at p. 5.) The report stated "[t]he salmon is the most important visitor to our rivers" and noted that "[t]he weight of testimony is on the side of those who believe the quantity [of salmon in the Sacramento and San Joaquin Rivers] to be decreasing[.]" (*Id.* at p. 8.) The report notes "[t]he preservation of our salmon fisheries is a subject of great importance" and recommended appointing a standing committee to "amend the present law and frame new laws as to protect legitimate fishing, and at the same time provide for an increase of fish in the future." (*Id.* at p. 10.)

By the mid-1910s, the value of the fishing industry had increased, and officials recognized the need to balance the interest in maximizing the fishery's economic potential with the need to prevent its collapse. (*See, e.g.*, California State Fish & Game Commission, *A Department of Commercial Fisheries*, Cal.

Fish & G. (Oct. 1914) p. 26 ["The primary object in view is to conserve and at the same time assist these [commercial fishing] industries and as far as possible to encourage the development of fisheries that have been neglected"].) The California Legislature responded by passing some of the country's most innovative and fish-protective statutes, including the language that still remains in section 5937.

In 1915, the Legislature amended Penal Code section 637 to require dam owners to permit sufficient water to continuously flow through fishways to keep downstream fish "in good condition." (1915 Cal. Stats. 820, ch. 491, § 1.)

When the California Legislature enacted the Fish and Game Code in 1933, it assessed the constitutionality of each statute that was to be incorporated into the Fish and Game Code, including Penal Code section 637. The proposed code included a table listing all statutes enacted since 1850 pertaining to fish and game. (Real Parties in Interest and Appellants, Exhibits in Support of Motion for Judicial Notice, Vol. 1, p. 233.) Beside each section proposed for recodification, the California Code Commission listed either the Fish and Game Code section that it was incorporated into or the reason for omission. (*Ibid*.) Omitted statutes were marked as superseded, obsolete, or unconstitutional. (*Id.* at pp. 234-237.) For instance, General Laws sections 255 and 2876 (most recently amended in 1880) are listed as "Omitted.—Unconstitutional" and followed by a case citation. (*Id.* at p. 236.) Penal Code section 637 is listed as having been

incorporated into the Fish and Game Code and was not omitted for being unconstitutional. (*Id.* at p. 235.)

In 1937, the Legislature amended the law to extend the water bypass requirement to all dams, not just those with fishways. Section 5937 has retained this requirement ever since.

In 1974, a California Attorney General opinion stated that, given section 5937's legislative history and a review of the law's purpose and policy, section 5937 should be interpreted literally. (57 Ops.Cal.Atty.Gen. 577, 582 (1974).) The opinion stated that "[t]he clear legislative intent in enacting section 5937 of the Fish and Game Code was to protect California's fishery resources." (*Ibid.*) Based on fish-friendly legislative enactments since 1957, the Attorney General identified "an increasing awareness of the necessity and importance of preserving California's fishery resources in connection with water usage and water projects[.]" (*Id.* at p. 580.) That increased awareness gave rise to "very strong concern over the future existence of California's fishery resources[,] . . . manifested by directives to all state and local agencies to take steps within their jurisdiction to preserve a high quality environment which includes preservation of fishery resources." (*Id.* at p. 582.) In short, section 5937 "was and is such an enactment by the state in carrying out its trust responsibility to preserve fishery resources leaving the beneficial use to the people." (*Id.* at pp. 582-583.)

Historical context shows that, in the 1800s and early 1900s, the short- and long-term economic implications of fishery health drove the Legislature to adopt increasingly fish-protective

statutes. When presented with threats of fishery collapse, the Legislature increased legal protections for fish. Section 5937's historical context and legislative history indicate that the California Legislature intentionally wrote section 5937 and its predecessors to protect California's productive and economically important fishery. Upon every opportunity to scale back section 5937, the Legislature only maintained or strengthened its force. When the Legislature reviewed Fish and Game Code statutes for constitutionality, which occurred after article X, section 2 was enacted in 1928, section 5937 passed constitutional muster. In short, the legislative history illustrates that, throughout California's history, the Legislature intended to prioritize the protection of fish and retained and strengthened section 5937 and its predecessors as an important part of that agenda.

II. Well-established principles of constitutional and statutory law provide a logical and workable procedure for applying section 5937 in a way that gives full effect to its mandate and is consistent with article X, section 2.

The central question in this case is how the mandates of section 5937 and article X, section 2 can effectively be applied in harmony with each other. The Court of Appeal was correct to note that any answer to that question must account for the fact that the latter operates simultaneously as a source of authority for, and a limitation on, the former. But at that point the court went astray – first, by needlessly overstating the potential for conflict between section 5937 and article X, section 2, and then by inventing out of whole cloth a new requirement that, in order to avoid any such conflict, courts must undertake a "totality of the

circumstances" analysis to establish that the flows required by section 5937 constitute a reasonable use of water before holding that section 5937 requires a dam owner to release any water at all.

TU respectfully urges this Court not to adopt the Court of Appeal's approach, which would deprive section 5937 of most or all of its independent legal meaning and render it a practical nullity. Instead, this Court can derive a clear and workable set of procedural steps for implementing section 5937 together with article X, section 2 simply by applying familiar principles of constitutional and statutory law. To do so successfully, it is crucial to clearly describe each step of the process and, at each step, identify the factual and legal determinations to be made, the order in which to make them, and which parties bear the various legal duties and burdens of proof.

The following sections of this brief set forth elements of the process that best explain dam owners' duties under section 5937 and the best way to resolve claims, like those in the present case, that a dam owner has failed to comply with those duties. Again, not every aspect of the steps described in the following sections has yet been implicated in this case. Our intent is not only to address the specific issues in dispute in the present appeal, but to demonstrate more broadly that an orderly procedure for applying section 5937 in a practical and equitable manner exists under California law.

A. It is the duty of dam owners, without the need for any enforcement action by public or private parties, to quantify and implement the flow regime[2] necessary to keep fish in good condition below their dams.

i. Section 5937 applies to the owners of all dams.

It is beyond reasonable dispute that section 5937 places an affirmative duty on the owners of dams to release sufficient water to keep fish below the dam in good condition. This is clear from the plain text of the first sentence of the statute, which reads:

> The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.

(§ 5937.)

This language is simple, clear, and direct. It requires all dam owners to continually release enough water to keep downstream fish in good condition, whether they have a fishway or not. Failure to do so is a misdemeanor offense. (§ 12000, subd. (a).)

The Real Parties make a complex historical argument spanning 14 pages of its brief to the effect that the plain language quoted above cannot really mean what it says. In the end, their

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[2] The term "flow regime" and the plural "flows" are used throughout this brief to reflect the fact that the flow necessary to keep fish in good condition will not be a single quantity, but will vary at different times of year, and may vary from year to year depending on water year type. See discussion, *infra*, in Section II.A.ii.

argument boils down to an assertion that this Court should decide this case based on a contested interpretation of a superseded statute instead of the plain text of a current one.

As a supplement to the arguments in Plaintiffs' reply brief on this point, TU notes that the Legislative Counsel statement the Real Parties offer as a reason to contravene the plain meaning of the statutory text can more plausibly be read to support that plain meaning. The statement reads:

> re: preservation of fish below dams. Gives owner the option to allow water to flow over, around or through dam if there is no fishway at dam.

(Real Parties in Interest and Appellants, Exhibits in Support of Motion for Judicial Notice, Vol. 2, p. 446.)

The simplest way to read this statement is as a confirmation of what the statute does on its face: it allows the owner of a dam that lacks a fishway to pass water over, around, or through the dam instead of having to construct a fishway just to release the flow. This reading eliminates any conceivable rationale for contravening the plain statutory text. Section 5937 means what it says – it applies to the owners of *all* dams in the state, both those with and without fishways.

ii. Section 5937 places the burden of quantifying the flow necessary to keep fish in good condition directly on the dam owner, and this burden is fair because the tools and expertise to meet it are readily available.

As discussed above, section 5937 requires all dam owners in California to release sufficient flow to keep fish in good condition. This requirement is, to apply a term used by the Court

of Appeal, self-executing – that is, it falls directly on the dam owner, who is not entitled to wait for some public agency or other party to complete a study or file a civil or criminal enforcement action before releasing the required flow.

Although the issue has not yet arisen in the present case given its current posture, one might ask whether requiring dam owners to release flow on their own initiative is unfair because ascertaining the quantity of flow needed to keep fish in good condition at various times of the year is a complex undertaking that requires scientific expertise. Dam owners might suggest they should be relieved of this burden unless and until some expert agency completes a study telling them exactly how much flow they must release at what times to keep fish in good condition.

While this argument may at first blush have some intuitive appeal, the time has long since passed since it accurately reflects the current state of streamflow science and water management. Peer-reviewed scientific methods for developing minimum instream flow thresholds are certainly not new – they were already well established over 35 years ago when the Third District Court of Appeal decided *CalTrout II*, ordering the defendant to immediately begin releasing minimum instream flows. (*Cal. Trout v. Superior Court* (1990) 218 Cal.App.3d 187, 198, 206-209 (*CalTrout II*) [discussing Instream Flow Incremental Methodology and other available streamflow methodologies].) This body of science has progressed substantially in the subsequent three and a half decades. Increasing concern for the effects of dewatering on the state's

native fish species, many of which are now protected under the state and federal Endangered Species Acts, has increased demand for methods to accurately determine the flows needed by fish and other aquatic life. This has led to the development of multiple methodologies based on different approaches, offering a range of choices to fit specific factual circumstances. (See, e.g., Rossi et al., *Hydraulic Properties of the Riffle Crest and Applications for Stream Ecosystem Management* (2021) 57 J. of the Am. Water Res. Ass'n pp. 923-940; California Environmental Flows Working Group, California Environmental Flows Framework Technical Report (March 2021); Mierau et al., *Managing Diversions in Unregulated Streams Using a Modified Percent-of-Flow Approach* (2017) 63 Freshwater Biology pp. 752-768; California Department of Fish and Wildlife, Standard Operating Procedure for Critical Riffle Analysis for Fish Passage in California (Sept. 2017); State Water Resources Control Board, Policy for Maintaining Instream Flows in Northern California Coastal Streams, Appendix C (effective Sept. 28, 2010); Navarro et al., *Instream Flow Incremental Methodology (IFIM) for Modelling Fish Habitat* (1994) 2 J. of Water Mgmt. Modeling).

The application of these methods has been assisted by technological improvements in the areas of streamflow monitoring, data processing, and computer modeling, leading to the creation of tools such as the Natural Flows Database, a machine-learning-based public-domain tool that can accurately model flows for any stream segment in California, including those that do not have streamflow measurement gauges in place.

(California Environmental Flows Working Group, California Natural Flows Database <https://rivers.codefornature.org> [as of May 1, 2026].) These and other tools have been used in numerous past and ongoing processes to develop minimum instream flow regimes in a variety of contexts, including federally-licensed hydropower dams, emergency rules to protect flows during droughts, creating diversion terms for new water right permits, and negotiating flow criteria for proposed inter-basin diversions. While the specific goals and levels of protection sought in each of these processes will vary, the underlying methods and approaches can be used in a variety of contexts. Moreover, the large number of ongoing instream flow processes has led to the widespread availability of experts with experience and expertise in applying instream flow methodologies.

In short, developing a schedule of flow releases to keep fish in good condition below dams like those operated by the City of Bakersfield is not a herculean task, but rather one which can be completed in a reasonable time and at reasonable expense by retaining qualified experts, without waiting for public agencies to perform this work.[3] Certainly, it is not an unreasonable requirement to impose on entities that are diverting the publicly-owned waters of the state, which support the publicly-owned fisheries of the state.

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[3] This is not to say that a dam owner cannot consult with the California Department of Fish and Wildlife and other experts in the course of quantifying flows needed for fish to obtain their input. This is undoubtedly a wise practice, and a common one in the field.

B. In considering a motion for preliminary injunctive relief, the trial court should consider the effect of the dam owner's pre-existing duty under section 5937 in determining which party should bear the costs of establishing an interim flow regime.

Regardless of whether a schedule of flow releases intended to comply with section 5937 is currently in place at a particular dam, affected parties may – as they have done here – bring a suit alleging that whatever amounts of water the owner is currently releasing, if any, are insufficient to keep fish in good condition. In any such case, an issue the court is likely to confront early on is the question of interim relief. Even in the best of circumstances, it will take time to resolve the question of how much flow must be released, particularly if the dam owner has made no previous efforts to collect data or develop a proposed flow regime. Since fish need adequate flow to survive, there is an obvious potential for irreparable harm in the interim while the case proceeds. And since methods are available to make faster, if less precise, estimates of the flow needed by fish, a basis for a preliminary injunction is available. (*CalTrout II*, *supra*, 218 Cal.App.3d at pp. 206-207, 213 [directing the trial court to require interim flow releases based on initial rough estimates because "there is no showing that the gain in precision warrants a delay of years before acting to comply"].)

Here, the Court of Appeal's instructions on remand expressly noted the appropriateness of interim relief. It provided the following guidance to the trial court on what such interim

flow requirements might look like, and who would bear the burdens of developing them:

> The court could impose a particular volume of flow or a percentage of natural flows, so long as the requirement is reasonable and supported by substantial evidence that it would keep fish in good condition. Such a standard would respect the parties' due process rights by explaining exactly how to comply with the injunction. Additionally, it will properly place the burden on the moving parties to formulate – and prove entitlement to – the specific injunctive relief being requested.

(Court of Appeal Opinion, *supra*, 110 Cal.App.5th at p. 358 [footnote and citations omitted].)

By requiring plaintiffs to develop a flow regime to protect fish when challenging a dam owner who has not done so, the Court of Appeal placed the burden and costs of complying with section 5937 on the wrong party. While the Court of Appeal may have correctly stated the respective burdens on the parties in a typical preliminary injunction motion, it failed to consider the specific circumstances of the present case under section 5937. As shown in the discussion in Section II.A.ii., *supra*, the dam owner—here, the City of Bakersfield—had an independent, pre-existing duty to quantify and implement the flows needed to keep fish in good condition prior to any litigation being filed. In this sense, by developing and presenting their own evidence on this issue, Plaintiffs were merely doing what the dam owner was already required to do. So while it may be true that the law generally requires a plaintiff, as the moving party, to bear the burden of proving they are entitled to the relief sought, it does not follow that they should be asked to bear the cost of meeting

that burden. Here, the obligation to comply with section 5937 falls independently on the dam owner. TU respectfully suggests this should be a consideration on remand in this case, and in future cases under section 5937.

C. In a proceeding alleging that the flows being released by a dam owner are insufficient to satisfy section 5937, the factual issue of the flow regime necessary to keep fish in good condition must be resolved separately from, and prior to, addressing any allegation that the required flows are an unreasonable use of water under article X, section 2.

Regardless of whether a flow regime is currently in place and being implemented at a particular dam, affected parties may – as they have done here – bring a suit alleging that whatever levels of flow the owner is releasing are insufficient to keep fish in good condition under section 5937. In such a case, the central issue of fact will be the flow regime required by the statute – that is, how much flow the dam owner must release at what times. The court must avoid conflating this issue with any legal claim that the flows needed for fish are an unreasonable use of water under article X, section 2. The former is a question of scientific fact that can be determined by retaining qualified experts to collect localized data and apply instream flow methodologies of the type discussed in Section II.A.ii., *supra*. The latter is a legal determination that is made according to the elements of California's reasonable use doctrine. In particular, the court must avoid any tendency to let legal questions of reasonableness creep into the analysis of how much flow fish need. Fish need what they need, and while experts can and will differ as to how much

flow they require, the question is a scientific one, and not one to be solved by appealing to legal standards of reasonableness.

Moreover, the determination of how much flow fish need must be resolved *before* entertaining any claim that some aspect of the required flow regime constitutes an unreasonable use of water. To illustrate this point, it may help to consider what a fisheries flow regime looks like in practice.

As a matter of biological fact, the amount of water needed to keep fish in good condition will vary greatly throughout the course of the year. Fish are adapted to annual hydrological cycles, and the amount of flow they need to successfully migrate and spawn in the winter or spring may be much greater than the flow they need to survive in the heat of the summer dry season. In TU's experience, all existing streamflow regimes based on fisheries' needs provide for seasonal variations in required flows. This is sometimes done by specifying a simple percentage of ambient streamflow. The preliminary injunction in this case used this percentage-of-streamflow approach and required the dam owner to bypass 40 percent of the Kern River's ambient flow. Elsewhere, streamflow regimes have been set by establishing monthly thresholds in cubic feet per second. (See, e.g., Cal. Code Regs., tit. 23, § 875, subd. (c) [setting minimum instream flow requirements in cubic feet per second to protect salmon and steelhead in the Shasta and Scott rivers].) Adding further complexity, it is increasingly common to set different flow thresholds for different water year types – for example, requiring less flow in dry or critically dry years than in wet or normal

years. This degree of variability across different times of year and across different types of years has benefits: it can not only provide greater protection for fish, but also avoid requiring diverters to release more flow than is necessary under some conditions. But, crucially, it also means that the degree to which an instream flow requirement will impact other water uses will vary widely over time. In the spring of wet years, there may be no impact on competing uses at all, while in the late summer of severe drought years, the potential impact on other water users may be considerable. Since the question of whether a use of water is reasonable depends in no small part on what impacts it has on other uses, a final reasonable use determination cannot be made until the full contours of a flow regime to keep fish in good condition have been quantified.[4]

D. How a court should frame an "as applied" constitutional challenge to section 5937.

The Real Parties allege, and the Court of Appeal found, that the trial court erred by ordering the City of Bakersfield to make interim flow releases without first establishing that they

[4] Although a final resolution of claims that the flows required by section 5937 are unconstitutional cannot be made until the full flow regime is quantified, this does not necessarily prevent affected parties from challenging interim relief like the Modification Order in this case, provided they can come forward with evidence that the interim flow regime will impose such extreme harm on concerns such as human health and safety that they can be said to amount to unreasonable use. While the case is still pending, the court need not address such claims in the abstract, but can do so in real time based on evidence presented by the parties.

were not unconstitutional under article X, section 2 as an unreasonable "use" of water.[5] The following sections of this brief will address how courts should address such claims under California law, and how the Court of Appeal erred in its analysis of the trial court ruling in this case.

i. Once the flow regime required by section 5937 has been quantified, the burden of proof falls on any party seeking to challenge the flow regime as unconstitutional under article X, section 2.

Once a court has made a determination of the flow regime necessary to fulfill section 5937's requirement to keep fish in good condition, any party seeking to challenge the releases required by that regime as somehow contrary to article X, section 2 necessarily bears the burden of showing proof in support of that claim. As the Plaintiffs persuasively argue, this requirement follows from a straightforward application of the principle that a

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[5] As an initial matter, it is not clear the Court must find that flows required by section 5937 are a "use" of water at all. One could just as easily view section 5937 as a legislative finding that operating a dam in a way that blocks sufficient flow from getting downstream to keep fish in good condition is an unreasonable *method of diversion* – something that is separately prohibited by article X, section 2. Moreover, the flow released from a dam is not being "used" by anyone. Rather, the effect of section 5937 is to limit the amount of water that is available for appropriation in the first place. (*Cal. Trout v. State Water Res. Control Bd.* (1989) 207 Cal.App.3d 585, 599 (*CalTrout I*) ["[Sections 5946 and 5937] straightforwardly limit the amount of water that may be appropriated by diversion from a dam in the designated area by requiring that sufficient water first be released to sustain fish below the dam"].)

party making an as-applied challenge to a statute bears the burden of proof. (Joint Opening Brief of Plaintiffs and Respondents, pp. 63-64, 68-72.) The requirement also follows as a matter of practical necessity. Water users, such as the City of Bakersfield and the Real Parties, are in the best position to know (1) how much water they seek to put to beneficial use at various times throughout the year, (2) to what degree the flow releases required by section 5937 will reduce the amount of water available for those beneficial uses in various types of water years, and (3) the alleged harm that will result from being required to implement the flow releases required by the statute. The trial court will not have this information if the dam owners and water users fail to provide it and the court cannot order its development. The way to generate the factual record necessary to resolve the claim of unreasonable use is to require these parties to come forward with evidence in the first instance.

ii. Because it reflects a legislative requirement, a court addressing a claim that the flow regime required by section 5937 violates article X, section 2 must apply a more deferential standard than the mere "reasonableness" test it applies to water uses not mandated by statute.

Where affected parties have met their burden to produce evidence that some aspect of the flow regime required by section 5937 constitutes unreasonable use under article X, section 2, the question remains of what standard a court should apply to resolve such a claim. At the outset, one thing is clear: a court cannot use the same standard to assess the reasonableness of a

legislatively-required flow regime as it would use in cases where the Legislature has not directly spoken. As Plaintiffs have persuasively argued, a water use expressly required by the Legislature is different than other uses, because article X, section 2 gives the Legislature the power to define what does and does not constitute reasonable use. (Joint Opening Brief of Plaintiffs and Respondents, pp. 52-54.) Thus, where the Legislature has made the judgment that dams must release sufficient water to protect publicly-owned natural resources such as fisheries, that requirement cannot simply be given co-equal status with other "uses" and "balanced" to determine whether, in the trial court's own judgment, it seems unreasonable. But assuming a court must determine whether a flow regime required by section 5937 is consistent with article X, section 2, what standard *should* it apply?

CalTrout I answered this question[6] by holding that flows required by section 5937 must be enforced unless they are shown to be "manifestly unreasonable." (*CalTrout I*, *supra*, 207 Cal.App.3d at p. 625.) This is a more deferential standard than the one that applies to competing uses under ordinary riparian or appropriative water rights, where the question is simply whether the challenged use is "reasonable" under article X, section 2. In any case, regardless of how the standard is articulated, the

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[6] Plaintiffs have thoroughly rebutted the Court of Appeals and Real Parties' attempts to distinguish *CalTrout I* on the grounds that it reviewed section 5937 in conjunction with the implementing mechanism provided by section 5946, and this brief will not add to their arguments here.

question is not what the trial court thinks is reasonable, but whether the legislatively-mandated outcome is constitutional. Any tension between the legislative determination represented by section 5937 and the reasonableness requirements of article X, section 2 must be resolved by applying a standard that shows appropriate respect for the judgment of the Legislature, as opposed to the normal standard used to balance competing interests under ordinary water rights. To do otherwise fails to acknowledge the express power article X, section 2 gives the Legislature to define reasonable use.

III. The Court of Appeal created an erroneous new standard for an "as applied" challenge to a statute's constitutionality.

As part of its analysis on how the requirements of section 5937 must supposedly be "balanced" against various uses of water, the Court of Appeal stated that:

> If the result mandated by a water use statute is reasonable and beneficial, then the statute is applied by its terms – even if the court is of the opinion that other uses/allocations of water would be superior in some way.

(Court of Appeal Opinion, *supra*, 110 Cal.App.5th at p. 353.)

The second half of this passage indicates some awareness that the Legislature has already defined the regulatory landscape and determined the appropriate balance. (*Id.*; see also Court of Appeal Opinion, *supra*, 110 Cal.App.5th at p. 352 [acknowledging that "section 5937 reflects the Legislature's view of reasonableness"].) Through this, the Court of Appeal acknowledges that the trial court's job is to give effect to the

statute unless the affected party can show that the statute itself or the result of applying the statute is unconstitutional. Unfortunately, when it comes time to say how the trial court should review the result mandated by section 5937, the Court of Appeal goes astray:

> On remand, the court must determine whether and to what extent using the waters of the Kern River to keep fish in good condition is a reasonable and beneficial use of water under California Constitution, article X, section 2. Such a determination looks to the totality of the circumstances, which include effects on fish and other wildlife (Wat. Code, § 1243, subd. (a)), recreation (*ibid.*), water quality and the transportation of adequate water supplies where needed (*United States*, *supra*, 182 Cal.App.3d at p. 130), water supplies for the domestic needs of people such as the residents served by the City of Bakersfield (Wat. Code, § 106), irrigation (Wat. Code, § 106), effects on other users of the watercourse (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354), and any effects on "appropriations essential to the economic development of this state" (*Audubon*, *supra*, 33 Cal.3d at p. 445; see also *Gin S. Chow*, *supra*, 217 Cal. at pp. 701-702).

(Court of Appeal Opinion, *supra*, 110 Cal.App.5th at pp. 356-357 [footnote omitted].)

This is the wrong approach. First, it condenses into one step what should be a two-step process, starting with a scientific determination of what flows keep fish in good condition, and then, if the dam owner asserts it, whether that mandated determination is unconstitutional. (See, *supra*, Sections II.A-D.) Second, it encourages the trial court to substitute its judgment for that of the Legislature and decide what balance of water uses the court finds most reasonable. Third, it relies on statutes

defining "beneficial use" to define "reasonable use" even though these are two separate concepts in the California Constitution and water law.

A. The Court of Appeal improperly relied on the law defining "beneficial use" for the issuance of new appropriative water rights for the entirely separate concept of reasonable use.

The Court of Appeal's citations in its remand instruction suggest the source of the court's error and confusion. To start, the Court of Appeal relied on Water Code section 1243 to require its new "totality of the circumstances" test to include effects on fish and wildlife and recreation. (Court of Appeal Opinion, *supra*, 110 Cal.App.5th at p. 356.) Section 1243 is included in Part 2 of Division 2 of the Water Code, sections 1200-1851 ("Part 2"). Part 2 establishes a broad public interest balancing standard under which the State Water Resources Control Board may issue a new water right permit requested by an applicant for a beneficial use. (Wat. Code, §§ 1250-1259.5.) Even beyond Water Code section 1243, all citations in the court's remand instructions are part of the law governing the appropriation of water rights and their beneficial uses, or cases interpreting the scope of already-existing water rights. The Court of Appeal relied on such authority even though no party in this case is questioning beneficial uses, seeking a water right, or arguing about the scope of a right that already exists. None of the cited cases involve a result mandated by a specific legislative directive, like the case at hand. Therefore, none of the Court of Appeal's citations in its remand instruction are applicable to any question of whether the

requirements of section 5937 are constitutionally reasonable. In fact, a test for reasonableness that draws from beneficial use statutes and case law awkwardly conflates beneficial use and reasonable use, which are two separate concepts in water law, as reflected by their separation in article x, section 2.

B. Water Code section 1243 and the public interest balancing standard in Division 2, Part 2 of the Water Code apply to the issuance of new water right permits and thus have no bearing on this case.

The result of relying on Water Code section 1243 and similar appropriation-related authority is that the Court of Appeal's remand instructions read like a test for appropriating water. Taken further, the instructions read almost as if, through section 5937, the Legislature is applying for a new water right to keep fish in good condition, and the trial court should use Part 2's public interest balancing standard to consider all beneficial uses to determine what balance the judge thinks is most reasonable.

Contrary to what the Court of Appeal Opinion implies, the case at hand would not add or modify any water rights. In one part of its opinion, the Court of Appeal frames a question underlying the reasonableness analysis as "how much water previously used for domestic consumption, irrigation, etc., will now be dedicated to the in-stream public trust use embodied in section 5937." (Court of Appeal Opinion, *supra*, 110 Cal.App.5th at p. 358.) This framing requires correction. Section 5937 flows are not a portion of an existing water right that would be used or dedicated to instream use. Rather, section 5937 regulates the operation of a dam and, therefore, indirectly limits the fulfillment

of a water right. (See *CalTrout I*, *supra*, 207 Cal.App.3d at p. 599 ["[sections 5946 and 5937] straightforwardly limit the amount of water that may be appropriated"].) A new dam operator does not need to (and could not) secure a water right for the sum of the water moving past the dam and the water it wants to use for, say, irrigation. Likewise, if the dam operator already has a dam and an irrigation water right, and later decides (or is required) to allow flow past the dam to keep fish in good condition, the water moving past the dam is not taken from the existing water right. That water never belonged to the dam operator in the first place because it was unavailable for appropriation.

Like the Court of Appeal, the Real Parties also cite repeatedly to Part 2 and other Water Code sections designating beneficial uses, as well as to cases interpreting that Part of the Water Code. For instance, Real Parties claim a conflict between the plain meaning of section 5937 and Water Code sections 106, 1243, and 1257, which state that fish and wildlife, domestic use, and irrigation are beneficial uses that should be balanced and considered when issuing a new water right. They take particular interest in Water Code section 1243, which simply confirms that fish and wildlife can be one of many beneficial uses included in a water right. Water Code section 1243 is most commonly applied to include fish and wildlife in a reservoir as a purpose and place of use in a water right. Like the other sections in Part 2, it has no bearing on the constitutionality of section 5937.

This case does not involve the issuance of a new water right or the modification of a water right and thus should not involve

Water Code section 1243 or the other appropriation-related authority the Court of Appeal relied on in its remand instructions.

C. Division 2, Part 2 of the Water Code illustrates what a "totality of the circumstances" test would look like had the Legislature chosen to include one in section 5937.

While the result of this case should not hinge on the beneficial use and water appropriation statutes in Part 2, the statutory framework of Part 2 illustrates what it looks like when the Legislature intends to impose a "totality of the circumstances" test.

In Part 2, the Legislature codified a host of considerations that must be taken into account when determining what is in the public interest when issuing appropriative water rights, including "the relative benefit" of all other beneficial uses, including but not limited to "use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, [and] recreational" purposes. (Wat. Code, § 1257.) Additionally, the Board is to grant the permit if it is in the public interest (*id.* at § 1253), must deny the permit if it is against the public interest (*id.* at § 1255), and may condition any permit so as best to conserve the public interest (*id.* at § 1257). (See also *id.* at §§ 1243, 1254, 1256, 1257.5, 1258, and 1259 [describing other considerations for issuing a water right].)

While the statutes in Part 2 have no bearing on the present controversy, that part of the Water Code demonstrates that the Legislature knows how to write a "totality of the circumstances"

test when it wants to. The Legislature did so for the appropriation of new water rights, but not for the operation of dams in section 5937.

CONCLUSION

For the reasons described above, TU respectfully requests that the Court reverse the Court of Appeal Opinion.

May 1, 2026

Trout Unlimited

By: /s/ *Matthew Clifford*

Matthew Clifford
State Director and Attorney

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Proposed Brief of *Amicus Curiae* Trout Unlimited is produced using 13-point or greater Roman type, including footnotes, and contains 7,879 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 1, 2026

Respectfully submitted,

/s/ Matthew Clifford

Matthew Clifford

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

5/1/2026

Date

/s/Lauren Bernadett

Signature

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